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

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

RESERVATIONS: (202) 741-6008

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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 213

RIN 3206–AM07

Excepted Service—Appointment of Persons With Intellectual Disabilities, Severe Physical Disabilities, and Psychiatric Disabilities

AGENCY: U.S. Office of Personnel Management.

ACTION: Final regulation.

SUMMARY: The U.S. Office of Personnel Management (OPM) is issuing a final regulation pertaining to the appointment of persons with intellectual disabilities, severe physical disabilities, and psychiatric disabilities. The regulation removes an unnecessary burden for these individuals when applying for Federal jobs and modernizes the terminology used to describe people with disabilities.

DATES: This final rule is effective March 25, 2013.

FOR FURTHER INFORMATION CONTACT: Phillip Spottswood by telephone on (202) 606–1389, by FAX on (202) 606–4430, by TDD on (202) 418–3134, or by email at *phil.spottswood@opm.gov*.

SUPPLEMENTARY INFORMATION: On February 7, 2012, OPM issued a proposed regulation at 77 FR 6022 to implement changes to the regulations in 5 CFR 213.3102(u) governing the appointment of people with mental retardation, severe physical disabilities, and psychiatric disabilities. As noted in the proposed rule, § 213.3102(u)(3)(i) currently requires all applicants seeking either a permanent or time-limited appointment to supply a "certification of job readiness." This certification has been used as the basis for determining that an applicant can be reasonably expected to perform in a particular work environment. Persons with disabilities today, however, often have work, educational, and/or other relevant experience that an agency may rely upon to determine whether they are likely to succeed in a particular work environment. Consequently we believe that a requirement that applicants provide a separate "certification of job readiness" is not necessary.

Elimination of the requirement that applicants supply a certification of job readiness will speed the hiring process for agencies by removing an unnecessary burden on applicants with disabilities. This is consistent with the policy outlined in the President's Memorandum of May 11, 2010 regarding the elimination of unnecessary complexities and inefficiencies in the Federal hiring process. Consequently, the proposed regulation eliminated the requirement that an applicant supply a "certification of job readiness" when seeking employment under this authority. The proposal also sought to modernize terminology used in the regulation herein by replacing the phrase "mental retardation" with "intellectual disability."

OPM received 12 sets of comments in response to the proposed changes to the regulation in 5 CFR 213.3102(u). Comments on the proposed changes were received from private citizens, two Federal agencies, a university law center, a professional organization, and a disability advocacy group.

One individual suggested OPM retain the "certification of job readiness" requirement as it currently exits. This commenter was concerned that agencies may be reluctant to hire an individual with a disability, even on a temporary basis, if the applicant had little or no work experience, or no work experience since becoming disabled. The commenter believes the "certification of job readiness" provides an objective basis for agencies to make hiring decisions, compared to the subjective and discretionary nature of the temporary employment option set out in section 213.3102(u)(5). Although we appreciate the concerns raised by this commenter, OPM is not adopting the suggestion to retain the "certification of job readiness" requirement. We believe the advantages of eliminating the "certification of job readiness" outweigh the potential disadvantages. These advantages, which will be realized by both people with disabilities and Federal agencies, include a speedier hiring process and the removal of a paperwork burden on job applicants.

Three commenters supported the proposed changes as being improvements to the employment of people with disabilities. One commenter noted that the certification had been "a source of delay and red tape" in the past and that this change was long overdue. One disability advocacy group stated that removing the certification of job readiness would both normalize and improve the timeliness of the hiring process. A professional organization agreed with both of the proposed changes. It noted that there had been confusion regarding the meaning of "job readiness." The remaining comments from the professional organization are addressed below.

An individual agreed with the elimination of the "certification of job readiness" requirement and the change in terminology to "intellectual disabilities." The commenter also suggested, however, that OPM establish in the final rule a time period during which agencies must determine whether an individual serving on temporary appointment under § 213.3102(u)(5) can perform the duties of the position. This commenter expressed concern that individuals on temporary appointments would remain on these appointments for overly long durations in the absence of a determination period. OPM is not adopting this suggestion because it is unnecessary. A temporary appointment in the excepted service is, by definition, limited to 1 year or less and may be extended for no more than 1 additional year (5 CFR 213.104). Therefore, we do not foresee instances of overly long temporary appointments. In addition, because each case may be unique, agencies may need varying amounts of time to determine the job readiness of individuals serving on temporary appointments.

The same individual suggested OPM provide guidance to help agencies determine the appropriateness of making a temporary appointment versus a permanent appointment. Because the circumstances pertaining to each applicant will be unique, OPM cannot provide guidance to assist agencies with every potential circumstance. Therefore, OPM is not adopting this suggestion.

Agencies may make temporary appointments when the agency cannot otherwise determine (based on available information) whether the applicant is likely to succeed in a particular work environment, or in instances when the work to be performed is truly of a temporary nature (e.g., short-term project work).

This individual also suggested that OPM provide a mechanism to ensure people with disabilities are given a full opportunity to display their abilities through education or experience as measured against specific criteria. We agree with the suggestion but note it is already in place. People with disabilities appointed under this authority are already subject to agency-developed qualification standards, against which their performance is measured (in the same fashion as any Federal employee).

One Federal agency suggested we change the phrase "intellectual disability" to "severe intellectual disability" on the basis that "intellectual disability" includes minor intellectual impairments which do not constitute "mental retardation." OPM is not adopting this suggestion. OPM is constrained in implementing the Executive Orders underlying this regulation by the scope of those Orders themselves. OPM's change was prompted by Congress's enactment, on October 6, 2010, of "Rosa's Law," which changed references from "mental retardation" to "intellectual disability," and a desire to use similar, less stigmatizing terminology here without changing the underlying scope of coverage of the regulation.

The same Federal agency recommended that OPM retain the "certification of job readiness" but establish its use as optional under these provisions. OPM is not adopting this suggestion. As noted above, we believe elimination of the "certification of job readiness" benefits both applicants and agencies by better facilitating the entry of people with disabilities into Federal service.

Lastly, several responses contained comments and/or suggestions (in whole or in part) that were beyond the scope of the proposed changes. As a result, OPM is not addressing these comments, beyond acknowledging their receipt:

- An agency suggested we reword the last sentence in § 213.3102(u)(5)(i) by inserting the word "successfully" before the word "perform" in the phrase, "* * * whenever the agency determines the individual is able to perform the duties of the position."
- A university law center questioned the overall effectiveness of the proposed changes to schedule A hiring rules for people with disabilities.
- One individual claimed his employer discriminated against him and separated him due to his disability.
- One commenter expressed difficulty in applying for and obtaining a Federal job.
- An individual commented that the proposed changes will not contribute to successful implementation of Executive Order 13548 titled, "Increasing Federal Employment of Individuals with Disabilities," because these provisions are discretionary and many agencies choose to fill their positions via merit (or internal) promotion procedures. The commenter proposed the following changes:
  OPM should change the word "may" to "shall" in § 213.3102(u)(2)(ii), to require agencies to accept the documentation described in that paragraph as proof of disability; change "may" to "shall" in § 213.3102(u)(4) regarding authority for permanent or time-limited appointments; and change "may" to "shall" in § 213.3102(u)(6)(ii), regarding crediting time spent under a temporary appointment towards eligibility for noncompetitive conversion to the competitive service; and
  OPM should require agencies to use these provisions for no less than 2 percent of all hires.
- The same individual submitted a second comment in which it proposed reopening the rule in order to model it after the "Pathways Programs" established under 5 CFR part 362.
- An agency suggested that OPM revise the criteria pertaining to "proof of disability" in § 213.3102(u)(3)(ii). The agency also suggested OPM require Federal agencies to accept and process applications made under this hiring authority, rather than allow agencies to redirect applicants (in some instances) to the USAJOBS Web site.
- The professional organization also requested clarification as to documentation for "proof of disability" and the authorized signatories for the Schedule A certification letter.

OPM is adopting the proposed rule as final, with only a few very minor editorial corrections.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because it affects only certain potential applicants for Federal jobs.

Executive Order 12866, Regulatory Review

This rule has been reviewed by the Office of Personnel Management and Budget in accordance with Executive order 12866.

List of Subjects in 5 CFR Part 213

Government employees, Individuals with disabilities.

U.S. Office of Personnel Management.

John Berry,

Director.

Accordingly, OPM is amending 5 CFR part 213 as follows:

PART 213—EXCEPTED SERVICE

■ 1. The authority citation for part 213 is revised to read as follows:

Authority: 5 U.S.C. 3161, 3301 and 3302; E.O. 10577, 3 CFR 1954–1958 Comp., p. 218; Sec. 213.101 also issued under 5 U.S.C. 2103. Sec. 213.3102 also issued under 5 U.S.C. 3301, 3302, 3307, 8337(b), and 8456; E.O. 13318, 3 CFR 1982 Comp., p. 185; 38 U.S.C. 4301 *et seq.*; Pub. L. 105–339, 112 Stat 3182–83; E.O. 13162; E.O. 12125, 3 CFR 1979 Comp., p. 16879; and E.O. 13124, 3 CFR 1999 Comp., p. 31103; and Presidential Memorandum—Improving the Federal Recruitment and Hiring Process (May 11, 2010).

■ 2. In 213.3102 revise paragraph (u) to read as follows:

§ 213.3102 Entire executive civil service.

* * * * *

(u) *Appointment of persons with intellectual disabilities, severe physical disabilities, or psychiatric disabilities*—(1) *Purpose.* An agency may appoint, on a permanent, time-limited, or temporary basis, a person with an intellectual disability, a severe physical disability, or a psychiatric disability according to the provisions described below.

(2) *Definition.* "Intellectual disabilities" means only those disabilities that would have been encompassed by the term "mental retardation" in previous iterations of this regulation and the associated Executive order, Executive Order 12125, dated March 15, 1979.

(3) *Proof of disability.* (i) An agency must require proof of an applicant's intellectual disability, severe physical disability, or psychiatric disability prior to making an appointment under this section.

(ii) An agency may accept, as proof of disability, appropriate documentation

(e.g., records, statements, or other appropriate information) issued by a licensed medical professional (e.g., a physician or other medical professional duly certified by a State, the District of Columbia, or a U.S. territory, to practice medicine); a licensed vocational rehabilitation specialist (State or private); or any Federal agency, State agency, or an agency of the District of Columbia or a U.S. territory that issues or provides disability benefits.

(4) *Permanent or time-limited employment options.* An agency may make permanent or time-limited appointments under this paragraph (u)(4) where an applicant supplies proof of disability as described in paragraph (u)(3) of this section and the agency determines that the individual is likely to succeed in the performance of the duties of the position for which he or she is applying. In determining whether the individual is likely to succeed in performing the duties of the position, the agency may rely upon the applicant's employment, educational, or other relevant experience, including but not limited to service under another type of appointment in the competitive or excepted services.

(5) *Temporary employment options.* An agency may make a temporary appointment when:

(i) The agency determines that it is necessary to observe the applicant on the job to determine whether the applicant is able or ready to perform the duties of the position. When an agency uses this option to determine an individual's job readiness, the hiring agency may convert the individual to a permanent appointment in the excepted service whenever the agency determines the individual is able to perform the duties of the position; or

(ii) The work is of a temporary nature.

(6) *Noncompetitive conversion to the competitive service.* (i) An agency may noncompetitively convert to the competitive service an employee who has completed 2 years of satisfactory service under this authority in accordance with the provisions of Executive Order 12125, as amended by Executive Order 13124, and § 315.709 of this chapter, except as provided in paragraph (u)(6)(ii) of this section.

(ii) Time spent on a temporary appointment specified in paragraph (u)(5)(ii) of this section does not count towards the 2-year requirement.

* * * * *

[FR Doc. 2013–04095 Filed 2–21–13; 8:45 am]

BILLING CODE 6325–39–P

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Parts 245 and 272

RIN 0584–AE10

National School Lunch Program: Direct Certification Continuous Improvement Plans Required by the Healthy, Hunger-Free Kids Act of 2010

AGENCY: Food and Nutrition Service, USDA.

ACTION: Final rule.

SUMMARY: This rule amends the National School Lunch Program (NSLP) regulations to incorporate provisions of the Healthy, Hunger-Free Kids Act of 2010 designed to encourage States to improve direct certification efforts with the Supplemental Nutrition Assistance Program (SNAP). The provisions require State agencies to meet certain direct certification performance benchmarks and to develop and implement continuous improvement plans if they fail to do so. This rule also amends NSLP and SNAP regulations to provide for the collection of data elements needed to compute each State's direct certification performance rate to compare with the new benchmarks. Improved direct certification efforts would help increase program accuracy, reduce paperwork for States and households, and increase eligible children's access to school meals.

DATES: This rule is effective March 25, 2013.

FOR FURTHER INFORMATION CONTACT: Vivian Lees or Patricia B. von Reyn, State Systems Support Branch, at (703) 305–2590.

SUPPLEMENTARY INFORMATION:

I. Background

A. Legislative History Leading up to This Rulemaking

Section 104 of the Child Nutrition and WIC Reauthorization Act of 2004 (Pub. L. 108–265) amended section 9(b) of the Richard B. Russell National School Lunch Act (NSLA) (42 U.S.C. 1758(b)) to require all local educational agencies (LEAs) that participate in the NSLP and/or School Breakfast Program to establish, by school year (SY) 2008–2009, a system to directly certify as eligible for free school meals children who are members of households receiving benefits under SNAP.

Section 4301 of the Food, Conservation, and Energy Act of 2008 (Pub. L. 110–246) (42 U.S.C. 1758a) requires the Secretary of Agriculture, beginning in 2008, to assess the effectiveness of State and local efforts to directly certify such school-age children for free school meals and to provide annual reports to Congress. (See the *Direct Certification in the National School Lunch Program: State Implementation Progress* (Report to Congress) for 2008, 2009, 2010, and 2011 at *http://www.fns.usda.gov/ora/menu/Published/CNP/cnp.htm.*)

Section 101(b) of Public Law 111–296, the Healthy, Hunger-Free Kids Act of 2010 (HHFKA), amended section 9(b)(4) of the NSLA (42 U.S.C. 1758(b)(4)) to establish and define required percentage benchmarks for directly certifying children who are members of households receiving benefits under SNAP. Section 101(b) further amended the NSLA to require that, beginning with SY 2011–2012, each State that does not meet the benchmark for a particular school year must develop, submit, and implement a continuous improvement plan (CIP) aimed at fully meeting the benchmarks and improving direct certification for the following school year. It also requires that the Secretary provide technical assistance to State agencies in developing and implementing CIPs.

These provisions of section 101(b) of the HHFKA, which were effective October 1, 2010, were implemented through USDA Food and Nutrition Service (FNS) Memorandum SP 32–2011, *Child Nutrition Reauthorization 2010: Direct Certification Benchmarks and Continuous Improvement Plans*, dated April 28, 2011, available at *http://www.fns.usda.gov/cnd/governance/Policy-Memos/2011/SP32-2011.pdf.*

On January 31, 2012, FNS published a proposed rule, *National School Lunch Program: Direct Certification Continuous Improvement Plans Required by the Healthy, Hunger-Free Kids Act of 2010*, in the **Federal Register** (77 FR 4688) to solicit comments on the incorporation of these and other direct certification improvement provisions into regulations governing the determination for eligibility for free and reduced price meals at 7 CFR part 245. The proposed rule also solicited comments on the paperwork burden for the new form FNS–834, *State Agency (NSLP/SNAP) Direct Certification Rate Data Element Report*, which will collect two of the data elements for the formula to compute direct certification performance rates.

B. Summary of Mandated Provisions in the Proposed Rule

In summary, the January 2012 proposed rule sought to incorporate the

following mandated provisions from the HHFKA into NSLP regulations:

- *Benchmarks.* The State performance benchmarks for directly certifying for free school meals those children who are members of households receiving benefits under SNAP are 80% for SY 2011–2012, 90% for SY 2012–2013, and 95% for SY 2013–2014 and for each school year thereafter.
- *Identify and notify.* Each school year, FNS will identify and notify State agencies that fail to meet the direct certification performance benchmark.
- *CIPs required.* A State agency that fails to meet the benchmark must develop and submit a CIP to FNS for approval.
- *CIP components.* The CIP must include, at a minimum, specific measures the State will use to identify more children who are eligible for direct certification with SNAP, a timeline for the State to implement these measures, and goals for the State to improve direct certification results for the following school year.
- *CIP implementation.* A State agency that is required to develop and submit a CIP must maintain it and implement it according to the timeline included in the approved plan.

C. Summary of Additional Provisions in the Proposed Rule

Additionally, in support of the mandated provisions, the proposed rule sought to improve the accuracy of State direct certification rates and to strengthen the direct certification process so that States could monitor their own performance in a timely manner using the same methodology that FNS will use. As such, the January 2012 rule proposed to set forth the following improvements and requirements:

- *Methodology.* A transparent methodology for computing direct certification rates by defining the data elements and the formula to compute these rates:

$$\text{Percent of SNAP children directly certified for free school meals} = \frac{\text{SNAP children directly certified for free school meals} + \text{SNAP children in special provision schools operating in a non-base year}}{\text{School-aged children in SNAP households during the months of July, August, and September}} = \frac{\#1 + \#3}{\#2}$$

- *Data Element #1.* A requirement that Data Element #1 be the count of the number of children who are members of households receiving benefits under SNAP and who were directly certified for free school meals as of the last operating day in October. Also, certifications via the "Letter Method" would not be included in the count of SNAP direct certifications as this is no longer permitted, pursuant to the statutory changes made by the HHFKA.
- *Form FNS–742 timeframes.* A change in the date that the FNS–742 (currently entitled the *Verification Summary Report*, but soon to be revised and renamed for use in SY 2013–2014 as the *School Food Authority (SFA) Verification Collection Report*)—a form that collects verification summary data as well as Data Element #1—is due, requiring that it come in one month earlier than currently in order to provide Data Element #1 to States and to FNS in a more-timely fashion. As such, under the proposed rule, the State agency would collect annual verification data from each LEA no later than February 1st (instead of March 1st) and report this data to FNS no later than March 15th (instead of April 15th) each year. To accommodate this change in submission timeframes, the proposed rule would also remove the requirement for State agencies to report "the aggregate number of students who were terminated as a result of verification but who were reinstated for free or reduced price meal benefits as of February 15th each year" (Reapplied and Reinstated).
- *Data Element #2.* A new way to estimate the universe of school-aged children in households that receive benefits under SNAP that would require that the SNAP State agency provide FNS and the State agency administering the NSLP with the actual count of children ages 5–17 who at any time during the months of July, August, or September were members of such households.
- *Data Element #3.* A more accurate way to estimate the number of children from households receiving SNAP benefits that attend schools operating in a non-base year under the special assistance provisions of section 11(a)(1) of the NSLA (42 U.S.C. 1759a(a)(1)) and 7 CFR 245.9. As proposed, Data Element #3 would require that a match be run between SNAP records and student enrollment records from such schools and would allow the State agency to count all such matches in addition to the counts of actual SNAP direct certifications from all other schools when determining State direct certification rates.
- *Form FNS–834, new interagency form.* A mechanism for reporting Data Elements #2 and #3 (a new interagency form, the FNS–834, *State Agency (NSLP/SNAP) Direct Certification Rate Data Element Report*) to FNS and NSLP State agencies by December 1st each year.
- *Special Circumstances.* An opportunity for States to inform us of special circumstances that would affect a State's direct certification rate in a quantifiable way not captured by the formula or the three data elements.
- *CIP additional component.* An additional component to the CIPs beyond the legislated mandate, which would require State agencies to provide information about their progress toward implementing other direct certification requirements. Also, the mandated CIP timeline would be "multiyear" in acknowledgement that by the time a State agency's CIP is submitted to FNS and approved, the new school year may already be underway.
- *CIP timeframe.* A requirement that the CIP be submitted to FNS within 60 days of a State's having been formally notified that it has failed to meet the benchmark.
- *Amend SNAP regulations.* An amendment to SNAP regulations at 7 CFR 272.8 to add the requirement for the SNAP State agency to provide Data Element #2 to FNS and to the State agency administering the NSLP.
- *States affected by this rule.* A notification that, at this time, the NSLP States affected by this rule are the 50 States, the District of Columbia, and Guam.

II. Public Comments and USDA/FNS Response

FNS received 26 comments on the proposed rule. Of these, 4 were from nutrition, health, or child advocacy organizations at the national, state, or

local level; 12 were from individuals representing 8 State agencies that administer the school meal programs; 6 were from law students; and the remaining 4 were from other interested individuals.

FNS greatly appreciates these public comments as they have been instrumental in developing this final rule. Although FNS considered all comments, the description and analysis in this final rule preamble focuses on the key issues. To view all public comments on the proposed rule, go to *www.regulations.gov* and search for public submissions under docket number FNS–2011–0020.

Overall, the comments were supportive of the proposed rule in that it strengthens the direct certification process so that more eligible children will be able to receive free meals at school. Commenters from advocacy organizations were in strong support of the proposed rule, indicating that the rule does a good job implementing statutory requirements and provides a sensible approach to improving the accuracy of computing State direct certification performance rates. Of the State agency employees that responded, most commented on specific issues that could affect their States.

The following discussion provides information on the comments as well as a discussion of the clarifications and changes made to the proposal based on the comments received:

Benchmarks

Proposed Rule on Benchmarks:

Sets the benchmarks at the mandated 80% for SY 2011–2012; 90% for SY 2012–2013; and 95% for SY 2013–2014 and each school year thereafter.

Comments on Benchmarks:

Changing the Benchmarks—Several State agencies were concerned that they would not be able to meet the direct certification performance benchmarks in the given timeframes. Most of those who commented would prefer that the benchmark for SY 2013–2014 and beyond be capped at 90% and that the benchmarks be phased in more gradually. One commenter felt that the 95% target fell short and recommended that the goal be set at 100%.

"Letter Method" and the Benchmarks—One State agency wanted to be able to count "Letter Method" certifications as direct certifications and felt that they could not reach the benchmark without doing so. "Letter Method" refers to the process where a family member brings to the school a letter issued by the SNAP agency confirming that the household receives SNAP benefits, and the student is certified for free meals through categorical eligibility based on this information.

Matching Criteria and the Benchmarks—Another State was concerned that some States, under pressure to meet the benchmarks, may purposely relax their matching criteria in order to increase the number of matches they get, thus increasing their direct certification rates even though some of the matches might not be valid.

USDA/FNS Response on Benchmarks:

On Changing the Benchmarks—The benchmarks and their effective dates are statutorily required under section 9(b)(4)(F) of the NSLA (42 U.S.C. 1758(b)(4)(F)), and may not be altered.

On "Letter Method" and the Benchmarks—Section 9(b)(4)(G) of the NSLA (42 U.S.C. 1758(b)(4)(G)) establishes that certifications based on the "Letter Method" with SNAP, as of SY 2012–2013, can no longer be regarded as direct certifications because some action is required by the household. Although States can continue to utilize this method as a form of certification for free meals, they must not count these students as directly certified with SNAP. The intended result is for improved State automated direct certification systems that can match and certify these students independent of household action.

On Matching Criteria and the Benchmarks—Regarding the concern about some States making their match criteria less stringent in order to inflate their numbers, the goal should remain that States set criteria to yield high levels of confidence so that eligible children are found in the match and ineligible children are not. States have different data elements available to them for making a match—what works well in one State might not work in another—and as such, this final rule does not establish a single national standard for match criteria. We will continue to develop and provide guidance to assist States in setting reasonable match criteria, including the sharing of best practices from other States that may have comparable characteristics.

Disposition on Benchmarks in Final Rule:

The provisions setting the mandated benchmarks in the new § 245.12(b) Direct certification performance benchmarks remain unchanged from the proposed rule.

Methodology and Data Collection

Proposed Rule on Methodology and Data Collection:

Provides for the collection and reporting of single data elements to replace, wherever possible, the complex estimates used in the past for the component statistics needed to estimate SNAP State direct certification performance rates. Provides for a new methodology using these new data elements that is straightforward, transparent, timelier, and more accurate. Outlines the reporting mechanisms for these new data elements—Data Element #1 is to be reported on the form FNS–742, and Data Elements #2 and #3 are to be reported on the new form FNS–834. Provides for an earlier submission of the FNS–742 and a December 1st deadline for the submission of the new FNS–834. To provide for the earlier submission of the FNS–742, the proposed rule would remove the requirement for reporting the number of students who reapplied and who were reinstated by February 15th.

Comments on Methodology and Data Collection:

Most commenters were supportive of the new methodology, lauding our proposal to use reported data (rather than generated estimates) and appreciative of the reporting mechanisms which would allow State agencies to track their own performance in a timely manner. Most also did not find the proposed reporting of these data elements to be burdensome for States and LEAs.

The Process as a Whole—One commenter believed the new methodology would impose a complex data collection process and assign potentially misleading rankings.

Data Element #1 and the Change in Form FNS–742 Timeframes, "Reapplied and Reinstated"—One commenter was concerned that the requirement to report the number of students who reapplied and were reinstated by February 15th was not actually proposed to be removed.

Data Element #2, Universe—Several commenters, who otherwise agreed with the new approach, pointed out that the new Data Element #2—requiring SNAP State agencies to provide a count for the universe of school-aged children in SNAP households—still includes children who may not be students in NSLP schools. Some State agencies reported having what they believe to be significant but unquantifiable numbers of dropouts, homeschoolers, or children in non-public or charter schools which may not participate in the NSLP. These States point out that the count against which they would be measured will be too high and their direct certification rates would appear to be lower because of it.

Data Element #2, 5–17 Age Range—Three commenters commented on our

proposal to continue using the 5–17 age range that FNS has used for years as "school-age" for estimating the number of school-aged children living in households receiving SNAP benefits when computing direct certification performance rates. Two suggested using an age range that is aligned with compulsory school attendance ages, either by using a narrower age range or by making the age range State-specific. The third commenter was concerned that using the 5–17 age range for Data Element #2 meant that the State must run their matches only on this same 5–17 age range.

Data Element #3, State Agency Concerns—Although most commenters were supportive of collecting Data Element #3—which requires States with special provision schools operating in a non-base year to have a match run between SNAP records and student enrollment records from these schools—some State agencies expressed special concern with this data element. Two of these States foresee problems because although some of their provision schools do have their students listed in the statewide student enrollment database, a few of their other provision schools do not. One State, however, had major concerns with this provision, and this State has a significant number of special provision schools. This State also pointed out that this issue will affect more and more States as they elect the new Community Eligibility Option (CEO) when it becomes available to all States in SY 2014–2015. Another State pointed out that it does not conduct matches at the State level; it uses district-level matching and is under the impression that the match for special provision schools must be done at the State level.

Data Element #3, Advocacy Organization Concerns—The advocacy organizations were in favor of this provision, commenting that it will improve the accuracy of the direct certification performance rate calculation and will provide schools with data to make good management decisions, especially with regard to continuing in their current special provision or switching to CEO or another option. One of these advocacy groups went on to urge FNS to allow CEO schools to use the results of the CEO match with SNAP (that must be completed by April 1 if the CEO wants to have their claiming percentages adjusted) in lieu of running a match again for this data element requirement in or near October.

USDA/FNS Response to Methodology and Data Collection:

On the Process as a Whole—FNS developed the new methodology to provide a more simplified and straightforward approach than has been used in years past. It has been designed to yield more accurate counts with which to measure States against the benchmarks and to give States the power to track their own performance. We expect this process to be an improvement over generating estimates to assess performance, particularly since State performance rates are no longer intended to track general trends but rather to compare States against actual benchmarks.

On Data Element #1 and the Change in Form FNS–742 Timeframes, "Reapplied and Reinstated"—In actuality, the requirement to report on the form FNS–742 the number of students who reapplied and were reinstated by February 15th was proposed to be removed and is removed by this final rulemaking. Removing this requirement allows the form FNS–742 to be submitted a month earlier, which will allow earlier computation of direct certification rates.

On Data Element #2, Universe—We acknowledge that the best scenario to determine the universe of those children who could potentially be directly certified with SNAP would be to get the count of children who not only live in households receiving benefits under SNAP but also are actually in attendance at schools that participate in the NSLP. This data, however, is not available. This final rule would require the SNAP State agency to provide an actual, unduplicated count of school-aged children ages 5–17 who are living in households receiving benefits under SNAP at any time during the period July 1 through September 30. This is a major improvement, but, as stated in the proposed rule, we acknowledge that the new methodology still does not account for children in this age range who are not attending school or who are attending schools not participating in the NSLP. Our commenters noted this as well.

In States with a high incidence of homeschoolers, dropouts, or children attending non-NSLP schools, the direct certification rate may indeed appear lower than it actually is. To measure the actual impact of a large homeschooling population, for instance, FNS would first need to determine, by State, the number of homeschooled children in the target 5–17 age range. Additionally, FNS would need to determine the number of these children who are also members of households receiving benefits under SNAP at any time during the July through September timeframe. Only then could FNS determine the size of the SNAP-and-homeschooled population that would need to be removed from the universe of children who could potentially be matched. A similar calculation would be needed in each State in order to determine the number of dropouts and the number of children attending non-NSLP schools. No reliable State-specific data is available which would enable FNS to determine these numbers.

In order to address this issue and in recognition of the potential for improving data sources, we are adding a check box to the new form FNS–834. This check box would provide States a mechanism for indicating that they have special circumstances that may affect their direct certification rate calculation in a quantifiable way. For FNS to consider making an adjustment due to a special circumstance, however, a State would need to forward a description of the circumstance, the count of the number of children affected by the circumstance, the methodology for estimating the count, and the source(s) of published State or Federal data used to support that methodology. This ancillary system for determining the effect of special circumstances should help to keep our own methodology dynamic and better able to adapt to improved data sources.

It is important to point out that there is already some built-in variability which could make a State's direct certification rate appear to be higher than it actually is. For instance, States that have mandatory pre-K programs that serve children younger than age 5, as well as States with children in attendance who are older than 17 during the target months, are able to count these children if they are directly certified, even though they would not be represented in the universe of those who could potentially be matched. This variability could potentially help offset any negative impact caused by the fact that not all children counted in the universe actually attend NSLP schools. Also, it is important to remember that the benchmarks are not set at 100%; and even for SY 2013–2014 and beyond, where the benchmark is at its highest at 95%, there is still a 5% built-in allowance.

On Data Element #2, 5–17 Age Range—Section 4301 of the Food, Conservation, and Energy Act of 2008 requires that when we assess State direct certification performance for the Report to Congress we include, for the universe of children who could potentially be matched against student enrollment records, an estimate of the number of school-aged children

receiving SNAP benefits during the months of July, August, or September. We have used the 5–17 age range as a proxy for "school-age" since the first Report to Congress in 2008. Of the two commenters who suggested using compulsory education requirements instead, one recommended using 6–15 as an age range that would more closely represent the average compulsory requirements across States, while the other suggested using State-specific compulsory age ranges as defined by individual State statute. Compulsory education requirements, however, set an age range for when children must be enrolled in and attending school; they do not preclude children younger or older from attending school, so they would not be good indicators for actual school enrollment.

According to the detailed table, "Enrollment Status of the Population of 3 Years Old and Older, by Sex, Age, Race, Hispanic Origin, Foreign Born, and Foreign-Born Parentage: October 2010," found in the *Current Population Survey* published by the U.S. Census Bureau and the U.S. Bureau of Labor Statistics, 94.5% of 5- and 6-year-olds and 96.1% of 16- and 17-year-olds were enrolled in school. School enrollment drops significantly on either side of this 5–17 age range. The 5–17 age range is therefore an appropriate approximation for the "school-age" snapshot required by Congress, and we intend to continue using it in estimating the number of school-aged children who could potentially be matched.

For the commenter who was concerned that the State would need to set its match criteria to include only the 5–17 year age range, we wish to clarify that States are to count all children directly certified with SNAP, not just those in the 5–17 age range. We use the 5–17 age range to estimate the universe of potential matches for the Report to Congress and to determine State performance, not to dictate the age range the State agency is to utilize for the match. States/LEAs are therefore responsible for matching SNAP data with their school enrollment data over a wider age range than the 5–17 in order to pick up all possible matches of children who are in school in the State, including those under 5 or over 17 years of age. Using the narrower range for the universe actually gives States an advantage for meeting the benchmarks if they were to find matches outside of that age range.

On Data Element #3, State Agency Concerns—States must ensure that matches are run between SNAP data and enrollment data of students attending special provision schools operating in a non-base year, so that the State can get credit for each of the SNAP children in these schools. This final rule does not prescribe a particular methodology for collecting this data element, enabling each State the flexibility to set up its own business practice. For instance, if a State uses district- or local-level matching, it might choose to use this same method for its non-base year special provision schools, or it may choose a different method, perhaps having such schools upload student enrollment files to the State, with the State running the match on their behalf. If a State uses State-level matching, it may have some schools not represented in its statewide student enrollment database, and the State may need to come up with a way to upload from such schools. For other State-level matching States, it may be that they are already running the matches for all the schools in the State, but just not sending the matches down to the local level for LEAs to enter into their point-of-service systems. In this latter scenario, just counting the number of such matches would be very easy for the State. Many States have no, or very few, special provision schools, so not all States are affected at this time.

For those States with special provision schools that are not geared up to run the match in SY 2012–2013, we are providing an alternative phase-in procedure. For SY 2012–2013, the State agency may elect to use base-year SNAP direct certification rates for these schools when completing the form FNS–834. For SY 2013–2014 and beyond, however, States are expected to have a system in place to do this match with their special provision schools operating in a non-base year.

On Data Element #3, Advocacy Organization Concerns—With regard to CEO schools—which have the opportunity to run a match by April 1 each year to determine if they would be eligible for an increase in claiming percentages—we agree that certain accommodations for them can be made. Pursuant to this final rule, States that have special provision schools exercising the CEO may establish the count for this data element for these CEO schools each year through data matching efforts in or near October (but not later than the last operating day in October) between SNAP data and student enrollment data from these schools—as for the other special provision schools—or by opting for one of the following two alternatives:

- Using the count of identified students matched with SNAP used in determining the CEO claiming percentage for that school year; or
- Using the count from the SNAP match conducted by April 1 of the same calendar year the FNS–834 is due, whether or not it was used in the claiming percentages.

In any case, it is important the count used represents students in CEO schools matched against SNAP records, without the inclusion of any letter method or non-SNAP matches. In other words, the State must selectively count the SNAP matches from the matching efforts performed for the April CEO opportunity if either of the two alternatives for CEO schools is elected. States also must ensure that students are not double counted.

Disposition of Methodology and Data Collection in Final Rule:

The provisions in the new § 245.12(c)(1) Data Element #1 remain unchanged from the proposed rule.

The provisions in the new § 245.12(c)(2) Data Element #2 remain unchanged from the proposed rule.

Likewise, the related provisions that amend SNAP regulations in the new § 272.8(a)(5)—to point the SNAP State agency to the requirements of § 245.12(c)(2) and to require the SNAP State agency to execute a data exchange and privacy agreement with the NSLP State agency—remain unchanged from the proposed rule.

Paragraph 245.12(c)(3) Data Element #3 is changed in the final rule to allow States annually the option of using specific alternatives for the estimation of Data Element #3 for its special provision schools that are exercising the CEO.

The alternative phase-in procedure for SY 2012–2013 for those States with special provision schools that cannot properly compute Data Element #3 for this first school year will be handled in FNS guidance and is not codified in the final rule.

To keep the methodology for computing Data Element #2 or Data Element #3 dynamic as State or Federal data sources improve over the years, FNS is adding a check box to the new form FNS–834 to allow NSLP or SNAP State agencies to indicate they have special circumstances to bring to FNS's attention.

The final rule, as in the proposed rule, would remove the provision regarding "Reapplied and Reinstated," and this final rule removes the provision by the rewording of § 245.11(i). In addition, the revised timeframes for submitting the FNS–742 that are made possible by removing this "Reapplied and Reinstated" requirement remain unchanged from the proposed rule in §§ 245.6a and 245.11(i). Note that even

though the revised form FNS–742 will not be implemented for SY 2012–2013, the provision requiring the earlier submission of the FNS–742 and the dropping of the "Reapplied and Reinstated" requirement applies as well to the current form FNS–742 that will be utilized for SY 2012–2013.

CIPs

Proposed Rule on CIPs:

Sets the requirement that a State that does not meet the direct certification performance benchmarks would need to develop a CIP that includes, at a minimum, the following components: the specific measures the State will use to identify more children who are eligible for direct certification with SNAP, a multiyear timeline for the State to implement these measures, goals for the State to improve direct certification results for the following school year, and a report on the State's progress in implementing other direct certification requirements. The proposed rule would also require that the State agency submit its CIP to FNS for approval within 60 days of formal notification.

Comments on CIPs:

Commenters were generally supportive of the requirements of the CIPs, including making the CIPs "multiyear" plans and adding a fourth component to track State progress in implementing other direct certification requirements.

What is to be included in the CIP—One commenter was concerned that States would spell out for themselves in their CIPs longer timelines than necessary for accomplishing tasks because of the "multiyear" timeline.

A State agency requested clarification and guidance on the content of the CIPs. Additionally, an advocacy organization had very specific ideas about what should be included in the CIP and how progress should be monitored, such as requiring State agencies to include: goals that are quantifiable and objective, the rationale for adopting the measures it proposes, and an analysis of why a previous plan may have failed.

State progress implementing other direct certification requirements in the CIP—A few commenters incorrectly believed that the first three components of the CIP were already incorporated in regulation and that this rulemaking would be adding just the fourth component.

One State agency was concerned that it would need to report progress toward phasing out the "Letter Method" even though it finds it an effective and successful secondary method of reaching eligible families in that State.

Another commenter wanted the fourth component of the CIP to include the tracking of extended eligibility, whereby other children in the directly-certified child's household can also be considered directly certified, by extension. (See USDA FNS Policy Memorandum SP 38–2009—*Extending Categorical Eligibility to Additional Children in a Household*, dated August 29, 2009, available at *http://www.fns.usda.gov/cnd/governance/Policy-Memos/2009/SP_38–2009_os.pdf*, and USDA Policy Memorandum SP 25–2010—*Questions and Answers on Extending Categorical Eligibility to Additional Children in a Household*, dated May 3, 2010, available at *http://www.fns.usda.gov/cnd/governance/Policy-Memos/2010/SP_25_CACFP_11_SFSP_10–2010_os.pdf*).

Other CIP issues—One commenter expressed concern that 60 days may not be enough time for a State agency to formulate and submit a CIP.

Two other commenters were in favor of applying fiscal sanctions or other negative incentives for repeated failure to meet the benchmarks so that States would not just be submitting CIPs each year with no other repercussions.

Two of the advocacy organizations suggested that States be required to post their CIPs for public access.

USDA/FNS Response to CIPs:

On what is to be included in the CIP—The proposal that the timeline in the CIP be "multiyear" was added in the proposed rule so that a State agency could define what measures it proposes to implement in each of several years. Some goals will take longer than a year to implement, some will take less, and others will logically follow after some other goal is reached. In addition, some States may take longer than others to implement effective changes, due in part to such circumstances as the number of LEAs in the State, the population of the State, the geographical size of the State, the current data structures in the State, the relationship with partner agencies, and the restrictions imposed by State law. The intent was to require States to accomplish tasks in appropriate timeframes. Regarding the specifics of what should go into the plans and how they should be structured, we will provide guidance to those State agencies that are required to develop CIPs. Each CIP will be reviewed individually and approved based on whether the goals and timeframes are reasonable for that particular State. Subsequent CIPs can track progress and reflect realigning goals.

On State progress implementing other direct certification requirements in the CIP—This final rulemaking codifies all four components of a CIP, not just the fourth.

For reporting "Letter Method" information, there is a phase-out plan for the "Letter Method" for SNAP as it applies to benchmarks and CIPs included in USDA FNS Memorandum SP 32–2011—*Child Nutrition Reauthorization 2010: Direct Certification Benchmarks and Continuous Improvement Plans*, dated April 28, 2011, available at *http://www.fns.usda.gov/cnd/governance/Policy-Memos/2011/SP32–2011.pdf*. By SY 2012–2013, the "Letter Method" must be fully phased-out as a means of direct certification of children in households receiving SNAP benefits, and the mandatory direct certification with SNAP must be conducted using data-matching techniques only. Letters to SNAP households may continue to be used as an additional means to notify households of children's categorical eligibility based on receipt of SNAP benefits, and schools may continue to use the letter to certify children in lieu of an application; however, such certifications cannot be counted as direct certifications. These certifications based on SNAP letters would be exempt from verification but would not be included in data reported for direct certifications with SNAP. As time goes on, States must have systems that effectively handle more-frequent direct certification with SNAP without the use of the "Letter Method." States will need to report in each CIP their progress in making this transition.

As for including in the fourth component of the CIPs information about the State's progress toward implementing extended eligibility policies, we currently monitor the State's progress during a management evaluation and the State monitors the SFA's progress during an administrative review. With the advent of the new benchmarks, there is additional incentive for States to fully implement the policy on extended eligibility since doing so would increase the State's direct certification performance rate.

On other CIP issues—With regard to the proposed 60-day timeframes for submitting a CIP, the timed CIP-development period would not start until after we formally notify the State that a CIP is needed. The new transparent methodology should facilitate a State's ability to continually monitor its own performance, analyze its systems, and plan for improvement. A State that monitors its own performance will likely begin to

estimate its SNAP direct certification performance rate as early as February 1st when the counts are due in from the LEAs, and a State that finds itself below a benchmark could begin to formulate and test its plans long before the State is even notified of the need to do a CIP. To ensure the development of a thoughtful, workable CIP, however, and to give the State time to get input from its State agency partners and to get the CIP through its own State approval process, this final rule sets the due date for submitting the CIP to FNS at 90 days after notification, instead of the 60 days that was proposed.

Regarding the suggestions for applying fiscal sanctions or other negative disincentives for repeated failures to meet the benchmarks, we want to reiterate that the CIP process is designed for steady progress to be made in improving direct certification rates. We anticipate that States will continue to make a good faith effort to improve their direct certification rates and that the CIPs will be a useful tool in guiding their efforts. FNS will address on a case-by-case basis any instance of willful noncompliance in implementing the improvements required under a CIP. In addition, FNS is in the process of developing a proposed rule to implement section 303 of the IHIFKA, *Fines for Violating Program Requirements*, which will provide an additional method to address any instances of severe mismanagement and willful noncompliance with program requirements.

Finally, with regard to general access to the CIPs, we agree that States may wish to share their CIPs with one another to encourage the formulation of successful plans, and we will continue to work to accommodate the sharing of best practices through channels such as PartnerWeb or State-to-State publications. However, mandatory public release of CIPs is unnecessary for this type of technical document and would be an additional burden on States. As such, USDA intends to leave the decision to the individual State as to whether or not it chooses to make its plan available to the public at large.

Disposition of CIPs in Final Rule:

The provisions regarding CIPs in the new § 245.12, paragraphs (a) *Direct certification requirements*, (d) *State notification*, (f) *Continuous improvement plan required components*, and (g) *Continuous improvement plan implementation*, remain unchanged from the proposed rule. The provision that sets the timeframes for submitting the CIPs is changed in the new paragraph § 245.12(e) *Continuous improvement plan required*, from 60 days in the proposed rule to 90 days in this final rule.

III. Further Clarification

• *Data Element #1*—On June 8, 2012, FNS published a notice in the **Federal Register** (77 FR 34005) to solicit comments on the proposed changes to the form FNS–742, *Verification Summary Report* (OMB #0584–0026), including the name change to *School Food Authority (SFA) Verification Collection Report*. Data Element #1 would be collected on line 3–2B of the revised form. This revised form will not be required until SY 2013–2014 in order to allow time for changes to be made to State automated systems. Since the revised form will not be implemented for SY 2012–2013, State agencies will not be required to report SNAP-only data for SY 2012–2013. Instead, for SY 2012–2013, the SNAP direct certifications will continue to be included as part of line 4–1A of the current version of the FNS–742. In the interim, States are expected to prepare and modify systems to meet the requirement to report SNAP-only data on the revised FNS–742 beginning with SY 2013–2014.

• *States Affected by This Rule*—To further clarify the criteria by which FNS determines whether or not a State is affected by this final rule, we offer the following: All NSLP States that also operate a food assistance program under SNAP would be affected by this final rule. The only exceptions are the Virgin Islands and Puerto Rico, each of which provides free meals to all children in those States regardless of the economic need of the child's family. Three NSLP States—the Commonwealth of the Northern Marianas, American Samoa, and the Commonwealth of Puerto Rico—are not affected by this rule because they do not operate SNAP, although each does operate a food assistance program under a Nutrition Assistance Block Grant. At this time, therefore, the NSLP States affected by this rule are the 50 States, the District of Columbia, and Guam.

Procedural Matters

Executive Order 12866 and Executive Order 13563

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

This rule has been designated non-significant under section 3(f) of Executive Order 12866.

Regulatory Flexibility Act

This rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act of 1980, (5 U.S.C. 601–612). Pursuant to that review, it has been certified that this rule would not have a significant impact on a substantial number of small entities.

Unfunded Mandates Reform Act

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

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

Executive Order 12372

This final rule affects the NSLP and SNAP.

The NSLP is listed in the Catalog of Federal Domestic Assistance Programs under No. 10.555. For the reasons set forth in the final rule in 7 CFR part 3015, subpart V, and related Notice (48 FR 29115, June 24, 1983), this program is included in the scope of Executive Order 12372 which requires intergovernmental consultation with State and local officials. Since the NSLP is a State-administered, Federally-funded program, FNS headquarters staff and FNS Regional Office staff have formal and informal discussions with State and local officials on an ongoing

basis regarding program requirements and operation. This structure allows FNS to receive regular input which contributes to the development of meaningful and feasible Program requirements.

SNAP is listed in the Catalog of Federal Domestic Assistance under 10.551. For the reasons set forth in the final rule at 7 CFR part 3015, subpart V and related Notice (48 FR 29115, June 24, 1983), SNAP is excluded from the scope of Executive Order 12372 which requires intergovernmental consultation with State and local officials.

Federalism Summary Impact Statement

Executive Order 13132 requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have federalism implications, agencies are directed to provide a statement for inclusion in the preamble to the regulations describing the agency's considerations in terms of the three categories called for under section (6)(b)(2)(B) of Executive Order 13121. FNS has considered the impact of this rule on State and local governments and has determined that this rule does not have federalism implications. Therefore, under section 6(b) of the Executive Order, a federalism summary is not required.

Executive Order 12988

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

Civil Rights Impact Analysis

FNS has reviewed this final rule in accordance with the Department Regulation 4300–4, Civil Rights Impact Analysis, to identify any major civil rights impacts the rule might have on children on the basis of race, color, national origin, sex, age or disability.

This rule requires State agencies to develop and implement CIPs if they do not meet certain percentage performance benchmarks for directly certifying for free school meals children in households receiving SNAP benefits. LEAs have for years been required to directly certify for free school meals those children in households receiving assistance under SNAP, and FNS has been required to assess State and local efforts to directly certify these children. This rule codifies the benchmarks and CIP requirements set by the HHFKA. After a careful review of the rule's intent and provisions, FNS has determined that this rule is technical in nature and affects State agencies only. This rule will not affect children in the NSLP, except to continue to encourage States to increase efforts to have more eligible children directly certified for free meals.

Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

Executive Order 13175 requires Federal agencies to consult and coordinate with Tribes on a government-to-government basis on policies that have Tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. USDA is unaware of any current Tribal laws that could be in conflict with the requirements of this rule. However, we have made special efforts to reach out to Tribal communities. Beginning in the spring of 2011, FNS has offered opportunities for consultation with Tribal officials or their designees to discuss the impact of the Healthy, Hunger-Free Kids Act of 2010 on tribes or Indian Tribal governments. The consultation sessions were coordinated by FNS and held on the following dates and locations:

1. HHFKA Webinar & Conference Call—April 12, 2011
2. Mountain Plains—HHFKA Consultation, Rapid City, SD—March 23, 2011
3. HHFKA Webinar & Conference Call—June, 22, 2011
4. Tribal Self-Governance Annual Conference in Palm Springs, CA—May 2, 2011
5. National Congress of American Indians Mid-Year Conference, Milwaukee, WI—June 14, 2011
6. Quarterly Consultation Meeting Conference Call—May 2, 2012

There were no comments about this regulation during any of the aforementioned Tribal Consultation sessions.

Reports from these consultations are part of the USDA annual reporting on Tribal consultation and collaboration. FNS will respond in a timely and meaningful manner to Tribal government requests for consultation concerning this rule. Currently, FNS provides regularly scheduled quarterly consultation sessions through the end of FY2012 as a venue for collaborative conversations with Tribal officials or their designees.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. Chap. 35; see 5 CFR 1320), requires that the Office of Management and Budget (OMB) approve all collections of information by a Federal agency from the public before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a current, valid OMB control number. This rule does contain information collection requirements subject to approval by OMB under the Paperwork Reduction Act of 1995.

One of the new provisions in this rule—the requirement for the development and submission of continuous improvement plans by any State that fails to meet certain mandated direct certification performance benchmarks—annually increases State agency reporting burden by 54 hours and the recordkeeping burden by 9 hours, for a total of 63 additional burden hours. FNS intends to merge these 63 hours into the Determining Eligibility for Free and Reduced Price Meals, OMB Control #0584–0026, expiration date March 31, 2013. The current collection burden inventory for the Determining Eligibility for Free and Reduced Price Meals (7 CFR part 245) is 1,073,432.

Another provision, requiring the collection of data elements on a new, interagency form (FNS–834, *State Agency (NSLP/SNAP) Direct Certification Rate Data Element Report*), involves changes in both NSLP and SNAP regulations and would increase burden hours on State agencies by an additional 53 hours annually. These 53 burden hours would remain with the newly established OMB Control Number until such time as the FNS–834 is incorporated into the Food Programs Reporting System (FPRS) and the system is approved by OMB.

A 60-day notice was imbedded into the proposed rule, *National School Lunch Program: Direct Certification Continuous Improvement Plans Required by the Healthy, Hunger-Free Kids Act of 2010*, published in the **Federal Register** at 77 FR 4688 on January 31, 2012, which provided the public an opportunity to submit comments on the information collection burden resulting from this rule. This

information collection burden has not yet been approved by OMB. FNS will publish a document in the **Federal Register** once these requirements have been approved.

The average burden per response and the annual burden hours are explained below and summarized in the charts which follow.

Estimated Annual Reporting and Recordkeeping Burden for 0584–NEW, Direct Certification Requirements, 7 CFR Part 245

Respondents for This Final Rule: State Agencies.

Estimated Number of Respondents for This Final Rule: 18.

Estimated Number of Responses per Respondent for This Final Rule: 2.

Estimated Total Annual Responses: 36.

Average Hours per Response: 1.75.

Estimated Total Annual Burden on Respondents for This Final Rule: 63.

ESTIMATED ANNUAL REPORTING BURDEN FOR 0584—NEW, DIRECT CERTIFICATION REQUIREMENTS, 7 CFR PART 245

	Section	Estimated number of respondents	Frequency of response	Average annual responses	Average burden per response	Annual burden hours
Reporting (State Agencies)						
State agencies that fail to meet the direct certification benchmark must develop and submit a *Continuous Improvement Plan* within 60 days of notification.	7 CFR 245.12 (e) and (g).	18	1	18	3	54
Total Reporting for Final Rule	.....	18	1	18	3	54
Total Existing Reporting Burden for Part 245.	.....	.....	.....	.....	.....	1,067,387
Total Reporting Burden for Part 245 with Final Rule.	.....	.....	.....	.....	.....	1,067,441

ESTIMATED ANNUAL RECORDKEEPING BURDEN FOR 0584—NEW, DIRECT CERTIFICATION REQUIREMENTS, 7 CFR PART 245

	Section	Estimated number of respondents	Frequency of response	Average annual responses	Average burden per response	Annual burden hours
Recordkeeping (State Agencies)						
State agencies that fail to meet the direct certification benchmark must maintain a *Continuous Improvement Plan.*	7 CFR 245.12 (e) and (g).	18	1	18	0.5	9
Total Recordkeeping for Final Rule.	.....	18	1	18	0.5	9
Total Existing Recordkeeping Burden for Part 245.	.....	.....	.....	.....	.....	6,045
Total Recordkeeping Burden for Part 245 with Final Rule.	.....	.....	.....	.....	.....	6,054

SUMMARY OF REPORTING AND RECORDKEEPING BURDEN (OMB #0584—NEW) 7 CFR PART 245

TOTAL NO. RESPONDENTS	18
AVERAGE NO. RESPONSES PER RESPONDENT	2
TOTAL ANNUAL RESPONSES	36
AVERAGE HOURS PER RESPONSE	1.75
TOTAL BURDEN HOURS FOR PART 245 WITH FINAL RULE	1,073,495
CURRENT OMB INVENTORY FOR PART 245	1,073,432
DIFFERENCE (NEW BURDEN REQUESTED WITH FINAL RULE)	63

*These 63 hours will be merged with OMB #0584–0026

Estimated Annual Burden for 0584–NEW, Direct Certification Requirements, 7 CFR Parts 245 and 272

Respondents for This Final Rule: State Agencies.

Estimated Number of Respondents for This Final Rule: 106.

Estimated Number of Responses per Respondent for This Final Rule: 1.

Estimated Total Annual Responses: 106.

Average Hours per Response: .5.

Estimated Total Annual Burden on Respondents for This Final Rule: 53.

ESTIMATED ANNUAL BURDEN FOR 0584—NEW, DIRECT CERTIFICATION REQUIREMENTS 7 CFR PARTS 245 AND 272

	Section	Estimated number of respondents	Frequency of response	Average annual responses	Average burden per response	Annual burden hours
Reporting (State Agencies)						
NSLP State agency must annually report to FNS data for calculating direct certification rates.	7 CFR 245.12(c) ..	54	1	54	0.5	27
SNAP State agency must annually report to FNS and to the NSLP State agency data for calculating direct certification rates.	7 CFR 272.8(a)(5)	52	1	52	0.5	26
Total Reporting for Final Rule	.....	106	1	106	0.5	53
Total Existing Reporting Burden	.....	.....	.....	.....	.....	0
Total Reporting Burden for Parts 245 and 272 with Final Rule.	.....	.....	.....	.....	.....	53

SUMMARY OF BURDEN (OMB #0584—NEW) 7 CFR PARTS 245 AND 272

TOTAL NO. RESPONDENTS	106
AVERAGE NO. RESPONSES PER RESPONDENT	1
TOTAL ANNUAL RESPONSES	106
AVERAGE HOURS PER RESPONSE	.5
TOTAL BURDEN HOURS FOR PARTS 245 and 272 WITH FINAL RULE*	53
CURRENT OMB INVENTORY FOR PARTS 245 and 272	0
DIFFERENCE (NEW BURDEN REQUESTED WITH FINAL RULE)	53

*Represents increase of 53 hours from existing reporting burden; no additional recordkeeping burden. These 53 hours will remain with the newly established OMB Control Number.

E-Government Act Compliance

The Food and Nutrition Service 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

7 CFR Part 245

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

7 CFR Part 272

Alaska, Civil rights, Claims, Food stamps, Grant programs-social programs, Reporting and recordkeeping requirements, Unemployment compensation, wages.

Accordingly, 7 CFR Parts 245 and 272 are amended as follows:

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

■ 1. The authority citation for 7 CFR Part 245 continues to read as follows:

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

§ 245.6a [Amended]

■ 2. Section 245.6a is amended in paragraph (h) by removing the word "March" and adding in its place the word "February".

■ 3. Paragraph 245.11(i) is revised to read as follows:

§ 245.11 Action by State agencies and FNSROs.

* * * * *

(i) No later than February 1, 2013, and by February 1st each year thereafter, each State agency must collect annual verification data from each local educational agency as described in § 245.6a(h) and in accordance with guidelines provided by FNS. Each State agency must analyze these data, determine if there are potential problems, and formulate corrective actions and technical assistance activities that will support the objective of certifying only those children eligible for free or reduced price meals. No later than March 15, 2013, and by March 15th each year thereafter, each State agency must report to FNS, in a consolidated electronic file by local educational agency, the verification information that has been reported to it as required under § 245.6a(h), as well as any ameliorative actions the State agency has taken or intends to take in local educational agencies with high levels of applications changed due to verification. State agencies are encouraged to collect and report any or all verification data elements before the required dates.

* * * * *

§§ 245.12 and 245.13 [Redesignated as §§ 245.13 and 245.14]

■ 4. Redesignate §§ 245.12 and 245.13 as §§ 245.13 and 245.14, respectively.

■ 5. New § 245.12 is added to read as follows:

§ 245.12 State agencies and direct certification requirements.

(a) *Direct certification requirements.* State agencies are required to meet the direct certification performance benchmarks set forth in paragraph (b) of this section for directly certifying children who are members of households receiving assistance under SNAP. A State agency that fails to meet the benchmark must develop and submit to FNS a continuous

improvement plan (CIP) to fully meet the requirements of this paragraph and to improve direct certification for the following school year in accordance with the provisions in paragraphs (e), (f), and (g) of this section.

(b) *Direct certification performance benchmarks.* State agencies must meet performance benchmarks for directly certifying for free school meals children who are members of households receiving assistance under SNAP. The performance benchmarks are as follows:

(1) 80% for the school year beginning July 1, 2011;

(2) 90% for the school year beginning July 1, 2012; and

(3) 95% for the school year beginning July 1, 2013, and for each school year thereafter.

(c) *Data elements required for direct certification rate calculation.* Each State agency must provide FNS with specific data elements each year, as follows:

(1) *Data Element #1*—The number of children who are members of households receiving assistance under SNAP that are directly certified for free school meals as of the last operating day in October, collected and reported in the same manner and timeframes as specified in § 245.11(i).

(2) *Data Element #2*—The unduplicated count of children ages 5 to 17 years old who are members of households receiving assistance under SNAP at any time during the period July 1 through September 30. This data element must be provided by the SNAP State agency, as required under 7 CFR 272.8(a)(5), and reported to FNS and to the State agency administering the NSLP in the State by December 1st each year, in accordance with guidelines provided by FNS.

(3) *Data Element #3*— The count of the number of children who are members of households receiving assistance under SNAP who attend a school operating under the provisions of 7 CFR 245.9 in a year other than the base year or that is exercising the community eligibility option (CEO). The proxy for this data element must be established each school year through the State's data matching efforts between SNAP records and student enrollment records for these special provision schools that are operating in a non-base year or that are exercising the CEO. Such matching efforts must occur in or close to October each year, but no later than the last operating day in October. However, States that have special provision schools exercising the CEO may alternatively choose to include, for these schools, the count of the number of identified students directly matched with SNAP used in determining the CEO claiming percentage for that school year, or they may choose to use the count from the SNAP match conducted by April 1 of the same calendar year, whether or not it was used in the CEO claiming percentages. State agencies must report this aggregated data element to FNS by December 1st each year, in accordance with guidelines provided by FNS.

(d) *State notification.* For each school year, FNS will notify State agencies that fail to meet the direct certification performance benchmark.

(e) *Continuous improvement plan required.* A State agency having a direct certification rate with SNAP that is less than the direct certification performance benchmarks set forth in paragraph (b) of this section must submit to FNS for approval, within 90 days of notification, a CIP in accordance with paragraph (f) of this section.

(f) *Continuous improvement plan required components.* CIPs must include, at a minimum:

(1) The specific measures that the State will use to identify more children who are eligible for direct certification, including improvements or modifications to technology, information systems, or databases;

(2) A multiyear timeline for the State to implement these measures;

(3) Goals for the State to improve direct certification results for the following school year; and

(4) Information about the State's progress toward implementing other direct certification requirements, as provided in FNS guidance.

(g) *Continuous improvement plan implementation.* A State must maintain its CIP and implement it according to the timeframes in the approved plan.

PART 272—REQUIREMENTS FOR PARTICIPATING STATE AGENCIES

■ 5. The authority citation for 7 CFR part 272 continues to read as follows:

Authority: 7 U.S.C. 2011–2036.

■ 6. Section 272.8 is amended by adding a new paragraph (a)(5) to read as follows:

§ 272.8 State income and eligibility verification system.

(a) * * *

(5) State agencies must provide information to FNS and to the State agencies administering the National School Lunch Program for the purpose of direct certification of children for school meals as described in § 245.12(c)(2) of this chapter. In addition, State agencies must execute a data exchange and privacy agreement in accordance with paragraph (a)(4) of this section and § 272.1(c).

* * * * *

Dated: February 4, 2013.

Audrey Rowe,

Administrator, Food and Nutrition Service.

[FR Doc. 2013–04118 Filed 2–21–13; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2013–0091; Directorate Identifier 2013–NM–016–AD; Amendment 39–17366; AD 2013–02–51]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: We are adopting a new airworthiness directive (AD) for all The Boeing Company Model 787–8 airplanes. This emergency AD was sent previously to all known U.S. owners and operators of these airplanes. This AD requires modification of the battery system, or other actions. This AD was prompted by recent incidents involving lithium ion battery failures that resulted in release of flammable electrolytes, heat damage, and smoke. We are issuing this AD to correct damage to critical systems and structures, and the potential for fire in the electrical compartment.

DATES: This AD is effective February 22, 2013 to all persons except those persons to whom it was made immediately effective by Emergency AD 2013–02–51, issued on January 16, 2013, which contained the requirements of this amendment.

We must receive comments on this AD by April 8, 2013.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

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

p.m., Monday through Friday, except Federal holidays.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Operations Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations 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: Robert Duffer, Manager, Systems and Equipment Branch, ANM–130S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, Washington 98057–3356; phone: 425–917–6493; fax: 425–917–6590; email: *Robert.Duffer@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

On January 16, 2013, we issued Emergency AD 2013–02–51, which requires modification of the battery system, or other actions. This emergency AD was sent previously to all known U.S. owners and operators of these airplanes. This action was prompted by recent incidents involving lithium ion battery failures that resulted in release of flammable electrolytes, heat damage, and smoke on two Model 787–8 airplanes. The cause of these failures is currently under investigation. These conditions, if not corrected, could result in damage to critical systems and structures, and the potential for fire in the electrical compartment.

FAA's Determination

We are issuing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

AD Requirements

This AD requires modification of the battery system, or other actions, in accordance with a method approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA.

Interim Action

We consider this AD interim action. As the investigation progresses, we might determine that additional action is necessary.

FAA's Determination of the Effective Date

An unsafe condition exists that requires the immediate adoption of this AD. The FAA has found that the risk to the flying public justifies waiving notice and comment prior to adoption of this rule because of recent incidents involving lithium ion battery failures that resulted in release of flammable electrolytes, heat damage, and smoke on two Model 787–8 airplanes. These conditions, if not corrected, could result in damage to critical systems and structures, and the potential for fire in the electrical compartment. Therefore, we find that notice and opportunity for prior public comment are impracticable and that good cause exists for making this amendment effective in less than 30 days.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety and was not preceded by notice and an opportunity for public comment. However, we invite you to send any written data, views, or arguments about this AD. Send your comments to an address listed under the **ADDRESSES** section. Include the docket number FAA–2013–0091; and Directorate Identifier 2013–NM–016–AD at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this AD. We will consider all comments received by the closing date and may amend this AD 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 AD.

Costs of Compliance

We estimate that this AD affects 6 airplanes of U.S. registry.

Currently, we have received no definitive data that would enable us to provide cost estimates for the actions required by this AD. As indicated earlier in this preamble, we specifically invite the submission of comments and other data regarding the costs of this AD.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

(1) Is not a "significant regulatory action" under Executive Order 12866,

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

(3) Will not affect intrastate aviation in Alaska, and

(4) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2013–02–51 The Boeing Company: Amendment 39–17366; Docket No. FAA–2013–0091; Directorate Identifier 2013–NM–016–AD.

(a) Effective Date

This AD is effective February 22, 2013 to all persons except those persons to whom it was made immediately effective by Emergency AD 2013–02–51, issued on January 16, 2013, which contained the requirements of this amendment.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all The Boeing Company Model 787–8 airplanes, certificated in any category.

(d) Subject

Joint Aircraft System Component (JASC)/Air Transport Association (ATA) of America Code 24, Electrical power.

(e) Unsafe Condition

This AD was prompted by recent incidents involving lithium ion battery failures that resulted in release of flammable electrolytes, heat damage, and smoke on two Model 787–8 airplanes. The cause of these failures is currently under investigation. We are issuing this AD to prevent damage to critical systems and structures, and the potential for fire in the electrical compartment.

(f) Compliance

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

(g) Modification or Other Action

Before further flight, modify the battery system, or take other actions, in accordance with a method approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA.

(h) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Seattle 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. Information may be emailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.*

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(i) Related Information

For more information about this AD, contact: Robert Duffer, Manager, Systems and Equipment Branch, ANM–130S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, Washington 98057–3356; phone: 425–917–6493; fax: 425–917–6590; email: *Robert.Duffer@faa.gov.*

(j) Material Incorporated by Reference

None.

Issued in Renton, Washington, on February 1, 2013.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2013–04004 Filed 2–21–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 61

Policy Clarification on Charitable Medical Flights

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of Policy.

SUMMARY: The FAA is issuing this notice of policy to describe its policy for volunteer pilots operating charitable medical flights. Charitable medical flights are flights where a pilot, aircraft owner, and/or operator provides transportation for an individual or organ for medical purposes. This notice of policy is in response to Section 821 of Public Law 112–95, Clarification of Requirements for Volunteer Pilots Operating Charitable Medical Flights.

DATES: This action becomes effective on February 22, 2013.

FOR FURTHER INFORMATION CONTACT: John Linsenmeyer, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; fax (202) 385–9612; email *john.linsenmeyer@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

Section 61.113(a) of Title 14 Code of Federal Regulations (14 CFR) states that no person who holds a private pilot certificate may act as pilot in command of an aircraft that is carrying passengers or property for compensation or hire; nor may that person, for compensation or hire, act as pilot in command of an aircraft.

Section 61.113(c) states that, for any flight carrying passengers, a private pilot may not pay less than the pro rata share of the operating expenses (fuel, oil, airport expenditures, or rental fees). This prohibition means that a private pilot can pay more, but not less, of these expenses when split equally among all the people aboard the aircraft. Private pilot certificates are considered to be an entry-level pilot's license, and the purpose of this regulation is to limit the operations of private pilots commensurate to their certification level. Pilots wishing to pay less than their pro rata share (or fly for hire) must obtain a commercial pilot certificate, which has higher certification requirements and may be required to comply with additional operating requirements.

Some pilots and other individuals have recognized a need to provide transportation services for conveyance of people needing non-emergency medical treatment. Section 821 of Public Law 112–95, requires, with certain limitations, that the FAA allow an aircraft owner or operator to accept reimbursement from a volunteer pilot organization for the fuel costs associated with a flight operation to provide transportation for an individual or organ for medical purposes (and for other associated individuals).

Volunteer pilot organizations have petitioned the FAA for exemption from the requirements of § 61.113(c) so that their pilots can be reimbursed for some or all of the expenses they incur while flying these flights. To allow compensation for expenses for the transportation of individuals, these private pilots are participating in an activity that would otherwise be prohibited by § 61.113(c).

The FAA has determined this activity can be conducted safely with limits applied to the organizations, pilots, and aircraft. Beginning in 2010, the FAA issued several exemptions to charitable medical flight organizations granting relief from the requirements of § 61.113(c). The exemptions contain conditions and limitations that are intended to raise the level of safety for these flights. These conditions and limitations include:

1. Developing of a pilot qualification and training program;
2. Authenticating pilots' FAA certification;
3. Requiring flight release documentation;
4. Imposing minimum pilot qualifications (flight hours, recency of experience, etc.);
5. Requiring a 2nd class FAA medical certificate;
6. Requiring the filing of an instrument flight plan for each flight;
7. Restricting pilots to flight and duty time limitations;
8. Requiring mandatory briefings for passengers;
9. Imposing higher aircraft airworthiness requirements; and
10. Requiring higher instrument flight rules (IFR) minimums.

The FAA recognizes the practical implications and benefits from this type of charity flying and will continue to issue exemptions for flights described

by Section 821 of Public Law 112–95. The FAA will continuously update these conditions and limitations as necessary to best ensure these operations meet this equivalent level of safety.

Issued in Washington, DC, on February 14, 2013.

John M. Allen,

Director, Flight Standards Service.

[FR Doc. 2013–04052 Filed 2–21–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 110

[Docket No. USCG–2012–0159]

RIN 1625–AA01

Anchorages; Captain of the Port Puget Sound Zone, WA

Correction

In rule document 2013–03121, appearing on pages 9811–9814 in the issue of Tuesday, February 12, 2013, make the following correction:

§ 110.230 [Corrected]

■ On page 9813, in the third column, on the eighteenth line from the top, "latitude 47°7′30″ N" should read "latitude 47°47′30″ N".

[FR Doc. C1–2013–03121 Filed 2–21–13; 8:45 am]

BILLING CODE 1505–01–D

POSTAL SERVICE

39 CFR Part 111

Promotions and Incentive Programs for First-Class Mail and Standard Mail

AGENCY: Postal Service™.

ACTION: Final rule.

SUMMARY: The Postal Service will revise the *Mailing Standards of the United States Postal Service*, Domestic Mail Manual (DMM®) 709.3 to include new promotions and incentive programs that will be offered at various time periods during calendar year 2013 for Presorted and automation First-Class Mail® cards, letters, and flats, and Standard Mail® letters, flats, or parcels.

DATES: *Effective date:* March 4, 2013.

FOR FURTHER INFORMATION CONTACT: Krista Becker at 202–268–7345 or Bill Chatfield at 202–268–7278. Email contacts are: *mobilebarcode@usps.gov* for the Mobile Coupon/Click-to-Call, Emerging Technologies, Product Samples, and Mobile Buy-It-Now programs; and *earnedvalue@usps.gov* or *picturepermit@usps.com* for the two other programs.

SUPPLEMENTARY INFORMATION: The Postal Service filed a notice with the Postal Regulatory Commission (PRC) (Docket No. R2013–1) on October 11, 2012 to offer six new promotions in 2013 and the PRC approved the 2013 promotions on November 16, 2012.

In this final rule, the Postal Service provides a description of the eligibility conditions for the various promotional programs and the revised mailing standards to implement the programs. The types of eligible mailpieces are listed in the descriptions for each promotion. EDDM-Retail® mailings are not eligible for participation in any of the promotions. OMAS and official government mailings are eligible for participation in the Earned Value Reply Mail promotion only. Registration for must be made separately for each promotion through the Business Customer Gateway.

Summary of Promotional Programs

The six promotional programs, in calendar order are:

1. Direct Mail Mobile Coupon and Click-to-Call
2. Earned Value Reply Mail
3. Emerging Technologies
4. Picture Permit Imprint
5. Product Samples
6. Mobile Buy-It Now

Postage Payment for Mobile Coupon/Click-to-Call, Emerging Technologies, and Mobile Buy-It Now

The following parameters apply to the Mobile Coupon/Click-to-Call, Emerging Technology, and Mobile Buy-It Now promotions.

Mailing documentation and postage statements must be submitted electronically. Mailings entered by an entity other than the mail owner must identify the mail owner and mail preparer in the by/for fields. Full-service mailings are limited to 9,999 pieces if submitted via Postal Wizard. If some pieces in a mailing are not claiming a promotion discount, separate postage statements must be used for pieces not claiming the discount and for pieces claiming the discount. All discounts must be claimed on the electronic postage statement at the time of mailing and will not be rebated at a later date.

Postage payment methods will be restricted to permit imprint, metered postage, or precancelled stamps. Pieces with metered postage must bear an exact amount of postage as stipulated by the class and shape of mail. Affixed postage values for metered mailings will be as follows:

First-Class Mail postcards	$0.20
First-Class Mail automation and (PRSTD) machinable letters	0.25
First-Class Mail nonmachinable letters	0.45
First-Class Mail automation and Presorted flats	0.35
STD Mail Regular letters	0.12
STD Mail Regular flats	0.13
STD Nonprofit letters	0.05
STD Nonprofit flats	0.06

Mailings with postage paid by metered or precancelled stamp postage will have the percentage discount deducted from the additional postage due, except for Value Added Refund mailings, which may include the amount of the discount with the amount to be refunded.

Description of Promotional Programs

Mobile Coupon/Click-to-Call

This promotion provides an upfront 2 percent postage discount for presort and automation mailings of First-Class Mail letters, postcards, or flats and Standard Mail (including Nonprofit) letters and flats that integrate mail with mobile technology and promote the value of direct mail. There are two separate ways to participate within the one overall program: Mobile Coupon and Click-to-Call. Mailers may participate in one or both ways, but only one discount may apply per mailing. The Mobile Coupon option will encourage mailers to integrate hard-copy coupons in the mail with mobile platforms for redemption. The Click-to-Call option will drive consumer awareness and increase usage of mail with mobile barcodes that provide click-to-call functionality.

For the Mobile Coupon program, at least one of the following options apply:

1. The mailpiece must be a coupon, entitling only the recipients to a discount off a product or service.

2. The mailpiece must contain either mobile-print technology (such as a 2D barcode or smart tag) that can be scanned by a mobile device linking to a mobile coupon or a short number to be used to initiate a text communication that then triggers a SMS/EMS or MMS message with a one-time coupon or code. Texts that allow an option for ongoing coupons via text are not eligible.

Coupon recipients must be able to present physical coupons or coupons stored on mobile devices at any of the mailer's retail locations that exist. For mailers who do not have retail

locations, the following conditions apply:

1. The mailpiece must contain a code to receive a discount online or via a call center.

2. The coupon discount is offered only to mailpiece recipients and is not a discount available to all customers.

3. The entire online shopping experience and path to purchase must be mobile-optimized.

For the Click-to-Call program, the mailpiece must contain mobile technology that can be scanned by a mobile device and the scanned item (barcode, RFID chip, NFC Smart tag, etc.) must link directly to a mobile-optimized Web site with a "click to call" link or bring up a phone number on the user's phone. The mailpiece must contain text near the barcode or image that guides the consumer to scan the image, or informs the consumer about the landing page.

Registration is January 15–April 30, 2013. The program period is from March 1–April 30, 2013.

Earned Value Reply Mail Promotion

First-Class Mail Business Reply and Courtesy Reply mailers will receive a $0.02 postage credit for each machinable Business Reply Mail® (BRM) or Courtesy Reply Mail™ (CRM) card or letter bearing a qualifying Intelligent Mail® barcode (IMb™) that is scanned in the postal network. IMbs on reply pieces must be encoded with the correct Mailer ID, barcode ID, service type ID, and ZIP+4® routing code as assigned by the USPS. This promotion is designed to encourage mailers to promote First-Class Mail as a primary reply mechanism for their customers and to keep the BRM/CRM envelopes in their outgoing mail pieces by providing a financial benefit when the BRM/CRM envelopes are used.

Registration is January 15 to March 31, 2013. Participants must register their Mailer IDs (MIDs) and permit account on the Incentive Programs Service area of the Business Customer Gateway. Participants also must agree to participate in a survey about the promotion. The program participation period is from April 1–June 30, 2013. There will be no requirement that the reply piece is mailed out during the promotion period, but it must be returned in the mail during that period. Rebate credit will not be earned for pieces scanned prior to April 1 or after June 30th. Rebate credits can be redeemed for postage for future mailings of First-Class Mail presort and automation letters, cards, or flats, or for Standard Mail letters or flats paid from the permit account to which the credit was applied. The USPS encourages participants to schedule their mailings in the appropriate time frame to maximize the number of reply pieces coming back during the promotion period.

Emerging Technologies

By providing an upfront 2 percent postage discount, this promotion is designed to build on the successes of past mobile barcode promotions and promote awareness of how innovative technologies (such as Near-Field Communication, Augmented Reality, and Authentication) can be integrated with a direct mail strategy to enhance the value of direct mail. Registration is June 15 to Sept. 30, 2013. The program participation period is from August 1–September 30, 2013. Mailers and mail service providers must register on the Business Customer Gateway via the Incentive Programs Service and agree to the promotion terms at least 2 hours prior to the first qualifying mailing, including specifying the permits and CRIDs to be used in the promotion. Participants also must agree to complete a survey about their participation in the program.

Eligible mailpieces are First-Class Mail presort and automation cards, letters, or flats, and Standard Mail letters or flats. All pieces must meet at least one of the following requirements:

1. Near-Field Communication (NFC) component: The mailpiece must contain a NFC smart tag or RFID chip that allows information to be transmitted to a mobile device.

2. Augmented Reality component: The mailpiece must contain print that allows the recipient to engage in an augmented reality experience facilitated by a mobile device or computer. The experience must combine real and virtual components, be interactive in real time, be registered in 2–D or 3–D, and be relevant to the contents of the mailpiece.

3. Authentication component: The mailpiece must integrate delivery of the physical mailpiece with mobile technology, allowing the user to complete authentication processes for customers and mail recipients. Mailers must obtain prior approval for their proposed authentication uses from the USPS program office.

The 2 percent discount for eligible pieces is applied at the time of mailing. If multiple emerging technologies are used on the same mailpiece, the discount is only applied once.

Picture Permit

The Picture Permit promotion is designed to further promote the use of Picture Permit Imprint Indicia, which can improve a mailpiece's visibility and impact as a marketing tool. For pre-approved mailers, the Picture Permit fee of 1 cent per mailpiece for First-Class Mail automation letters and cards will be waived, and the current 2 cents fee for Standard Mail automation letters will be waived. Full-service Intelligent Mail barcodes are required on each piece. It is recommended that prospective participants allow 4 months before the first mailing date to complete the Picture Permit Imprint Indicia approval process and have proposed designs approved by the USPS Picture Permit program office. Registration for the Picture Permit promotion is allowed from June 1 to Sept. 30, 2013. The promotion participation period is from August 1–September 30, 2013. Mailers and mail service providers must first complete the initial program registration for Picture Permit at the Web site: *www.usps.com/picturepermit*. After completion of the 4-step authorization process, preapproved participants will be invited to register for the promotion. Approved mailers must agree to participate in a survey about the promotion.

Postage must be paid by permit imprint, with documentation and postage statements submitted electronically. Participants must claim the waiver of fees on the electronic postage statement at the time of submission. All mailpieces in a mailing must be eligible for the promotion. Qualified plant-verified drop shipment (PVDS) mailings that are verified and paid for by September 30, 2013 may be entered at destination entry facilities through October 15, 2013. Questions may be sent by email to: *picturepermit@usps.com*.

Product Samples

Designed to re-invigorate product sampling via the mail, the Product Samples promotion will provide mailers with a 5 percent upfront postage discount on qualifying mail that contains product samples. The promotion will increase awareness of the new "Simple Samples" pricing in Standard Mail, which began Jan. 27, 2013. Mailers and mail service providers must register from May 1 to September 30, 2013 on the Incentive Programs Service area of the Business Customer Gateway. Mailers must agree to participate in a survey about the promotion. The program participation period is from August 1 to September 30, 2013. Qualified PVDS mailings that are verified and paid for by September 30, 2013 may be entered at destination

entry facilities through October 15, 2013.

All qualifying parcels must contain a product sample, a physical product whose purpose is to encourage recipients to purchase a product or service, form a belief or opinion, or take an action. Postage must be paid by permit imprint, meter, or precancelled stamps; postage statements and documentation must be submitted electronically. Participants must claim the discount on the electronic postage statement at the time of submission. Questions may be sent by email to: *mobilebarcode@usps.gov*.

Mobile Buy-It-Now

This promotion provides mailers (of presort and automation First-Class Mail cards, letters, and flats and Standard Mail letters and flats) with an upfront 2 percent postage discount to encourage them to demonstrate how direct mail combined with mobile technology can be a convenient method for consumers to do their holiday shopping. To participate, mailers and mail service providers must register on the Incentive Programs Service area of the Business Customer Gateway and agree to promotion terms from September 15 to December 31, 2013, at least 2 hours before presenting the first qualifying mailing. The program participation period is from November 1 to December 31, 2013. Participants must agree to complete a survey about their participation in the promotion.

Qualifying mailpieces must include a two-dimensional barcode or print/mobile technology that can be read or scanned by a mobile device, directly leading the recipient to a mobile-optimized Web page that allows the purchase of an advertised product through a financial transaction on the mobile device. The mailpiece must also contain text near the barcode or image that guides the consumer to scan the image or informs the consumer about the landing page. These additional requirements apply:

1. The destination Web page must contain information relevant to the content of the mailpiece, and some of the products advertised must be available for purchase on a mobile device.

2. The purchase must be able to be completed through the mobile device via an electronic payment method, such as a credit card, debit card, or via PayPay, or by allowing an order to be placed on the mobile device through the Internet, leading to a subsequent invoice.

3. A product, for purposes of this promotion, is defined as a tangible and physical item that can be shipped via a mailing or shipping product offered by the USPS (although delivery by the USPS is not required). The sale of a service without a tangible product does not qualify.

4. Products must be offered for fulfillment via home delivery; products offered as shipments for in-store pickup only will not qualify.

General Discount Information

Commingled, co-mailed, and combined mailings are allowed, but a separate postage statement is required for those mailpieces eligible to participate in the applicable promotion.

Each price reduction will be taken off the eligible postage amount due at the time of mailing. Promotion discounts do not apply to single-piece First-Class Mail pieces including residual single-piece First-Class Mail pieces claimed on a postage statement for Presorted and automation mailings. Price reductions also do not apply to any Standard Mail residual pieces paying single-piece First-Class Mail prices.

Eligible mailings must be accompanied by electronic documentation, submitted via mail.dat, mail.xml, or Postal Wizard. The electronic documentation must identify the mail owner and mail preparer in the "by/for" fields for all mailings, either by the Customer Registration ID (CRID) or Mailer ID (MID) assigned by USPS. As a general reminder, mailings of automation flats or automation cards and letters, including Standard Mail letters (other than those with simplified addresses) claiming a carrier route automation letter price, must have Intelligent Mail barcodes. Full-service use of IMbs is required for some promotions as specified.

Registration Before Participation and More General Information

To participate in any of the promotional programs, customers must be registered on the Incentive Programs Service area of the Business Customer Gateway at *https://gateway.usps.com/bcg/login.htm*. Customers must specify which permits and CRIDs will participate in which promotion(s). Registration opens as specified for each program above. Program requirements, including updated FAQs, are available on the RIBBS™ Web site at *https://ribbs.usps.gov/index.cfm?page=mobilebarcode* or by email to *mobilebarcode@usps.gov*.

The Postal Service adopts the following changes to *Mailing Standards of the United States Postal Service*, Domestic Mail Manual (DMM), which is incorporated by reference in the *Code of Federal Regulations*. See 39 CFR 111.1.

List of Subjects in 39 CFR Part 111

Administrative practice and procedure, Postal Service.

Accordingly, 39 CFR part 111 is amended as follows:

PART 111—[AMENDED.]

■ 1. The authority citation for 39 CFR part 111 continues to read as follows:

Authority: 5 U.S.C. 552(a); 13 U.S.C. 301–307; 18 U.S.C. 1692–1737; 39 U.S.C. 101, 401, 403, 404, 414, 416, 3001–3011, 3201–3219, 3403–3406, 3621, 3622, 3626, 3632, 3633, and 5001.

■ 2. Revise the following sections of the *Mailing Standards of the United States Postal Service*, Domestic Mail Manual (DMM).

Mailing Standards of the United States Postal Service, Domestic Mail Manual (DMM):

* * * * *

700 Special Standards

* * * * *

709 Experimental and Temporary Classifications

* * * * *

[Revise the title and complete text of 3.0 as follows:]

3.0 Promotions for First-Class Mail and Standard Mail for 2013

3.1 Summary of Programs

There will be six new promotional incentive programs offered during calendar year 2013 for Presorted and automation First-Class Mail cards, letters, and flats, and Standard Mail letters, flats, or parcels. EDDM-Retail mailings are not eligible for participation in any of the promotions; OMAS and official government mailings are eligible only for participation in the Earned Value Reply Mail promotion. Automation letters and flats must bear correct Intelligent Mail barcodes. Participants in each promotion also agree to participate in a survey about the promotion. See 3.2 for how to register. The six promotional programs, in calendar order, are:

a. Direct Mail Mobile Coupon and Click-to-Call

1. Registration: January 15–April 30, 2013;

2. Program period: March 1–April 30, 2013.

b. Earned Value Reply Mail

1. Registration: January 15–March 31, 2013;

2. Program period: April 1–June 30, 2013.

c. Emerging Technologies
1. Registration: June 15–September 30, 2013;
2. Program period: August 1–September 30, 2013.
d. Picture Permit Imprint
1. Advance registration: 4 months or more before program period begins.
2. Enrollment: June 1–September 30, 2013;
3. Program period: August 1–September 30, 2013.
e. Product Samples
1. Registration: May 1–September 30, 2013;
2. Program period: August 1–September 30, 2013.
f. Mobile Buy-It Now
1. Registration: September 15–December 31, 2013;
2. Program period: November 1–December 31, 2013.

3.2 Registration and General Conditions for Documentation

Customers must register for each promotion on the Incentive Programs Service through the Business Customer Gateway at *https://gateway.usps.com/bcg/login.htm*, and specify which permits and CRIDs will participate in the promotion. Mailpieces must be mailed under the following conditions:

a. Except for the Earned Value Reply Mail and Picture Permit promotions, postage must be paid by permit imprint or by affixing metered postage or a precanceled stamp to each piece of mail. Pieces with metered postage must bear an exact amount of postage as stipulated by the class and shape of mail, and according to the table published in the **Federal Register** notice under "postage payment methods." Provisions for additional postage are in 234.2.2a and 334.2.2a for First-Class Mail pieces over 1 ounce, and in 244.2.2 and 344.2.2 for Standard Mail pieces over 3.3 ounces.

b. The postage statement and mailing documentation must be submitted electronically. The mail owner's identity must be indicated in the electronic documentation, which must identify the mail owner and mail preparer in the by/for fields, either by Customer Registration ID (CRID) or Mailer ID (MID) assigned by the USPS. All Presorted and automation pieces declared on a postage statement must qualify for the discount.

c. The electronic equivalent of the mailer's signature on the postage statement will certify that each mailpiece claimed on the postage statement qualifies for the applicable promotion.

3.3 Program Descriptions

Each of the six promotions is briefly described below. More detailed information, including updated FAQs, is available on the RIBBS Web site at *https://ribbs.usps.gov/index.cfm?page=mobilebarcode*.

3.3.1 Direct Mail Mobile Coupon and Click-to-Call

This promotion provides an upfront 2 percent postage discount for presort and automation mailings of First-Class Mail letters, postcards, or flats and Standard Mail (including Nonprofit) letters and flats that integrate mail with mobile technology. There are two separate ways to participate within the one overall program; mailers may participate in one or both, but only one discount applies per mailing. The Mobile Coupon option integrates hard-copy coupons in the mail with mobile platforms for redemption. Participation in the Click-to-Call option increases use of mail with mobile barcodes that provide click-to-call functionality. Conditions are as follows:

a. For the Mobile Coupon program, the coupon is offered only to mailpiece recipients, the entire path to purchase must be mobile-optimized, and at least one of the following two options apply:

1. The mailpiece must be a coupon, entitling only the recipients to a discount off a product or service.

2. The mailpiece must contain either mobile-print technology that can be scanned by a mobile device linking to a mobile coupon or a short number to be used to initiate a text communication that triggers a text message with a one-time coupon or code.

b. For both options in 3.3.1a, coupon recipients must be able to present physical coupons or coupons stored on mobile devices at retail locations or the mailpiece must contain a code to receive a discount online or via a call center.

c. For the Click-to-Call program, the mailpiece must contain mobile technology that can be scanned by a mobile device and the scanned item must link directly to a mobile-optimized Web site with a "click to call" link or to a phone number on the user's phone. The mailpiece must contain text near the image to guide the consumer to scan the image.

3.3.2 Earned Value Reply Mail

First-Class Mail Business Reply Mail (BRM) and Courtesy Reply Mail (CRM) mailers will receive a $0.02 postage credit for each machinable BRM or CRM card or letter bearing a qualifying Intelligent Mail barcode (IMb) that is scanned in the postal network during the program period. IMbs on reply pieces must be encoded with the correct Mailer ID, barcode ID, service type ID, and correct ZIP+4 routing code as assigned by the USPS. Rebate credits can be redeemed for postage for future mailings of First-Class Mail presort and automation letters, cards, or flats, or for Standard Mail letters or flats paid from the permit account where the credit was applied.

3.3.3 Emerging Technologies

If multiple emerging technologies are used on the same mailpiece, the 2% upfront discount is only applied once. To be eligible for the discount, all First-Class Mail presort and automation cards, letters, or flats, and Standard Mail letters or flats must meet at least one of the following requirements:

a. The mailpiece must contain a Near-Field Communication (NFC) smart tag or RFID chip that allows information to be transmitted to a mobile device.

b. The mailpiece must contain print that allows the recipient to engage in an augmented reality experience, relevant to the contents of the mailpiece, facilitated by a mobile device or computer.

c. The mailpiece must integrate delivery of the physical mailpiece with mobile technology, allowing the user to complete authentication processes for customers and mail recipients. Mailers must obtain prior approval from the USPS program office for each proposed process.

3.3.4 Picture Permit Imprint

For pre-approved mailers, the Picture Permit fee for First-Class Mail automation letters and cards will be waived, and the fee for Standard Mail automation letters will be waived. Full-service Intelligent Mail barcodes are required on each piece. Mailers and mail service providers must complete registration for Picture Permit at the Web site: *www.usps.com/picturepermit*. After completion of the authorization process, preapproved participants will be invited to register for the promotion. Postage must be paid by permit imprint; participants must claim the waiver of fees on the electronic postage statement at the time of submission. All mailpieces in a mailing must be eligible for the promotion. Qualified PVDS mailings that are verified and paid for by September 30, 2013 may be entered at destination entry facilities through October 15, 2013.

3.3.5 Product Samples

The Product Samples promotion will provide mailers with a 5 percent upfront postage discount on qualifying mail that contains product samples. All qualifying parcels must contain a product sample. Qualified PVDS

mailings that are verified and paid for by September 30, 2013 may be entered at destination entry facilities through October 15, 2013.

3.3.6 Mobile Buy-It Now

The Mobile Buy-It-Now promotion provides mailers (of presort and automation First-Class Mail cards, letters, and flats and Standard Mail letters and flats) with an upfront 2 percent postage discount. Qualifying mailpieces must include a two-dimensional barcode or print/mobile technology that can be read or scanned by a mobile device, directly leading the recipient to a mobile-optimized Web page that allows the purchase of an advertised product through a financial transaction on the mobile device. The mailpiece must also contain text near the image that guides the consumer to scan the image. These additional requirements apply:

a. The destination Web page must contain information relevant to the content of the mailpiece and some of the products advertised must be available for purchase on a mobile device.

b. The purchase must be able to be completed through the mobile device via an electronic payment method, or by allowing an order placed on the mobile device through the Internet leading to a subsequent invoice.

c. A product, for purposes of this promotion, is defined as a tangible and physical item that can be shipped via a mailng or shipping product offered by the USPS (although delivery by the USPS is not required).

d. Products must be offered for fulfillment via home delivery; products offered as shipments for in-store pickup only will not qualify.

3.4 Discounts

For all promotion providing an upfront postage discount, mailers must claim the postage discount on the postage statement at the time the statement is electronically submitted. Mailings with postage affixed will deduct the discount amount from the additional postage due, except that mail service providers authorized to submit Value Added Refund ("VAR") mailings may include the discount in the amount to be refunded. See also 3.2.

3.5 Mobile Barcode or Image Placement

For promotions that include printing of a mobile barcode or other scannable printed image, the image cannot be placed on a detached address label (DAL or DML) or card that is not attached to the mailpiece. The image cannot be placed in the (postage) indicia zone or the (Intelligent Mail) barcode clear zone on the outside of the mailpiece. For letters, the barcode clear zone is defined in 202.5.1. For flats, the barcode clear zone for this purpose is the barcode itself and an area that extends an additional ⅛ inch from any part of the barcode. The indicia zone is defined as follows:

a. The postage "indicia zone" is 2 inches from the top edge by 4 inches from the right edge of the mailpiece;

b. When the postage indicium is not in the area described in 3.4a, the mobile barcode or image must not be placed within 2 inches of the actual postage indicium.

* * * * *

We will publish an appropriate amendment to 39 CFR part 111 to reflect these changes.

Stanley F. Mires,

Attorney, Legal Policy and Legislative Advice.

[FR Doc. 2013–03926 Filed 2–21–13; 8:45 am]

BILLING CODE 7710–12–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2012–0961; FRL–9782–8]

Approval and Promulgation of Air Quality Implementation Plans; Charlotte, Raleigh/Durham and Winston-Salem Carbon Monoxide Limited Maintenance Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to approve a limited maintenance plan update submitted by the State of North Carolina, through the North Carolina Department of Environment and Natural Resources (NC DENR), on August 2, 2012. The limited maintenance plan update is for the Charlotte, Raleigh/Durham and Winston-Salem carbon monoxide (CO) maintenance areas. Specifically, the State submitted a limited maintenance plan update for CO, showing continued attainment of the 8-hour CO National Ambient Air Quality Standard (NAAQS) for the Charlotte, Raleigh/Durham and Winston-Salem Areas. The 8-hour CO NAAQS is 9 parts per million (ppm). EPA is taking direct final action to approve the limited maintenance plan update because it is consistent with the Clean Air Act (CAA or Act), and EPA's policy for limited maintenance plans.

DATES: This direct final rule is effective April 23, 2013 without further notice, unless EPA receives adverse comment by March 25, 2013. If EPA receives such comments, it will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R04–OAR–2012–0961, by one of the following methods:

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

2. *Email: R4-RDS@epa.gov.*

3. *Fax:* (404) 562–9019.

4. *Mail:* EPA–R04–OAR–2012–0961, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960.

5. *Hand Delivery or Courier:* Lynorae Benjamin, Chief, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding Federal holidays.

Instructions: Direct your comments to Docket ID No. EPA–R04–OAR–2012–0961. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit through *www.regulations.gov* or email, information that you consider to be CBI or otherwise protected. The *www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *www.regulations.gov*, your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any

disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Docket: All documents in the electronic docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding federal holidays.

FOR FURTHER INFORMATION CONTACT: Richard Wong, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. The telephone number is (404) 562–8726. Mr. Wong can be reached via electronic mail at *wong.richard@epa.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background

A maintenance plan, as defined in section 175A of the CAA, is a revision to the SIP to provide for the maintenance of the NAAQS for the air pollutant in question in the area concerned for at least 10 years after the redesignation. Eight years after the redesignation, states are required to submit an update to the maintenance plan to provide for the maintenance of the NAAQS for another 10 years after the initial 10 year period has expired. North Carolina's second maintenance plan for the Charlotte, Raleigh-Durham and Winston-Salem Areas was approved on March 24, 2006 (71 FR 14817).

A limited maintenance plan for CO is a maintenance plan that is available to states that have demonstrated that the design values for CO in the nonclassifiable nonattainment or maintenance area are at, or below, 7.65 ppm or 85 percent of the 8-hour CO NAAQS. To qualify for a limited maintenance plan, the area's design value must not exceed the 7.65 ppm threshold throughout the entire rulemaking process. The design value for CO is defined as the second highest reading in the area in a two-year period. Should an area have more than one monitor, the monitor with the second highest value in a two-year period serves as the design monitor. EPA has also previously determined that the limited maintenance plan for CO is available to all states as part of their update to the maintenance plans as per section 175A(b), regardless of the original nonattainment classification, or lack thereof.

NC DENR elected to convert its second 10-year maintenance plan for CO to a limited maintenance plan, to provide additional flexibility for implementing transportation conformity requirements in these CO maintenance areas. Briefly, counties in the Charlotte, Raleigh-Durham and Winston-Salem Areas were previously designated nonattainment for the 8-hour CO NAAQS. *See* 56 FR 56694, November 6, 1991. These areas subsequently attained the 8-hour CO NAAQS and were redesignated from nonattainment to attainment. On November 7, 1994, EPA redesignated the Winston-Salem Area to attainment for the 8-hour CO NAAQS based on the measured air quality data and a 10-year maintenance plan submitted for the Winston-Salem Area. *See* 59 FR 48399. Additionally, on September 18, 1995, EPA redesignated both the Charlotte Area and the Raleigh-Durham Area to attainment for the 8-hour CO NAAQS based on the measured air quality data and the 10-year maintenance plan submitted for these areas. *See* 60 FR 39258.

Section 175A(b) of the CAA mandates that the State shall submit an additional revision to the maintenance plan eight years after redesignation of any area as an attainment area. NC DENR fulfilled this requirement by providing the second and final maintenance plan for all three CO maintenance areas in the State. EPA subsequently approved NC DENR's maintenance plan. In summary, on March 24, 2006, EPA approved the second 10-year maintenance plan for the Charlotte, Raleigh-Durham, and Winston-Salem CO Maintenance Areas, which are composed of the following four counties: Mecklenburg (Charlotte Area); Durham and Wake (Raleigh-Durham Area); and Forsyth (Winston-Salem Area). *See* 71 FR 14817.

As mentioned above, NC DENR elected to convert the second maintenance plan for the Charlotte, Raleigh-Durham and Winston-Salem Areas to a limited maintenance plan for the ease of implementing transportation conformity requirements for the CO NAAQS. The limited maintenance plans was submitted on August 2, 2012, for EPA approval. EPA has made the determination that North Carolina's limited maintenance plan satisfies the requirements for section 175A maintenance plan, and is consistent with EPA's policy for limited maintenance plan elements as outlined in an October 6, 1995, memorandum from the Office of Air Quality Planning and Standards , entitled "Limited Maintenance Plan Option for Nonclassifiable CO Nonattainment Areas" (October 6, 1995, Memorandum). More information regarding limited maintenance plan requirements is provided below.

II. What criteria is EPA using to evaluate this submittal?

In addition to the general requirements in section 175A of the CAA, guidance for CO limited maintenance plans is provided in the October 6, 1995, memorandum, which states that the following five components need to be addressed: (1) Attainment inventory; (2) maintenance demonstration; (3) monitoring network/verification of continued attainment; (4) contingency plan; and (5) conformity determinations under limited maintenance plans. These elements were outlined in the October 6, 1995, EPA memorandum, and are comprehensively discussed below.

III. What is EPA's analysis of this submittal?

A. Requirements of Section 175A of the CAA

Section 175A contains four subsections pertaining to maintenance plans. Section 175A(a) establishes requirements for initial SIP redesignation request maintenance plans, as previously addressed by North Carolina and subsequently approved by EPA for all three of North Carolina's CO areas. *See* 59 FR 48399 and 60 FR 39258.

Section 175A(b) requires States to submit an update to the maintenance plan eight years following the original redesignation to attainment. For the section 175A(b) update, the State must outline methods for maintaining the pertinent NAAQS for ten years after the expiration of the ten-year period referred to in subsection (a), i.e., North Carolina's maintenance plan update must outline methods for maintaining the CO NAAQS through 2015. NC DENR satisfied the requirements for the second maintenance plans for all of its CO maintenance areas, and EPA subsequently approved NC DENR's second maintenance plan for each of its CO maintenance areas. *See* 71 FR 14817, March 24, 2006. As indicated above, although North Carolina has previously satisfied the requirements for the 175A(b) maintenance plan updates for all of its CO areas, the State has elected to convert these maintenance plans to limited maintenance plans.

Section 175A(c) does not apply to this rulemaking, given that EPA has previously redesignated the Charlotte, Raleigh/Durham, and Winston-Salem areas to attainment for CO.

Section 175A(d) which included the contingency provisions requirements are addressed in detail in section B4, below.

B. Consistency With the October 6, 1995, Memorandum

As discussed above, EPA's interpretation of section 175A of the CAA, as it pertains to limited maintenance plans for CO, is contained in the October 6, 1995, Memorandum. North Carolina addressed the five major elements of that policy, as follows:

1. Attainment Inventory

The State is required to develop an attainment emissions inventory to identify a level of emissions in the area which is sufficient to attain the CO NAAQS. This inventory should be consistent with EPA's most recent guidance on emission inventories for nonattainment areas available at the time and should include the emissions during the time period associated with the monitoring data showing attainment. It should be based on actual "typical CO season day" emissions for all source classifications (i.e., stationary point and area sources and nonroad and onroad mobile sources) for the attainment year. In its August 2, 2012, submittal, NC DENR provided a comprehensive CO emissions inventory for nonroad mobile, onroad mobile, point, and area sources for the Charlotte, Raleigh-Durham, and Winston-Salem CO Maintenance Areas.

NC DENR collected or developed point source emissions inventory from stationary sources that have the potential to emit more than five tons per year of CO emissions from a single facility and are required to have an operating permit. The stationary area source inventory is estimated on a county level and consisted of those sources whose emissions are relatively small, but due to the large number of sources, the collective emissions could be significant. North Carolina estimated the stationary area source emissions by multiplying an emission factor by some known indicator of collective activity (such as fuel usage, number of households, or population). For on-road mobile source emissions, NC DENR used USEPA's Motor Vehicle Emission Simulator (MOVES) model version 2010a (i.e., MOVES2010a), released in August 2010, for estimating vehicle emissions. Nonroad mobile sources are pieces of equipment that can move but do not use roadways (e.g. lawn mowers, construction equipment, railroad locomotives, aircraft). The emissions from this category are calculated at the county level using USEPA's NONROAD2008a nonroad mobile model, with the exception of railroad locomotives and aircraft engines. The railroad locomotives and aircraft engines are estimated by taking an activity and multiplying by an emission factor. Table 1 displays the 2010 attainment year emissions inventory as required for the limited maintenance plans. Appendix B of North Carolina's SIP submittal provides detailed discussions regarding the development of emissions for the four emission source classifications, and is provided in the docket for today's rulemaking.

TABLE 1—2010 CO EMISSIONS (TONS/DAY) FOR MAINTENANCE AREAS

County	Point source	Area source	On-road	Nonroad	Total
Raleigh-Durham Maintenance Area					
Durham	0.97	1.54	186.00	19.04	207.55
Wake	1.17	4.26	642.97	70.62	719.02
Total	2.14	5.80	828.97	89.66	926.57
Winston-Salem Maintenance Area					
Forsyth	2.22	1.41	244.16	23.97	271.76
Charlotte Maintenance Area					
Mecklenburg	2.39	4.21	724.39	114.71	845.70

2. Maintenance Demonstration

In the October 6, 1995, Memorandum, EPA stated that the maintenance demonstration requirement is considered to be satisfied for nonclassifiable areas if the monitoring data show that the area is meeting the air quality criteria for limited maintenance areas (i.e., 85 percent of the eight hour CO NAAQS, or 7.65 ppm). EPA determined in this same memorandum that there is no requirement to protect emissions over the maintenance period. Instead, EPA believes that if the area begins the

maintenance period at, or below, 7.65 ppm (85 percent of the 8-hour CO NAAQS), the applicability of prevention of significant deterioration (PSD) requirements, control measures already in the SIP, and other federal measures should provide adequate assurance of maintenance throughout the maintenance period. Monitoring data from 2008–2011 shows all three areas below the 8-hour CO NAAQS values as listed in Table 2. All monitoring levels are well below the 85 percent threshold of 7.65 ppm and therefore the State has satisfied the maintenance demonstration requirement for a limited maintenance plan for each of its CO maintenance areas.

TABLE 2—CO 8-HOUR MONITORED CONCENTRATION NAAQS

[parts per million]

County	Monitor ID	2009	2010	2011	8-hr NAAQS
Raleigh-Durham Maintenance Area					
Wake	371830014	1.3	1.3	1.4	9
Winston-Salem Maintenance Area					
Forsyth	370670023	1.7	1.9	2.1	9
Charlotte Maintenance Area					
Mecklenburg	371190041	1.7	1.7	1.5	9

3. Monitoring Network and Verification of Continued Attainment

Once an area has been redesignated, the state should continue to operate an appropriate air quality monitoring network, in accordance with 40 CFR Part 58, to verify the attainment status of the area. This is particularly important for areas using a limited maintenance plan because there will be no cap on emissions. In accordance with 40 CFR Part 58, NC DENR commits to continue monitoring CO at these three sites to ensure that CO concentrations remain well below the 7.65 ppm threshold for limited maintenance plans. The State's monitoring plan for 2012 can be found at the following site: *http://www.ncair.org/monitor/monitoring_plan/new_plan/2012_NCDAQ_Network_Plan.pdf.* EPA has determined that the State has satisfied the monitoring network and verification of continued attainment requirements for the limited maintenance plan.

4. Contingency Plan

Section 175A(d) of the CAA requires that a maintenance plan include contingency provisions, as necessary, to promptly correct any violation of the NAAQS that occurs after redesignation of an area. The October 6, 1995, Memorandum further requires that the contingency provisions identify the measures to be adopted, a schedule and procedure for adoption and implementation, and a specific time limit for action by the state.

In its August 2, 2012, submittal, NC DENR committed to the same contingency measures that EPA previously approved on March 24, 2006 (71 FR 14817) and a subsequent clarification on June 19, 2007 (72 FR 33692). The State pre-adopted an oxygenated fuels program with minimum oxygen content by weight of 2.7 for Charlotte, Raleigh-Durham, and Winston-Salem maintenance areas. The oxygenated fuel program is required under the CAA for the Raleigh-Durham and Winston-Salem areas as a required control measure prior to the attainment redesignation. Charlotte was placed under oxygenated fuel program for effective area-wide CO emission reduction and ease for State implementation. The triggering date will be no more than 60 days after an ambient air quality violation is monitored. NC DENR will commence an analysis and regulation development process during this time. The State will consider the following control measures:

a. Amending the oxygenated fuels program by adopting oxygenate content of 2.0 percent to 2.7 percent by weight, or activate of the 2.7 percent by eight pre-adopted contingency measure, or 2.7 percent to 3.1 percent by weight.

b. Expanding coverage of oxygenated fuels to include counties where a strong commuting pattern into the core maintenance area exists.

c. Alternative fuel vehicle programs to include compressed natural gas and electric vehicles.

d. Employee commute options programs.

NC DENR committed to implement at least one of the control measures within 24 months of the trigger, or as expeditiously as practicable. EPA has determined that the State has satisfied the contingency plan requirements pursuant to section 175A(d) of the CAA as well as those of the October 6, 1995, Memorandum.

5. Conformity Determination Under Limited Maintenance Plan

The transportation conformity rule of November 24, 1993 (58 FR 62188), and the general conformity rule of November 30, 1993 (58 FR 63214), apply to nonattainment areas and maintenance areas operating under the maintenance plans. Under either rule, one means of demonstrating conformity of federal actions is to indicate that expected emissions from planned actions are consistent with the emissions budget for the area.

EPA's October 6, 1995, Memorandum states that emissions budgets in limited maintenance plan areas may be treated as essentially not constraining for the length of the maintenance period because it is unreasonable to expect that such an area will experience so much growth in that period that a violation of the CO NAAQS would result. In other words, EPA concluded that, for these areas, emissions need not be capped for the maintenance period.

In accordance with the Transportation conformity rule, approval of a limited maintenance plan only removes the requirement to conduct a regional emissions analysis as part of the conformity determination. The requirement to demonstrate conformity per the requirements in section 93.109, in Table 1 still applies. Additionally, federally funded projects are still subject to "Hot Spot" analysis requirements. However, no regional modeling analysis would be required.

Transportation partners should note that this approval of these limited maintenance plans in future

transportation conformity determinations. Additionally, while this finding waives the requirements for a regional emissions analysis for the CO, as mentioned above, it does not waive other conformity requirements for the CO standard for the Charlotte, Raleigh-Durham and Winston-Salem areas, and it does not waive transportation conformity requirement for other pollutants/precursors for which these areas may be designated nonattainment or redesigned to attainment with a full maintenance plan.

The State has satisfied the conformity determination under limited maintenance plan requirements for the Charlotte, Raleigh-Durham, and Winston-Salem areas in this limited maintenance plan.

IV. Final Action

EPA is approving the CO limited maintenance plan for the Charlotte, Raleigh-Durham, and Winston-Salem Areas. The State of North Carolina has complied with the requirements of section 175A of the CAA, as interpreted by the guidance provided in the October 6, 1995, Memorandum. North Carolina has shown monitored levels of CO in the three areas have been consistently well below the requisite level of 7.65 ppm for the 8-hour CO NAAQS in order to qualify for the limited maintenance plan. North Carolina has also shown monitored values for the 8-hour CO NAAQS have been consistently well below the NAAQS levels from 2009–2011. EPA has made the determination that the North Carolina, August 2, 2012, submission providing the CO limited maintenance plan for the Charlotte, Raleigh-Durham, and Winston-Salem Areas is consistent with the CAA and EPA's guidance on limited maintenance plans. This action is being taken pursuant to section 110 of the CAA.

EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. However, in the proposed rules section of this **Federal Register** publication, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision should adverse comments be filed. This rule will be effective April 23, 2013 without further notice unless the Agency receives adverse comments by March 25, 2013.

If EPA receives such comments, then EPA will publish a document withdrawing the final rule and informing the public that the rule will not take effect. All public comments received will then be addressed in a subsequent final rule based on the proposed rule. EPA will not institute a second comment period. Parties interested in commenting should do so at this time. If no such comments are received, the public is advised that this rule will be effective on April 23, 2013 and no further action will be taken on the proposed rule. Please note that if we receive adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, we may adopt as final those provisions of the rule that are not the subject of an adverse comment.

V. Statutory and Executive Order Reviews

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

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 F43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

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

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

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by April 23, 2013. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. *See* section 307(b)(2).

List of Subjects in 40 CFR Part 52

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

Dated: February 11, 2013.

A. Stanley Meiburg,

Acting Regional Administrator, Region 4.

40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart II—North Carolina

■ 2. Section 52.1770(e) is amended by adding a new entry for entry for "8-Hour Carbon Monoxide Limited Maintenance Plan for Charlotte, Raleigh/Durham and Winston-Salem Maintenance Areas." at the end of the table to read as follows:

§ 52.1770 Identification of plan.

* * * * *

(e) * * *

EPA APPROVED NORTH CAROLINA NON-REGULATORY PROVISIONS

Provision	State effective date	EPA approval date	Federal Register citation	Explanation
*	*	*	*	*
8-Hour Carbon Monoxide Limited Maintenance Plan for Charlotte, Raleigh/Durham and Winston-Salem Maintenance Area.	August 2, 2012	2/22/13	[Insert citation of publication].	

[FR Doc. 2013–04011 Filed 2–21–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2013–0094; FRL–9783–3]

Interim Final Determination To Stay and Defer Sanctions, Placer County Air Pollution Control District and Feather River Air Quality Management District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Interim final rule.

SUMMARY: EPA is making an interim final determination to stay the imposition of offset sanctions and to defer the imposition of highway sanctions based on a proposed approval of a revision to the Placer County Air Pollution Control District (PCAPCD) and Feather River Air Quality Management District (FRAQMD) portion of the California State Implementation Plan (SIP) published elsewhere in this **Federal Register**. The SIP revision concerns two permitting rules submitted by the PCAPCD and FRAQMD, respectively: Rule 502, *New Source Review*, and Rule 10.1, *New Source Review*.

DATES: This interim final determination is effective on February 22, 2013. However, comments will be accepted until March 25, 2013.

ADDRESSES: Submit comments, identified by docket number EPA–R09–OAR–2013–0094, by one of the following methods:

1. *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions.

2. *Email: R9airpermits@epa.gov.*

3. *Mail or deliver:* Gerardo Rios (Air-3), U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901.

Instructions: All comments will be included in the public docket without change and may be made available online at *http://www.regulations.gov*, including any personal information provided, unless the comment includes Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider CBI or otherwise protected should be clearly identified as such and should not be submitted through *http://www.regulations.gov* or email. *http://www.regulations.gov* is an "anonymous access" system, and EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send email directly to EPA, your email address will be automatically captured and included as part of the public comment. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Docket: Generally, documents in the docket for this action are available electronically at *http://www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed at *http://www.regulations.gov*, some information may be publicly available only at the hard copy location (e.g., copyrighted material, large maps), and some may not be publicly available in either location (e.g., CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Laura Yannayon, EPA Region IX, (415) 972–3534, *yannayon.laura@epa.gov.*

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

I. Background

On July 27, 2011 (76 FR 44809), we published a limited approval and limited disapproval of PCAPCD Rule 502 and FRAQMD Rule 10.1 as adopted locally on October 28, 2010 and October 5, 2009, respectively. We based our limited disapproval action on certain deficiencies in the submitted rule. This disapproval action started a sanctions clock for imposition of offset sanctions 18 months after August 27, 2011 and highway sanctions 6 months later, pursuant to section 179 of the Clean Air Act (CAA) and our regulations at 40 CFR 52.31. Under 40 CFR 52.31(d)(1), offset sanctions apply eighteen months after the effective date of a disapproval and highway sanctions apply six months after the offset sanctions, unless we determine that the deficiencies forming the basis of the disapproval have been corrected.

On October 31, 2011 and February 7, 2012, PCAPCD and FRAQMD adopted amended versions of Rules 502 and 10.1, respectively, which were intended to correct the deficiencies identified in our July 27, 2011 limited disapproval action. On November 18, 2011 and September 21, 2012, the State submitted these amended rules to EPA. In the Proposed Rules section of today's **Federal Register**, we are proposing a limited approval/limited disapproval of these rules because we believe it corrects the deficiencies identified in our July 27, 2011 disapproval action, but other revisions have created new deficiencies. Based on today's proposed action, we are taking this final rulemaking action, effective on publication, to stay the imposition of the offset sanctions and to defer the imposition of the highway sanctions

that were triggered by our July 27, 2011 limited disapproval.

EPA is providing the public with an opportunity to comment on this stay/deferral of sanctions. If comments are submitted that change our assessment described in this final determination and our proposed limited approval and limited disapproval of PCAPCD Rule 502 and FRAQMD Rule 10.1, respectively, we intend to take subsequent final action to reimpose sanctions pursuant to 40 CFR 52.31(d). If no comments are submitted that change our assessment, then all sanctions and sanction clocks will be permanently terminated on the effective date of a final rule approval.

II. EPA Action

We are making an interim final determination to stay the imposition of the offset sanctions and to defer the imposition of the highway sanctions associated with PCAPCD Rule 502 and FRAQMD Rule 10.1 (as adopted 2010 and 2009 respectively) based on our concurrent proposal to approve the State's SIP revision as correcting the deficiencies that initiated sanctions.

Because EPA has preliminarily determined that the State has corrected the deficiencies identified in EPA's limited disapproval action, relief from sanctions should be provided as quickly as possible. Therefore, EPA is invoking the good cause exception under the Administrative Procedure Act (APA) in not providing an opportunity for comment before this action takes effect (5 U.S.C. 553(b)(3)). However, by this action EPA is providing the public with a chance to comment on EPA's determination after the effective date, and EPA will consider any comments received in determining whether to reverse such action.

EPA believes that notice-and-comment rulemaking before the effective date of this action is impracticable and contrary to the public interest. EPA has reviewed the State's submittal and, through its proposed action, is indicating that it is more likely than not that the State has corrected the deficiencies that started the sanctions clocks. Therefore, it is not in the public interest to initially impose sanctions or to keep applied sanctions in place when the State has most likely done all it can to correct the deficiencies that triggered the sanctions clocks. Moreover, it would be impracticable to go through notice-and-comment rulemaking on a finding that the State has corrected the deficiencies prior to the rulemaking approving the State's submittal. Therefore, EPA believes that it is necessary to use the interim final rulemaking process to stay and defer sanctions while EPA completes its rulemaking process on the approvability of the State's submittal. Moreover, with respect to the effective date of this action, EPA is invoking the good cause exception to the 30-day notice requirement of the APA because the purpose of this notice is to relieve a restriction (5 U.S.C. 553(d)(1)).

III. Statutory and Executive Order Reviews

This action stays and defers Federal sanctions and imposes no additional requirements.

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a "significant regulatory action" and therefore is not subject to review by the Office of Management and Budget.

This action is not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001) because it is not a significant regulatory action.

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

This rule does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4).

This rule does not have tribal implications because it will 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, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

This action does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999).

This rule is not subject to Executive Order 13045, "Protection of Children From Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), because it is not economically significant.

The requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272) do not apply to this rule because it imposes no standards.

This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report to Congress and the Comptroller General. However, section 808 provides that any rule for which the issuing agency for good cause finds that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest, shall take effect at such time as the agency promulgating the rule determines. 5 U.S.C. 808(2). EPA has made such a good cause finding, including the reasons therefore, and established an effective date of February 22, 2013. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This rule is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by April 23, 2013. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purpose of judicial review nor does it extend the time within which petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental regulations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements.

Dated: February 12, 2013.

Jared Blumenfeld,

Regional Administrator, Region IX.

[FR Doc. 2013–04001 Filed 2–21–13; 8:45 am]

BILLING CODE 6560–50–P

Proposed Rules

Federal Register
Vol. 78, No. 36
Friday, February 22, 2013

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Part 278

RIN 0584–AE22

Supplemental Nutrition Assistance Program: Suspension of SNAP Benefit Payments to Retailers

AGENCY: Food and Nutrition Service (FNS), USDA.

ACTION: Proposed rule.

SUMMARY: Integrity in the Supplemental Nutrition Assistance Program (SNAP) is a primary Program concern. This proposed rule codifies a provision of the Food, Conservation, and Energy Act of 2008 (FCEA) which authorizes the Department to suspend the payment of redeemed SNAP benefits to certain retail food stores or wholesale food concerns pending administrative action to disqualify the firms for fraudulent activity. In this proposed rule, the Department is also clarifying that, in all trafficking cases, requests for extensions to reply to charges of trafficking shall not be granted and that Freedom of Information requests will be completed separate from the administrative sanction process to prevent retailer-caused delays in the issuance of a final determination. Further, under existing authority in the Food and Nutrition Act of 2008 (hereinafter referred to as "the Act"), the Department is proposing several changes to enhance retailer business integrity requirements.

DATES: Comments must be postmarked on or before April 23, 2013 to be assured of consideration.

ADDRESSES: The Food and Nutrition Service, USDA, invites interested persons to submit comments on this proposed rule. Comments may be submitted by one of the following methods:

- *Federal e-Rulemaking Portal: Go to http://www.regulations.gov*. Preferred method; follow the online instructions for submitting comments on docket [FNS–2012–0029].
- *Mail:* Send comments to Shanta Swezy, Chief, Retailer Management and Issuance Branch, USDA, FNS, SNAP, Benefit Redemption Division, 3101 Park Center Drive, Room 426, Alexandria, Virginia 22302.
- All comments submitted in response to this proposed rule will be included in the record and will be made available to the public. Please be advised that the substance of the comments and the identity of the individuals or entities submitting the comments will be subject to public disclosure. FNS will make the comments publicly available on the Internet via *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Shanta Swezy, Chief, Retailer Management and Issuance Branch, USDA, FNS, SNAP, Benefit Redemption Division, 3101 Park Center Drive, Room 426, Alexandria, Virginia 22302; *shanta.swezy@fns.usda.gov*; or (703) 305–2238.

SUPPLEMENTARY INFORMATION:

Procedural Matters

Executive Order 12866

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

Regulatory Impact Analysis

Need for Action

The proposed rule is needed to codify a nondiscretionary SNAP benefit issuance provision as provided in Section 4132 of the FCEA (Pub. L. 110–246), and to further address SNAP-retailer integrity utilizing current authority provided by the Act.

Benefits

Implementing the statutory requirements of Section 4132 of the FCEA will codify a provision in the Food and Nutrition Act of 2008, that improves Program integrity, enhance the Program's ability to appropriately serve those who are truly in need and help to ensure that SNAP benefits are used as intended. While committed to providing vital nutrition assistance to our most vulnerable Americans, protecting taxpayer dollars and ensuring program integrity are equally important. Once final, these regulations will allow the Department to take appropriate action against retailers who are committing SNAP fraud and lack the necessary business integrity to further the purposes of the Program.

Costs

The Department does not anticipate that this provision will have a significant cost impact. The primary costs anticipated are those FNS will bear in relation to updating systems, retailer-related training materials, and letters to reflect the new regulations, as well as informing State agencies and participating stores of the changes. The costs are expected to be minimal as the changes may be incorporated into planned, regularly scheduled maintenance updates and mailings that already exist to inform participating stores of relevant program changes.

There may be some cost impact on State agencies whose contracted electronic benefit transfer (EBT) systems need enhancement or do not have the functionality necessary to hold SNAP funds. While it is recognized that some costs may be incurred, it is anticipated that FNS will work with State agencies and EBT contractors to keep these costs minimal. In addition, the Department shares in State SNAP administrative costs such as those that may be associated with this rulemaking.

This rulemaking will have no cost impact on most SNAP-authorized firms. SNAP-authorized firms that flagrantly violate Program rules by trafficking in SNAP benefits would be subject to SNAP benefit payment suspension and would ultimately incur a loss of that benefit payment should the final civil, criminal or FNS administrative action result in a sanction for SNAP trafficking. Further, firms that fail to report ownership changes would lose their ability to accept SNAP benefits for six months and SNAP-authorized retailers who allow an unauthorized party to use their SNAP authorization to conduct SNAP business would be subject to a fine for the unauthorized acceptance of SNAP benefits by the unauthorized party.

Though damaging to the Program, the problems being addressed in the proposed rule are limited in scope and FNS has limited data upon which to base an estimate of their frequency or

the amount of benefits that might be involved.

Regulatory Flexibility Act

FNS offices, retailers and other firms participating in SNAP, State social service agencies and SNAP clients are the entities affected by this change.

This rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act (RFA) of 1980, (5 U.S.C. 601–612). Pursuant to that review, it has been certified that this rule would not have a significant impact on a substantial number of small entities. This rule will only affect those authorized retailers that violate SNAP rules.

Unfunded Mandates Reform Act

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

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

Executive Order 12372

SNAP is listed in the Catalog of Federal Domestic Assistance Programs under 10.551. For the reasons set forth in the final rule in 7 CFR part 3015, subpart V, and related Notice (48 FR 29115, June 24, 1983), this program is included in the scope of Executive Order 12372, which requires intergovernmental consultation with State and local officials.

Federalism Summary Impact Statement

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

Prior Consultation With State Officials

We have presented information regarding all FCEA provisions to State agencies in various forums. Because SNAP is a State administered, Federally-funded program, FNS offices have formal and informal discussions with State officials on an ongoing basis regarding program implementation and policy issues. This arrangement allows State agencies to provide comments that form the basis for discretionary decisions in SNAP rules. Further, States support Departmental efforts to enhance retailer integrity.

Nature of Concerns and the Need To Issue This Rule

While all parties believe that retailers should not receive payment for fraudulent transactions, not all State EBT contractors may have immediate capability to hold SNAP benefit payments. Comments are being solicited to address this concern.

Extent to Which We Meet Those Concerns

This proposal will solicit comments from State agencies and EBT contractors regarding concerns associated with enacting these changes. The final rule will take these concerns into account and FNS will actively work with State agencies and EBT contractors to achieve compliance with the new provisions.

Executive Order 12988

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

Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, requires Federal agencies to consult and coordinate with tribes on a government-to-government basis on policies that have tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. FNS has regularly scheduled quarterly consultation sessions, which act as a venue for collaborative conversations with Tribal officials or their designees. The consultation session for this rule was held on February 29, 2012. The only comment received regarding this regulation at that session was one that expressed general support for SNAP integrity efforts to prevent trafficking.

The Department will respond in a timely and meaningful manner to all Tribal government requests for consultation concerning this rule. Further, the Department is unaware of any current Tribal laws that could be in conflict with the proposed rule and requests that commenters address any concerns in this regard in their responses.

Civil Rights Impact Analysis

The Department has reviewed this rule in accordance with Departmental Regulations 4300–4, "Civil Rights Impact Analysis," and 1512–1, "Regulatory Decision Making Requirements." After a careful review of the rule's intent and provisions, the Department has determined that this rule will not in any way limit or reduce the ability of protected classes of individuals to receive SNAP benefits on the basis of their race, color, national origin, sex, age, disability, religion or political belief nor will it have a differential impact on minority owned or operated business establishments and women owned or operated business establishments that participate in SNAP.

The regulation affects or may potentially affect the retail food stores and wholesale food concerns that participate in (accept or redeem) SNAP. The only retail food stores and wholesale food concerns that will be directly affected, however, are those firms that violate SNAP rules and regulations. FNS does not collect data from retail food stores or wholesale food concerns regarding any of the protected classes under Title VI of the Civil Rights Act of 1964. As long as a retail food store or wholesale food concern meets the eligibility criteria stipulated in the Act and SNAP regulations, they can participate in SNAP. Also, FNS specifically prohibits retailers and wholesalers that participate in SNAP to

engage in actions that discriminate based on race, color, national origin, sex, age, disability, religion or political belief. This proposed rule will not change any requirements related to the eligibility or participation of protected classes or individuals, minority-owned or operated business establishments or women-owned or operated business establishments in SNAP. As a result, this rulemaking will have no differential impact on protected classes of individuals, minority-owned or operated business establishments or women-owned or operated business establishments.

Further, the Department specifically prohibits the State and local government agencies that administer the Program from engaging in actions that discriminate based on race, color, national origin, gender, age, disability, marital or family status. Regulations at 7 CFR 272.6, specifically state that "State agencies shall not discriminate against any applicant or participant in any aspect of program administration, including, but not limited to, the certification of households, the issuance of coupons, the conduct of fair hearings, or the conduct of any other program service for reasons of age, race, color, sex, handicap, religious creed, national origin or political beliefs. Discrimination in any aspect of the program administration is prohibited by these regulations, according to the Act. Enforcement may be brought under any applicable Federal law. Title VI complaints shall be processed in accord with 7 CFR part 15." Where State agencies have options, and they choose to implement a certain provision, they must implement it in such a way that it complies with the regulations at 7 CFR 272.6.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. Chap. 35; see 5 CFR 1320) requires the Office of Management and Budget (OMB) approve all collections of information by a Federal agency before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a current valid OMB control number. This proposed rule does not contain information collection requirements subject to approval by OMB under the Paperwork Reduction Act of 1995.

E-Government Act Compliance

The Food and Nutrition Service 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.

Background

The Supplemental Nutrition Assistance Program (SNAP) is the largest program in the domestic hunger safety net. SNAP provides nutrition assistance benefits via electronic debit cards to millions of low income people to supplement their food budgets so they can purchase more healthy food. FNS authorizes eligible retail food stores and wholesale food concerns to accept these benefits as payment for the purchase of eligible food. The compliance of authorized retailers and wholesalers with the rules of the SNAP is essential to program integrity. Unless retail food stores and wholesale food concerns consistently and diligently abide by program requirements, SNAP cannot fully accomplish its objectives and may, in fact, become less effective. The exchange of SNAP benefits for cash, ineligible items or other consideration reduces the value of benefits available for recipients to purchase eligible food items. Thus, in addition to the improper use of Federal funds, the realization of the basic objective of the SNAP, to improve nutrition in the diets of needy families, is undermined.

The Department introduces several proposals in this rulemaking. While it primarily addresses the implementation of Section 4132 of the FCEA, Public Law 110–246, the Department also proposes changes aimed at addressing the business integrity of retailers that are participating in the Program. The business integrity related proposals focus on ownership change reporting, unauthorized redemptions and unpaid debt.

The FCEA Suspension Provision

The FCEA, enacted on June, 18, 2008, renamed and amended the Food and Nutrition Act of 2008, 7 U.S.C. 2011 (the Act). This rulemaking addresses the implementation of the provision in Section 4132 of the FCEA that authorizes the Department, in certain cases, to suspend the payment of redeemed SNAP benefits to a suspected retail food store or wholesale food concern pending administrative action to disqualify the firm.

Specifically, the FCEA provision addressed by this rulemaking states that the Secretary, in consultation with the Department's Office of the Inspector General (OIG), may suspend payment of unsettled program funds that have been redeemed if the Department determines that flagrant violations of the Act (including regulations promulgated under the Act) are being committed by a retail food store or wholesale food concern.

The provision further specifies that if the program disqualification is subsequently determined and upheld, these unsettled program benefits may be subject to forfeiture. Conversely, if the program disqualification is not upheld, then the unsettled program benefits will be released to the store with the Department not being liable for any interest on the suspended funds.

A Synopsis of the Proposal

FNS, in this rulemaking, proposes the following procedures for implementing this provision:

A. State EBT contractors will set up their systems to suspend the payment of a firm's unsettled funds when directed to do so by FNS.

B. Affected firms will be notified that payment will continue to be suspended until a determination relative to the sanction action that is underway is finalized.

C. Existing procedures will be followed by FNS for charging the firm and notifying it of its final determination.

D. Existing procedures will also be used for administrative and judicial reviews.

E. Existing procedures guiding criminal or civil actions will be followed.

F. Suspended benefits held while actions are underway will be forfeited to the Department of Treasury if and when the Agency action to sanction firm for trafficking becomes final and/or the civil or criminal action is concluded.

G. Outside of the value of the actual transactions themselves, no interest or credit (for benefits held in suspension or any transactions estimated to have been subsequently lost due to the suspension) will be paid to the firm if it is ultimately determined that the firm is subject to a lesser penalty or no penalty.

Legislative Language Clarification

As stated above, Section 4132 of the FCEA amended the Act. The language in this Provision was inserted into section 12(h) of the amended Act. Section 12(h)(2)(B)(i) deals with the forfeiture of funds. Specifically, this paragraph in the amended Act states that, "* * * if the program disqualification is upheld, (the suspended benefits) may be subject to forfeiture pursuant to section 15(g)." However, the amended Act does not contain a section 15(g). This is because, in the same revision, section 15(g) was redesignated as section 15(e). Sections 15(d) and 15(e) were stricken from the amended Act since they dealt with

paper coupons and, as such, were no longer relevant. Therefore, section 12(h)(2)(B)(i) of the amended Act was intended to refer to section 15(e) and not section 15(g). Section 15(e) under the amended Act authorizes the forfeiture of funds and other items of value inappropriately received in exchange for SNAP benefits.

The Proposed Scope and Parameters of Suspension Activity

In fiscal year 2011, there were a total of 231,465 firms that were authorized to accept SNAP benefits. During that fiscal year, 1,219 of these firms were sanctioned for trafficking and civil or criminal court action was concluded on approximately 5 firms. Trafficking, defined in the regulation at 7 CFR 271.2, is primarily (but not exclusively) the buying or selling of benefits for cash or consideration other than eligible food. Currently, firms that are suspected of trafficking are sent a letter of charges by FNS that specifies the violations or charges that the agency believes constitute a basis for a permanent disqualification. This letter provides the firm with the opportunity to submit to FNS information, an explanation or evidence concerning any alleged instances of noncompliance. The firm is not disqualified until the firm receives a letter advising it of the administrative determination that has been made based on the evidence available to the agency and information submitted by the firm. Until this time, the firm currently retains the ability to remain an active, participating retailer in SNAP and no unsettled program benefits are withheld. Trafficking of SNAP benefits may continue, and in some cases, retailers deliberately delay the FNS determination.

The Department is not proposing to make any changes in the process described above for the vast majority of firms suspected of trafficking. Instead, we are proposing that FNS, in conjunction and coordination with OIG, apply this suspension provision to the firms that are suspected of engaging in flagrant trafficking violations. Limiting the applicability of this proposal to the most flagrant violators is consistent with the language and intent of the FCEA suspension provision.

FNS will consult with OIG to establish the parameters for initiating suspension activities in a memorandum of agreement to ensure a common understanding and consistent application of the FCEA suspension provision among both agencies of the USDA. In general, suspension of funds under this proposal would be triggered when a firm flagrantly traffics SNAP benefits in significant amounts. In consultation with OIG, FNS will define flagrant violators based on one or more factors, such as SNAP redemption levels, the number of households utilizing SNAP benefits at the location, store inventory, and the SNAP history of the store owners. For example, FNS has encountered situations in which SNAP redemptions at a particular retailer location suddenly and drastically increase in terms of the amount of SNAP redemptions and/or the number of SNAP households conducting business at the store. Generally, such activity has been a clear indication of trafficking. Within a relatively short period of time, these retailers are able to conduct substantial fraudulent SNAP activity, take off with the trafficked benefits, and ultimately appreciate large profits from trafficking activity before FNS and OIG are able to complete a formal investigation. The ability to withhold some revenues from such violators would depreciate their profits and, hopefully, dissuade them from trafficking.

To maintain investigative integrity and security, an exact definition of "flagrant" cannot be provided to the general public. The Department would not wish to provide a target for violators to avoid action. However, it is in the above and similar types of situations that FNS seeks the ability to minimize the extent of the fraudulent activity a retailer is able to perpetrate by immediately and simultaneously withholding redeemed benefits and initiating an investigation. The ability to suspend funds would apply only to the most egregious of flagrant cases in which the amount of SNAP benefits potentially being diverted from its intended use is substantial. The process for handling any other trafficking case would not change as a result of this provision. Furthermore, FNS will establish checks and balances by requiring consultation with OIG on each case to ensure that there is agreement between both agencies that the retailer has met the established criteria. FNS is particularly interested in obtaining comments from the public on the types of factors and criteria that could prove useful in distinguishing between flagrant cases that would be impacted by this provision and other more routine trafficking cases that would not.

It is also important to note that the "flagrant" violation stipulation in this proposal would only apply to the suspension of unsettled funds. Any firm found to have trafficked under the existing procedures, whether it is considered a "flagrant" violation or not, is still subject to a permanent disqualification as specified in the current regulations at 7 CFR 278.6(e)(1)(i). This proposal has no effect on the applicability of this current administrative action.

The Suspension of the Unsettled Funds

When a firm begins conducting suspicious transactions that fit the parameters of flagrant violations, we are codifying the FCEA provision by proposing that all unsettled benefit redemptions be immediately suspended for that firm. In addition, we are also proposing that the unsettled funds be subject to forfeiture if the Program disqualification is upheld. The purpose of these proposals is to ensure that a firm does not profit from this illicit activity. This proposal also safeguards the use of Federal funds.

We recognize that there may be some concern regarding the suspension of benefits for a firm that has not yet been found to have trafficked. However, as stated above, the Department anticipates that this provision will affect a relatively small subset of the firms that are charged with trafficking. Therefore, we believe that the benefit of preventing egregious fraudulent payments far outweighs the risk of permitting a firm to possibly profit from trafficking in SNAP benefits until a decision is ultimately made on its case.

The FCEA provision provides that the Department would not be liable for the value of any interest on withdrawn or suspended funds. We are codifying this provision in this proposed rulemaking. In addition, we are also proposing that FNS not be held liable for any lost sales due to funds settlement being suspended under this provision.

Effect on SNAP Recipients

FNS recognizes that there may be some inconvenience to SNAP households when benefit deposits into a firm's bank account are suspended, thereby causing the retailer to cease accepting SNAP payments. As a result, normal shopping patterns, especially for those recipients who are within walking distance of the firm, may need to be altered. However, neither the Act nor the current regulations at 7 CFR 278.6 allow for any accommodation due to potential SNAP customer hardship under such circumstances.

Notification of the Firm

The intent of the FCEA provision to suspend settlement is to prevent violators from continuing to profit by trafficking in Program benefits and to ultimately capture dollars that are the fruits of their trafficking. Therefore, the action to suspend the payment of

unsettled accounts must occur immediately. While we recognize that it will not be possible to notify retailers in advance of a suspension action, FNS is proposing to advise firms at the time that they apply to be an authorized retailer of the suspension provision outlined in this proposal. In this manner, firms would be adequately notified of the possibility of this occurring if they conduct transactions that could be considered flagrant violations.

In addition, FNS would issue a notice to the firm as soon as administratively possible to advise the firm as to the reason why the payments have been suspended. The Agency will examine ways on how to provide this notification in an automated and expeditious manner and welcomes public comments in this area.

Lastly, firms already have contact numbers provided by the State EBT contractors to call if there are any issues concerning benefit payments. The EBT contractors will be instructed by States to provide the firm with the contact information for the appropriate FNS office for the firm to contact concerning any action taken as a result of this provision.

Effect on State EBT contractors

The Department is keenly interested on receiving comments from State agencies and EBT contractors regarding necessary system changes, costs, necessary timeline for implementation of the ability to hold unsettled funds, alternative processes for suspending funds (e.g. redirecting payment to FNS for holding purposes), and any other associated challenges.

Remainder of the Disqualification Process

We are proposing in this rulemaking that once firms have their benefits suspended, the administrative process associated with disqualification would continue as described above and under 7 CFR 278.6, as well as Subparts A and B of 7 CFR part 279, and the suspension of benefits would remain in effect. Suspension of benefit payments would also remain in effect until any civil or criminal actions are concluded.

The current disqualification process for firms suspected of trafficking includes the issuance of a letter of charges, an examination of the firm's response to the charges, and the issuance of a notice of determination disqualifying the firm (if appropriate). In some cases, retailers deliberately delay the FNS determination by requesting additional time to respond to the charges and/or submitting Freedom of Information Act (FOIA) requests. As such, the Department is taking this opportunity to clarify that, in all trafficking cases, retailer requests to extend the 10-day period, provided in current regulations at 7 CFR 278.6(b)(1), to respond to the letter of charges shall not be granted. The Act provides retailers charged with trafficking or other program violations a full opportunity to present FNS with information through the administrative and judicial review process. In addition, FNS instituted a 10-day retailer response period between the time the letter of charges and the notice of determination are each issued. FNS proposes to maintain this 10-day response period, but to revise language in current 7 CFR 278.6(b) to clarify that a firm's full opportunity to submit information, explanation, or evidence concerning any instances of noncompliance to FNS is during the administrative review process and not prior to the notice of determination issued by the FNS regional office. Upon the date of receipt of the notice of determination, the action to permanently disqualify the retailer continues to take effect immediately. The retailer then has an additional 10 days to file a written request for an opportunity to submit further information in support of its position through an administrative review or, if appropriate, a judicial review of the original agency action. See current 7 CFR 278.6 and 7 CFR part 279.

Furthermore, Freedom of Information Act (FOIA) requests will be completed separate from the administrative sanction process. The opportunity to present information prior to a final determination or during the administrative review process should not be considered an opportunity for discovery. Therefore, FOIA requests shall not delay a final determination. Any information the retailer is seeking though FOIA requests may be presented, if necessary, at the judicial review level. Because the Department is merely clarifying its policy through this rulemaking, we are not proposing any regulatory changes regarding FOIA requests.

Business Integrity Provisions

In this rulemaking, the Department is proposing several revisions and additions to the existing regulations to ensure that retailers who are accepting SNAP benefits are furthering the purposes of the Program and have the requisite business integrity to ensure that their firms follow all of the Program rules.

Reporting Changes in Ownership

Applicant retailers sign and certify that they understand and will abide by a myriad of Program requirements. One such requirement is that the SNAP authorization be maintained by the applicant owner or owners, that any changes in ownership be reported to FNS, and that the authorization not be conveyed to a new business owner should the applicant sell the SNAP authorized firm. FNS provides an approved firm with a standard retailer authorization package when a firm is initially authorized to become a SNAP retailer. The authorization letter that is part of this package states, among other things, that the firm is to report to FNS any changes in firm ownership. However, in the course of conducting recent reauthorization and compliance activity, the Department has come across instances in which there were unreported changes of ownership.

In an effort to enhance ownership integrity, the Department is proposing, in 7 CFR 278.1(j) and 7 CFR 278.1(l), to codify this ownership change reporting requirement and authorize FNS to withdraw the SNAP authorization of any firm that timely fails to report changes in ownership within the firm. For purposes of reporting changes in ownership, "timely" would be defined as 10 business days after the occurrence of the change in ownership. This provision would apply to any firm initially authorized subsequent to the implementation date of this provision that fails to report either any additional owner(s) as well as the loss of any owner(s). Also under this provision, any affected owner would not be able to reapply for authorization for a period of six months. All owners involved, including all of those named on the original application, as well as any additional owners, are affected by the six-month timeframe of this provision. Action for failure to report ownership changes would not supersede the Act and companion regulations that provide for penalties associated with falsification of ownership information.

Unauthorized Redemptions

The Department is concerned when an authorized retail establishment is sold or transferred to a different owner, and the selling owner(s) allows the buyer(s) of the store to continue to operate as a SNAP retailer under the selling owner(s)'s authorization. This type of activity is expressly forbidden under the existing regulations at 7 CFR 278.4, 7 CFR 278.6(m) and 7 CFR 278.7(c), which prohibit the acceptance of SNAP benefits by an unauthorized

party. Currently, an unauthorized firm that accepts such benefits is subject to an unauthorized redemption fine under 7 CFR 278.6(m). However, there is currently no penalty for the seller in this instance. The buyer cannot accept SNAP transactions without the seller's active knowledge and participation. This is because the buyer would need to use the seller's EBT point-of-sale terminal, and the funds secured from the SNAP purchases would still be settled into either the sellers bank account or into a bank account that the seller is complicit in arranging for the buyer's use. To address the seller's complicit involvement in this area, and as a preventative for unauthorized redemptions, the Department is proposing to make the seller(s) of a store that continues to make unauthorized redemptions subject to two separate penalties. The first penalty, proposed in 7 CFR 278.1(b)(3)(v) and 7 CFR 278.1(k)(3)(vii), would make the seller(s) permanently ineligible for SNAP participation due to lacking the business integrity to further the purposes of the Program. In addition to not being able to be authorized in a new store, the seller(s) would also have the authorization of any another existing participating store in which they have a share of ownership permanently withdrawn. The second penalty, proposed in 7 CFR 278.6(m), would make the seller(s) subject to an unauthorized redemption fine. The amount of the fine would be the same as authorized to be assessed against the buyer.

Unpaid Debt

The current regulations at 7 CFR 278.1(k)(7) allow FNS to deny or withdraw the authorization of any store that fails to pay certain fiscal claims or fines based on a lack of business integrity. The Department proposes to expand this authority by allowing the denial or withdrawal of a store owned by a firm that fails to pay *any* fine, claim or fiscal penalty assessed against it under Part 278 of the regulations. The denial or withdrawal would be able to be assessed against any store owned by a firm at any time after FNS determines that the debt has become delinquent. The expansion of this authority is being proposed because the Department strongly believes that a firm that is delinquent on any FNS debt lacks the business integrity necessary to remain an authorized retailer. The withdrawal would remain in effect as long as the debt remains unpaid. Once the debt is repaid, the owner(s) may reapply for authorization.

In addition, any administrative review requested as a result of a denial or withdrawal of an unpaid debt will be limited to the existence of, and delinquent nature of, the debt. The initial reason for and the amount of the original debt would not be subject to review at this time as the debtor received those review rights when the initial debt was established.

Establishing Firm Practice to Violate the Program

Current regulations at 7 CFR 278.6(e)(2) and (e)(3) state that a firm is to be disqualified if it has been found to have been the firm's practice to exchange major non-food items for SNAP benefits. Major non-food items, for the purposes of this discussion, are expensive or conspicuous nonfood items, cartons of cigarettes, or alcoholic beverages. Under these regulations, the appropriate disqualification time period would be three years if the firm had not been warned that such violations might be occurring or five years if the firm had received prior warning. In either case, firm practice must also be established; if there was no finding that it was the firm's practice, then the appropriate penalty would be a six-month disqualification due to carelessness or poor supervision (7 CFR 278.6(e)(5)).

The Department is taking this opportunity to realign policy with the current regulations. FNS policy states that in instances involving sale of major items by two or more store clerks, firm practice is established if the firm has received prior warning. This proposed rule would clarify that prior warning is not needed to establish firm practice in instances when major ineligible items are sold by two or more clerks and that in such instances, a three year disqualification as prescribed by regulation, would apply.

List of Subjects in 7 CFR Part 278

Banks, Banking, Food stamps, Grant programs-social programs, Penalties, Reporting and recordkeeping requirements, Surety bonds.

Accordingly, 7 CFR part 278 is proposed to be amended as follows:

■ 1. The authority citation for 7 CFR part 278 continues to read as follows:

Authority: 7 U.S.C. 2011–2036.

■ 2. In § 278.1:

■ a. In paragraph (b)(3) introductory text, place the words "or withdraw" between "shall deny" and "the authorization."

■ b. Redesignate paragraph (b)(3)(vi) as paragraph (b)(3)(vii) and add new paragraph (b)(3)(vi).

■ c. Add a new sentence to the end of paragraph (j).

■ d. Add new paragraph (k)(3)(vii)).

■ e. Revise paragraph (k)(7).

■ f. Redesignate paragraphs (l)(1)(v) through (l)(1)(vii) as paragraphs (l)(1)(vi) through (l)(1)(viii) and add a new paragraph (l)(1)(v).

The revisions and additions read as follows:

§ 278.1. Approval of retail food stores and wholesale food concerns.

* * * * *

(b) * * *

(3) * * *

(vi) Evidence that an owner(s) or officer(s) of the firm permitted an unauthorized third party to use its POS terminal to conduct SNAP transactions.

* * * * *

(j) * * * In addition, firms are required to report any changes in ownership either of the firm or within the firm to FNS within 10 business days after the change occurs.

(k) * * *

(3) * * *

(vii) Any firm that contains an owner(s) or officer(s) who previously allowed an unauthorized third party to use a POS terminal to conduct SNAP transactions shall be withdrawn and permanently denied.

* * * * *

(7) The firm failed to pay in full any fiscal claim assessed against the firm under 7 CFR Part 278. FNS shall issue a notice to the firm (using any delivery method that provides evidence of delivery) to inform the firm of any authorization denial or withdrawal and advise the firm that it may request a review of that determination. Any review of the determination will be limited to the existence of and delinquent nature of the debt.

(l) * * *

(1) * * *

(v) The privately owned firm failed to report any changes in ownership within the firm to FNS within 10 business days after the occurrence of the change in ownership. The owner(s), officer(s) or manager(s) of such firms shall be withdrawn and shall not be able to submit a new application for authorization in the Program for a minimum period of six months from the effective date of the withdrawal;

* * * * *

■ 3. In § 278.6:

■ a. Redesignate paragraphs (b) through (o) as paragraphs (c) through (p) and add a new paragraph (b).

■ b. Revise the first sentence and remove the second sentence of redesignated paragraph (c)(1).

■ c. Revise redesignated paragraph (f)(2)(i).
■ d. Revise redesignated paragraph (f)(3)(i).
■ e. Revise redesignated paragraph (m).

The revisions and additions read as follows.

§ 278.6. Disqualification of retail food stores and wholesale food concerns, and imposition of civil money penalties in lieu of disqualifications.

* * * * *

(b) *Suspension of benefit payments.* FNS may have State benefit providers suspend the payment of unsettled Program benefits to a suspected firm pending administrative action to disqualify the firm. This shall apply to those firms that are suspected by FNS, in consultation with the Department's Office of the Inspector General, to have committed flagrant violations of the Food and Nutrition Act of 2008, as amended, or this Part.

(1) Suspension of benefits under this paragraph will remain in effect during the entire sanction process, including during the administrative or judicial review process.

(2) Any firm that has had its unsettled payments suspended under this paragraph shall forfeit those funds if a final determination is made to permanently disqualify the firm. Conversely, the funds shall be released to the firm if a permanent disqualification is not upheld.

(3) FNS shall not be liable for paying either any interest for unsettled payments suspended under this paragraph or compensation for any lost sales due to the authorization being suspended under this paragraph.

(c) * * * (1) * * * The FNS regional office shall send any firm considered for disqualification, or imposition of a civil money penalty under paragraph (a) of this section, or a fine as specified under paragraph (l) or (m) of this section, a letter of charges before making a final administrative determination. * * *

* * * * *

(f) * * *

(2) * * *

(i) It is the firm's practice to sell expensive or conspicuous nonfood items, cartons of cigarettes, or alcoholic beverages in exchange for SNAP benefits. It is considered the firm's practice when, based on investigative evidence, the exchanges of these ineligible items for SNAP benefits involved two or more clerks.

* * * * *

(3) * * *

(i) It is the firm's practice to commit violations such as the sale of common nonfood items in amounts normally found in a shopping basket, and the firm was previously advised of the possibility that violations were occurring and of the possible consequences of violating the regulations. It is considered the firm's practice when, based on investigative evidence, the exchanges of any ineligible items for SNAP benefits involved two or more clerks.

* * * * *

(m) *Fines for allowing the use of POS equipment by an unauthorized user.* Any firm that allows either a new owner or any other unauthorized user to utilize its POS equipment to conduct SNAP transactions is subject to the same fine that may be assessed against the unauthorized third party that conducts the transactions. The amount of this fine is specified in § 278.6(n).

* * * * *

Dated: February 14, 2013.

Audrey Rowe,

Administrator, Food and Nutrition Service.

[FR Doc. 2013-04037 Filed 2-21-13; 8:45 am]

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DEPARTMENT OF ENERGY

10 CFR Part 430

[Docket No. EERE-2013-BT-STD-0006]

RIN 1904-AC55

Energy Efficiency Program for Commercial and Industrial Equipment: Public Meeting and Availability of the Framework Document for Commercial and Industrial Fans and Blowers

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Extension of public comment period.

SUMMARY: The comment period for the notice of public meeting and availability of the Framework Document pertaining to the development of energy conservation standards for commercial and industrial fan and blower equipment published on February 1, 2013, is extended to May 2, 2013.

DATES: The comment period for the notice of public meeting and availability of the Framework Document relating to commercial and industrial fan and blower equipment is extended to May 2, 2013.

ADDRESSES: Any comments submitted must identify the framework document for commercial and industrial fans and blowers and provide docket number EERE-2013-BT-STD-0006 and/or RIN number 1904-AC55. Comments may be submitted using any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: CIFB2013STD0006@EE.Doe.Gov.* Include EERE-2013-BT-STD-0006 in the subject line of the message.
- *Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE-2J, Framework Document for Commercial and Industrial Fans and Blowers, EERE-2013-BT-STD-0006, 1000 Independence Avenue SW., Washington, DC 20585-0121. Phone: (202) 586-2945. Please submit one signed paper original.
- *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, 6th Floor, 950 L'Enfant Plaza SW., Washington, DC 20024. Phone: (202) 586-2945. Please submit one signed paper original.

Docket: For access to the docket to read background documents, or comments received, go to the Federal eRulemaking Portal at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Mr. Charles Llenza, 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. Telephone: (202) 586-2192. Email: *CIFansBlowers@ee.doe.gov.*

In the office of the General Counsel, contact Ms. Elizabeth Kohl, U.S. Department of Energy, Office of the General Counsel, GC-71, 1000 Independence Avenue SW., Washington, DC 20585-0121. Telephone: (202) 586-7796. Email: *Elizabeth.Kohl@hq.doe.gov.*

SUPPLEMENTARY INFORMATION: The U.S. Department of Energy (DOE) published a proposed determination that commercial and industrial fans and blowers (fans) meet the definition of covered equipment under the Energy Policy and Conservation Act of 1975, as amended (76 FR 37628, June 28, 2011). As part of its further consideration of this determination, DOE is analyzing potential energy conservation standards for fans. DOE published a notice of public meeting and availability of the framework document to consider such standards (78 FR 7306, Feb. 1, 2013). The framework document requested public comment from interested parties and provided for the submission of comments by March 18, 2013. Thereafter, Air Movement and Control

Association International (AMCA), on behalf of itself and its affiliates, requested an extension of the public comment period by 45 days. AMCA stated that the additional time is necessary to conduct a rapid and intensive research project in order to provide DOE with better information at an early stage of the regulatory process, making subsequent phases more efficient and effective.

Based on AMCA's request, DOE believes that extending the comment period to allow additional time for interested parties to submit comments is appropriate. Therefore, DOE is extending the comment period until May 2, 2013 to provide interested parties additional time to prepare and submit comments. Accordingly, DOE will consider any comments received by May 2, 2013 to be timely submitted.

Issued in Washington, DC, on February 12, 2013.

Kathleen B. Hogan,

Deputy Assistant Secretary for Energy Efficiency, Energy Efficiency and Renewable Energy.

[FR Doc. 2013–04058 Filed 2–21–13; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

10 CFR Part 431

[Docket No. EERE–2012–BT–STD–0029]

RIN 1904–AC82

Energy Efficiency Program for Commercial and Industrial Equipment: Public Meeting and Availability of the Framework Document for Packaged Terminal Air Conditioners and Packaged Terminal Heat Pumps

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice of public meeting and availability of the framework document.

SUMMARY: The U.S. Department of Energy (DOE) is initiating a rulemaking and data collection process to consider amending energy conservation standards for packaged terminal air conditioners (PTACs) and packaged terminal heat pumps (PTHPs). DOE will hold a public meeting to discuss and receive comments on its planned analytical approach and issues it will address in this rulemaking proceeding. DOE welcomes written comments and relevant data from the public on any subject within the scope of this rulemaking. To inform interested parties and to facilitate this process, DOE has prepared a framework document that details the analytical approach and identifies several issues on which DOE is particularly interested in receiving comments.

DATES: *Meeting:* DOE will hold a public meeting on Tuesday, March 12, 2013, from 9:00 a.m. to 5:00 p.m. in Washington, DC. Additionally, DOE plans to conduct the public meeting via webinar. You may attend the public meeting via webinar, and registration information, participant instructions, and information about the capabilities available to webinar participants will be published on DOE's Web site at: *http://www1.eere.energy.gov/buildings/appliance_standards/product.aspx/productid/45*. Participants are responsible for ensuring their systems are compatible with the webinar software.

DOE must receive requests to speak at the public meeting before 4:00 p.m., Tuesday, February 26, 2013. DOE must receive an electronic copy of the statement with the name and, if appropriate, the organization of the presenter to be given at the public meeting before 4:00 p.m., Tuesday, March 5, 2013.

Comments: DOE will accept written comments, data, and information regarding the framework document before and after the public meeting, but no later than March 25, 2013.

ADDRESSES: The public meeting will be held at the U.S. Department of Energy, Forrestal Building, Room 8E–089, 1000 Independence Avenue SW., Washington, DC 20585–0121. Please note that foreign nationals planning to participate in the public meeting are subject to advance security screening procedures. If a foreign national wishes to participate in the public meeting, please inform DOE of this fact as soon as possible by contacting Ms. Brenda Edwards at (202) 586–2945 so that the necessary procedures can be completed. Please note that any person wishing to bring a laptop computer into the Forrestal Building will be required to obtain a property pass. Visitors should avoid bringing laptops, or allow an extra 45 minutes. As noted above, persons may also attend the public meeting via webinar.

Interested parties are encouraged to submit comments electronically. However, comments may be submitted by any of the following methods:

- *Federal eRulemaking Portal: www.regulations.gov*. Follow the instructions for submitting comments.
- *Email to the following address: PkgTerminalAC-HP2012STD0029@ee.doe.gov*. Include docket number EERE–2012–BT–STD–0029 and/or RIN 1904–AC82 in the subject line of the message. All comments should clearly identify the name, address, and, if appropriate, organization of the commenter.
- *Postal Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, Framework Document for PTACs and PTHPs, Docket No. EERE–2012–BT–STD–0029 and/or RIN 1904–AC82, 1000 Independence Avenue SW., Washington, DC 20585–0121. Please submit one signed paper original.
- *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Sixth Floor, 950 L'Enfant Plaza SW., Washington, DC 20024. Please submit one signed paper original.

Instructions: All submissions received must include the agency name and docket number and/or RIN for this rulemaking. No telefacsimilies (faxes) will be accepted.

Docket: The docket is available for review at *www.regulations.gov*, including **Federal Register** notices, public meeting attendees' lists and transcripts, comments, and other supporting documents/materials. All documents in the docket are listed in the *www.regulations.gov* index. However, not all documents listed in the index may be publicly available, such as information that is exempt from public disclosure.

A link to the docket Web page can be found at: *http://www.regulations.gov/#!docketDetail;dct=FR%252BPR%252BN%252BO%252BSR%252BPS;rpp=25;po=0;D=EERE-2012-BT-STD-0029*. This Web page contains a link to the docket for this notice on the *www.regulations.gov* Web site. The *www.regulations.gov* Web page contains simple instructions on how to access all documents, including public comments, in the docket.

For information on how to submit a comment, review other public comments and the docket, or participate in the public meeting, contact Ms. Brenda Edwards at (202) 586–2945 or by email: *Brenda.Edwards@ee.doe.gov*.

FOR FURTHER INFORMATION CONTACT: Mr. Ronald Majette, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies, EE–2J, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–7935. Email: *PTACs@ee.doe.gov*.

Ms. Jennifer Tiedeman, U.S. Department of Energy, Office of the General Counsel, GC–71, 1000 Independence Avenue SW.,

Washington, DC 20585–0121. Telephone: (202) 287–6111. Email: *Jennifer.Tiedeman@hq.doe.gov.*

For information on how to submit or review public comments and on how to participate in the public meeting, contact Ms. Brenda Edwards, 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. Telephone (202) 586–2945. Email: *Brenda.Edwards@ee.doe.gov.*

SUPPLEMENTARY INFORMATION: Title III, Part C of the Energy Policy and Conservation Act of 1975 (EPCA), Public Law 94–163 (42 U.S.C. 6311–6317, as codified), added by Public Law 95–619, Title IV, section 441(a), established the Energy Conservation Program for Certain Industrial Equipment, which includes the PTACs and PTHPs that are the focus of this notice.[1]

The Energy Policy Act of 1992 (EPACT 1992), Public Law 101–486, amended section 342 of EPCA to establish Federal energy conservation standards that generally correspond to the levels in American Society of Heating, Refrigerating and Air-Conditioning Engineer (ASHRAE)/Illuminating Engineering Society of North America (IESNA) Standard 90.1, "*Energy Standard for Buildings Except Low-Rise Residential Buildings*," (ASHRAE Standard 90.1), effective October 24, 1992. These standards apply to most types of covered equipment listed in section 342(a) of EPCA, including PTACs and PTHPs. (42 U.S.C. 6313(a)) Further, section 342(a)(6)(A) of EPCA states that if ASHRAE modifies the required efficiency levels specified in Standard 90.1 for PTACs and PTHPs, DOE must amend the national standard for that equipment at the level specified in updated ASHRAE Standard 90.1, unless DOE determines that a more stringent standard would result in significant energy savings and would be technologically feasible and economically justified. (42 U.S.C. 6313(a)(6)(A)) On October 29, 1999, ASHRAE amended its efficiency levels for PTACs and PTHPs in ASHRAE Standard 90.1–1999; in response, DOE published a final rule (2008 final rule) amending the minimum energy conservation standard for PTACs and PTHPs at a more-stringent level than those specified in ASHRAE Standard 90.1–1999. 73 FR 58772 (Oct. 7, 2008).

Section 305 of the Energy Independence and Security Act of 2007 (EISA 2007), Public Law 110–140, amended section 342(a)(6)(C) of EPCA to mandate that not later than six years after the issuance of any final rule establishing or amending a standard for ASHRAE equipment, DOE must either publish a notice of determination that more-stringent standards for such equipment are not needed or a notice of proposed rulemaking proposing amended standards that are technologically feasible and economically justified. (42 U.S.C. 6313(6)(A)(i)) Therefore, DOE must publish either a determination or notice of proposed rulemaking by no later than October 7, 2014 (6 years after the publication of the 2008 final rule). This framework document is being published as a first step toward meeting these statutory requirements.

DOE has prepared this framework document to explain the relevant issues, analyses, and processes it anticipates using to determine whether to amend energy conservation standards, and, if so, to develop such amended standards. The focus of the public meeting noted above will be to discuss the information presented and issues identified in the framework document. At the public meeting, DOE will make presentations and invite discussion on the rulemaking process as it applies to PTACs and PTHPs. DOE will also solicit comments, data, and information from participants and other interested parties.

DOE is planning to conduct in-depth technical analyses in the following areas: (1) Engineering, (2) energy-use characterization, (3) equipment price, (4) life-cycle cost and payback period, (5) national impacts, (6) manufacturer impacts, (7) utility impacts, (8) employment impacts, (9) emission impacts, and (10) regulatory impacts. DOE will also conduct several other analyses that support those previously listed, including the market and technology assessment, the screening analysis (which contributes to the engineering analysis), and the shipments analysis (which contributes to the national impact analysis).

DOE encourages those who wish to participate in the public meeting to obtain the framework document and be prepared to discuss its contents. A copy of the framework document is available at: *http://www1.eere.energy.gov/buildings/appliance_standards/product.aspx/productid/45.*

Public meeting participants need not limit their comments to the issues identified in the framework document. DOE is also interested in comments on other relevant issues that participants believe would affect energy conservation standards for this equipment, applicable test procedures, or the preliminary determination on the scope of coverage. DOE invites all interested parties, whether or not they participate in the public meeting, to submit in writing by March 25, 2013, comments and information on matters addressed in the framework document and on other matters relevant to DOE's consideration of amended standards for PTACs and PTHPs.

The public meeting will be conducted in an informal, facilitated, conference style. There shall be no discussion of proprietary information, costs or prices, market shares, or other commercial matters regulated by U.S. antitrust laws. A court reporter will record the proceedings of the public meeting, after which a transcript will be available on the DOE Web site at: *http://www1.eere.energy.gov/buildings/appliance_standards/product.aspx/productid/45.*

After the public meeting and the close of the comment period on the framework document, DOE will collect data, conduct the analyses as discussed in the framework document and at the public meeting, and review the public comments it receives.

DOE considers public participation to be a very important part of the process to determine whether to establish amended energy conservation standards and, if so determined, to set those amended standards. DOE actively encourages participation and interaction of the public during the comment period in each stage of the rulemaking process. Beginning with the framework document, and during each subsequent public meeting and comment period, interactions with and among members of the public provide a balanced discussion of the issues that will assist DOE in the standards rulemaking process. Accordingly, anyone who wishes to participate in the public meeting, receive meeting materials, or be added to the DOE mailing list to receive future notices and information about this rulemaking should contact Ms. Brenda Edwards at (202) 586–2945, or via email at *Brenda.Edwards@ee.doe.gov.*

Issued in Washington, DC, on February 15, 2013.

Kathleen B. Hogan,

Deputy Assistant Secretary for Energy Efficiency, Energy Efficiency and Renewable Energy.

[FR Doc. 2013–04106 Filed 2–21–13; 8:45 am]

BILLING CODE 6450–01–P

[1] For editorial reasons, upon codification in the U.S. Code, Part C was re-designated Part A–1.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 27 and 29

Interest in Restructure of Rotorcraft Airworthiness Standards

AGENCY: Federal Aviation Administration, DOT.

ACTION: Request for comments.

SUMMARY: The Federal Aviation Administration (FAA) is requesting comments and information on the public's interest in restructuring the rotorcraft airworthiness standards of normal category rotorcraft and transport category rotorcraft. Specifically, the agency is seeking comments on whether to change the existing applicability standards for maximum weight and number of passenger seats for either or both types of rotorcraft, or whether to consider other approaches for determining applicability. The FAA is soliciting public input because of some rotorcraft community interest in increasing the 7,000 pound maximum weight limit for the modern normal category rotorcraft and because there may be recommendations for new approaches to make the rotorcraft airworthiness standards more efficient and adaptable to future technology. This action is part of an effort to develop recommendations for possible FAA rulemaking action.

DATES: Send your comments to reach us on or before May 23, 2013.

ADDRESSES: Send comments identified by docket number FAA–2013–0144 using any of the following methods:

- *Federal eRegulations Portal:* Go to *http://www.regulations.gov*, use the search function to locate the docket number, and follow the online instructions for sending your comments electronically.
- *Mail:* Send comments to Docket Operations, M–30, U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE, Room W12–140, West Building Ground Floor, Washington, DC, 20590–0001.
- *Hand Delivery:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 8 a.m., and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* Fax comments to Docket Operations at 202–493–2251.

Privacy: The FAA will post all comments it receives, without change, to *http://www.regulations.gov*, including any personal information the commenter provides. Using the search function of the docket Web site, anyone can find and read the electronic form of all comments received into any FAA docket, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). DOT's complete Privacy Act Statement can be found in the **Federal Register** published on April 11, 2000 (65 FR 19477–19478), as well as at *http://DocketsInfo.dot.gov*.

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

FOR FURTHER INFORMATION CONTACT: FAA, Rotorcraft Directorate, Regulations and Policy Group (Attn: John Vanhoudt, ASW–111), 2601 Meacham Blvd., Fort Worth, Texas 76137; telephone (817) 222–5167; facsimile (817) 222–5961; or email *john.vanhoudt@faa.gov*.

SUPPLEMENTARY INFORMATION:

Your Comments Are Welcome

We invite your comments on the issues described in this request. The most useful comments are those that address the questions identified in the Request for Comments section below. Responses to these questions will be helpful in evaluating the issues and determining what future actions we should undertake.

To ensure consideration, you must submit comments as specified under the **ADDRESSES** section of this preamble. We will consider all communications received on or before the closing date for comments. All comments submitted will be available for examination, both before and after the closing date for comments, under the docket number FAA–2013–0144 at *http://www.regulations.gov*.

Background and Discussion

Currently, the applicability rule for part 27 (14 CFR 27.1) prescribes airworthiness standards for "normal category rotorcraft with maximum weights of 7,000 pounds or less and nine or less passenger seats." Rotorcraft with a maximum weight greater than 7,000 pounds or with 10 or more passenger seats are certificated as transport category rotorcraft under part 29.

The applicability rules for rotorcraft certificated under parts 27 and 29 have been discussed since the early 1990s. In February 1994, the FAA held a public meeting to determine a course of action that was in the best interest of the public and the aviation community. Subsequently, an Aviation Rulemaking Advisory Committee working group was established with representatives from the FAA, the Joint Aviation Authorities, and Transport Canada Civil Aviation, as well as from U.S. and European helicopter manufacturers. In February 1995, the Rotorcraft Gross Weight and Passenger Issues Working Group was established and tasked with recommending new or revised requirements for increasing the gross weight and passenger limitations for normal category rotorcraft. There was agreement to increase the gross weight limitation of part 27 from 6,000 to 7,000 pounds with added passenger safety requirements.

More recently we have recognized that the evolution of the part 27 and 29 rules has not kept pace with technology and the capability of newer rotorcraft. Therefore, the FAA is interested in investigating new approaches to make the rotorcraft airworthiness regulations more efficient and adaptable to future technology. Additionally, the FAA has found that without a rulemaking effort to extensively revise the rotorcraft standards, we are left with the option of issuing multiple special conditions for the same technologies (fly-by-wire flight control systems, search and rescue approach, etc.).

If we find adequate interest from the rotorcraft community, we would consider initiating a rulemaking effort, similar in scope to the proposed revisions of the small airplane part 23 standards. The new part 23 rulemaking initiative resulted from a determination that applying a weight standard to certification for small aircraft was no longer relevant. Conversely, if the level of interest indicates the current standards remain appropriate but would benefit from some revision, we may undertake a smaller rulemaking effort to update a limited number of regulations in parts 27 and 29.

Request for Comments

As noted above, the FAA is seeking comments to determine whether an all new approach for parts 27 and 29 is appropriate for future rotorcraft airworthiness standards and safety levels, or whether the existing standards philosophy based on weight (currently 7,000 pound maximum for part 27) and maximum number of passengers (currently maximum of 9 passengers for part 27) is appropriate. In providing your comments, we would find it most useful if you address some or all of the following questions:

(a) To what extent do you believe the current rotorcraft certification standards need to be amended to remain relevant over the next 20 years, given the rapid pace of advances in technology?

(b) Should the current rotorcraft certification standards be completely changed, or are weight and number of passengers still relevant for determining certification?

(c) If you believe certification should continue to be based on weight and number of passengers, to what extent should the existing standards be updated, and how?

(d) As revisions to regulatory certification standards would require participation in a rulemaking committee over a substantial period of time, to what extent would you be willing to participate?

As a convenience, these questions are available for submission in the same format as above at the following Web site link: *http://www.faa.gov/aircraft/air_cert/design_approvals/rotorcraft/comm*.

If the FAA decides to have further rulemaking discussions on these issues, we will issue a document, giving the public another opportunity to comment.

Issued in Fort Worth, TX, on February 8, 2013.

Kimberly K. Smith,

Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 2013–03709 Filed 2–21–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–1331; Directorate Identifier 2012–NE–44–AD]

RIN 2120–AA64

Airworthiness Directives; Rolls-Royce (1971) Limited, Bristol Engine Division Turbojet Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for all Rolls-Royce (1971) Limited, Bristol Engine Division (RR) Viper Mk. 601–22 turbojet engines. This proposed AD was prompted by a review carried out by RR of the lives of certain critical parts. This proposed AD would require reducing the life of these parts. We are proposing this AD to prevent life-limited part failure, damage to the engine, and damage to the airplane.

DATES: We must receive comments on this proposed AD by April 23, 2013.

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

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

For service information identified in this AD, contact Rolls-Royce plc, Corporate Communications, P.O. Box 31, Derby, England, DE248BJ; phone: 011–44–1332–242424; fax: 011–44–1332–249936; or email: *http://www.rolls-royce.com/contact/civil_team.jsp*. You may view this service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803. For information on the availability of this material at the FAA, call 781–238–7125.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Robert Green, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; phone: 781–238–7754; fax: 781–238–7199; email: *Robert.Green@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–2012–1331; Directorate Identifier 2012–NE–44–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov*, including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this proposed AD. Using the search function of the Web site, anyone can find and read the comments in any of our dockets, including, if provided, the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2012–0243 (Correction: November 13, 2012), dated November 12, 2012, a Mandatory Continuing Airworthiness Information (referred to hereinafter as "the MCAI"), to correct an unsafe condition for the specified products. The MCAI states:

> A review, carried out by Rolls-Royce, of the lives of critical parts of the Viper Mk. 601–22 engine, has resulted in reduced cyclic life limits for certain critical parts.
>
> Operation of critical parts beyond these reduced cyclic life limits may result in part failure, possibly resulting in the release of high-energy debris, which may cause damage to the aeroplane and/or injury to the occupants.
>
> For the reasons described above, this AD requires implementation of the reduced cyclic life limits for the affected critical parts, i.e., replacement of each part before the applicable reduced life limit is exceeded, and replacement of those critical parts that have already exceeded the reduced cyclic life limits.

You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

RR Alert Service Bulletin 72–A206, dated November, 2012.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of the United Kingdom and is approved for operation in the United States. Pursuant to our bilateral agreement with the European

Community, EASA has notified us of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all information provided by EASA and determined the unsafe condition exists and is likely to exist or develop on other products of the same type design. This proposed AD would require reducing the life of certain critical parts.

Costs of Compliance

We estimate that this proposed AD affects 32 engines installed on airplanes of U.S. registry. We also estimate that it would take 0 hours per product to comply with this proposed AD. The average labor rate is $85 per hour. We are not requiring parts replacement, so parts cost is $0. We estimate the cost of the proposed AD on U.S. operators to be $0.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this AD:

1. Is not a "significant regulatory action" under Executive Order 12866;

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

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new AD:

Rolls-Royce (1971) Limited, Bristol Engine Division: Docket No. FAA–2012–1331; Directorate Identifier 2012–NE–44–AD.

(a) Comments Due Date

We must receive comments by April 23, 2013.

(b) Affected Airworthiness Directives (ADs)

None.

(c) Applicability

This AD applies to all Rolls-Royce (1971) Limited, Bristol Engine Division (RR) Viper Mk. 601–22 turbojet engines.

(d) Reason

This AD was prompted by a review carried out by RR of the lives of certain critical parts. We are issuing this AD to prevent life-limited part failure, damage to the engine, and damage to the airplane.

(e) Actions and Compliance

Unless already done, do the following actions.

(1) After the effective date of this AD, remove the following parts before they reach their specified new, lower life limits: compressor shaft, part number (P/N) V900766; 20,720 flight cycles since new (CSN); compressor rear stubshaft (center bearing hub), P/Ns V900007 and V900994; 9,600 CSN; combustion chamber outer casing, P/Ns V950013 and V950331; 32,000 CSN.

(2) After the effective date of this AD, do not install any part identified in paragraph (e)(1) of this AD into any engine, nor return any engine to service, with the parts identified in paragraph (e)(1) of this AD installed, if the part exceeds the new, lower life limits specified in paragraph (e)(1) of this AD.

(f) Alternative Methods of Compliance (AMOCs)

The Manager, Engine Certification Office, FAA, may approve AMOCs for this AD. Use the procedures found in 14 CFR 39.19 to make your request.

(g) Related Information

(1) For more information about this AD, contact Robert Green, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; phone: 781–238–7754; fax: 781–238–7199; email: *Robert.Green@faa.gov*.

(2) Refer to European Aviation Safety Agency Airworthiness Directive 2012–0243 (Correction: November 13, 2012), dated November 12, 2012, and Rolls-Royce Alert Service Bulletin 72–A206, dated November, 2012, for related information.

(3) For service information identified in this AD, contact Rolls-Royce plc, Corporate Communications, P.O. Box 31, Derby, England, DE248BJ; phone: 011–44–1332–242424; fax: 011–44–1332–249936; or email: *http://www.rolls-royce.com/contact/civil_team.jsp*. You may view this service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803. For information on the availability of this material at the FAA, call 781–238–7125.

Issued in Burlington, Massachusetts, on February 15, 2013.

Robert J. Ganley,

Acting Manager, Engine & Propeller Directorate, Aircraft Certification Service.

[FR Doc. 2013–04103 Filed 2–21–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2013–0092; Directorate Identifier 2012–NM–067–AD]

RIN 2120–AA64

Airworthiness Directives; Embraer S.A. Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain Embraer S.A. Model ERJ 170 and ERJ 190 airplanes. This proposed AD was prompted by reports of chafing between the auxiliary power unit (APU) electronic starter controller (ESC) power cables and the airplane tail cone firewall. This proposed AD would require a detailed inspection for damage to the insulation and inner conductors of the APU ESC power cables, installing

new grommet support in the tail cone firewall, and corrective actions if necessary. We are proposing this AD to detect and correct damage to the APU ESC power cable harness, which if not corrected, could result in reduced structural integrity of the fuselage and empennage in the event of fire penetration through the firewall.

DATES: We must receive comments on this proposed AD by April 8, 2013.

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

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

For service information identified in this proposed AD, contact Embraer S.A., Technical Publications Section (PC 060), Av. Brigadeiro Faria Lima, 2170—Putim—12227–901 São Jose dos Campos—SP—BRASIL; telephone +55 12 3927–5852 or +55 12 3309–0732; fax +55 12 3927–7546; email distrib@embraer.com.br; Internet *http://www.flyembraer.com*. You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Cindy Ashforth, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone (425) 227–2768; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2013–0092; Directorate Identifier 2012–NM–067–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov*, including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

The Agência Nacional de Aviação Civil (ANAC), which is the aviation authority for Brazil, has issued Brazilian Airworthiness Directives 2012–03–03 and 2012–03–04, both dated April 13, 2012 (referred to after this as "the MCAI"), to correct an unsafe condition for the specified products. The MCAI states:

> It has been found the occurrences of chafing between the Auxiliary Power Unit (APU) Electronic Starter Controller (ESC) power cables (harness W205) and the airplane tail cone firewall due to the grommet installed in the tail cone firewall moves out of its place. This condition, if not corrected, may result in reduced structural integrity of the fuselage and empennage in an event of fire penetration through the firewall.

The required actions include a detailed inspection for damage to the harness insulation and inner conductors of the APU ESC power cables, installing a new grommet support in the tail cone firewall, and corrective actions if necessary. Corrective actions include repairing the harness W205 insulation or replacing the harness W205 of the APU ESC power cables with a new harness. You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

Embraer has issued Service Bulletin 170–53–0093, Revision 01, dated March 16, 2012 (for Model ERJ 170 airplanes); Service Bulletin 190–53–0054, Revision 01, dated March 16, 2012 (for Model ERJ 190 airplanes); and Service Bulletin 190LIN–53–0059, Revision 01, dated March 16, 2012 (for Model ERJ 190–100 ECJ airplanes). The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Differences Between This AD and the MCAI or Service Information

Although Brazilian Airworthiness Directive AD 2012–03–04, dated April 13, 2012, specifies a compliance time of "within 3,000 flight hours (FH)" after the effective date of this AD for performing a detailed inspection on the APU ESC power cables for damage, this AD requires the action be done within 3,000 flight hours (FH) or 18 months after the effective date of this AD, whichever occurs first. This proposed compliance time aligns with the compliance time listed in Brazilian AD 2012–03–03, dated April 13, 2012.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 253 products of U.S. registry. We also estimate that it would take about 15 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Required parts would cost about $0 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these parts. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $322,575, or $1,275 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

1. Is not a "significant regulatory action" under Executive Order 12866;

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

3. Will not affect intrastate aviation in Alaska; and

4. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new AD:

Embraer S.A.: Docket No. FAA–2013–0002; Directorate Identifier 2012–NM–007–AD.

(a) Comments Due Date

We must receive comments by April 8, 2013.

(b) Affected ADs

None.

(c) Applicability

This AD applies to the airplane models identified in paragraphs (c)(1) and (c)(2) of this AD.

(1) Embraer S.A. Model ERJ 170–100 LR, –100 STD, –100 SE, and –100 SU airplanes; and Model ERJ 170–200 LR, –200 SU, and –200 STD airplanes; certificated in any category; as identified in Embraer Service Bulletin 170–53–0093, Revision 01, dated March 16, 2012.

(2) Embraer S.A. Model ERJ 190–100 STD, –100 LR, –100 ECJ, and –100 IGW airplanes; and Model ERJ 190–200 STD, –200 LR, and –200 IGW airplanes; certificated in any category; as identified in Embraer Service Bulletin 190–53–0054, Revision 01, dated March 16, 2012; and Embraer Service Bulletin 190LIN–53–0059, Revision 01, dated March 16, 2012.

(d) Subject

Air Transport Association (ATA) of America Code 53, Fuselage.

(e) Reason

This AD was prompted by reports of chafing between the auxiliary power unit (APU) electronic starter controller (ESC) power cables and the airplane tail cone firewall. We are issuing this AD to detect and correct damage to the APU ESC power cable harness, which could result in reduced structural integrity of the fuselage and empennage in the event of fire penetration through the firewall.

(f) Compliance

You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

(g) Detailed Inspection, Installation, and Corrective Actions

Within 3,0000 flight hours or 18 months after the effective date of this AD, whichever occurs first: Do a detailed visual inspection for damage to the insulation and inner conductors of the APU ESC power cables (harness W205), in accordance with the Accomplishment Instructions of Embraer Service Bulletin 170–53–0093, Revision 01, dated March 16, 2012 (for Model ERJ 170 airplanes); Embraer Service Bulletin 190–53–0054, Revision 01, dated March 16, 2012 (for Model ERJ 190 airplanes except for Model ERJ 190–100 ECJ airplanes); and Embraer Service Bulletin 190LIN–53–0059, Revision 01, dated March 16, 2012 (for Model ERJ 190–100 ECJ airplanes).

(1) If no damage is found, before further flight, install a new grommet support having part number (P/N) 191–21716–003 in the tail cone firewall, in accordance with the Accomplishment Instructions of Embraer Service Bulletin 170–53–0093, Revision 01, dated March 16, 2012 (for Model ERJ 170 airplanes); Embraer Service Bulletin 190–53–0054, Revision 01, dated March 16, 2012 (for Model ERJ 190 airplanes except for Model ERJ 190–100 ECJ airplanes); and Embraer Service Bulletin 190LIN–53–0059, Revision 01, dated March 16, 2012 (for Model ERJ 190–100 ECJ airplanes).

(2) If any damage is found during any inspection required in paragraph (g) of this AD, that affects only the insulation of harness W205 of the APU ESC power cables: Before further flight, repair the insulation and install a new grommet support having P/N 191–21716–003 in the tail cone firewall, in accordance with the Accomplishment Instructions of Embraer Service Bulletin 170–53–0093, Revision 01, dated March 16, 2012 (for Model ERJ 170 airplanes); Embraer Service Bulletin 190–53–0054, Revision 01, dated March 16, 2012 (for Model ERJ 190 airplanes except for Model ERJ 190–100 ECJ airplanes); or Embraer Service Bulletin 190LIN–53–0059, Revision 01, dated March 16, 2012 (for Model ERJ 190–100 ECJ airplanes).

(3) If any damage is found during any inspection required in paragraph (g) of this AD that affects the insulation of harness W205 of the APU ESC power cables and the inner conductors: Before further flight, replace the harness with a new harness and install a new grommet support having P/N 191–21716–003 in the tail cone firewall, in accordance with the Accomplishment Instructions of Embraer Service Bulletin 170–53–0093, Revision 01, dated March 16, 2012 (for Model ERJ 170 airplanes); Embraer Service Bulletin 190–53–0054, Revision 01, dated March 16, 2012 (for Model ERJ 190 airplanes except for Model ERJ 190–100 ECJ airplanes); and Embraer Service Bulletin 190LIN–53–0059, Revision 01, dated March 16, 2012 (for Model ERJ 190–100 ECJ airplanes).

(h) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Branch, send it to ATTN: Cindy Ashforth, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–227–2768; fax: 425–227–1149. Information may be emailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority

(or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(i) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) Brazilian Airworthiness Directives 2012–03–03 and 2012–03–04, dated April 13, 2012; and the service information specified in paragraphs (i)(1)(i), (i)(1)(ii), and (i)(1)(iii) of this AD; for related information.

(i) Embraer Service Bulletin 170–53–0093, Revision 01, dated March 16, 2012.

(ii) Embraer Service Bulletin 190–53–0054, Revision 01, dated March 16, 2012.

(iii) Embraer Service Bulletin 190LIN–53–0059, Revision 01, dated March 16, 2012.

(2) For service information identified in this AD, contact Embraer S.A., Technical Publications Section (PC 060), Av. Brigadeiro Faria Lima, 2170—Putim—12227–901 São Jose dos Campos—SP—BRASIL; telephone +55 12 3927–5852 or +55 12 3309–0732; fax +55 12 3927–7546; email *distrib@embraer.com.br*; Internet *http://www.flyembraer.com*. You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on February 11, 2013.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2013–04045 Filed 2–21–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 91

[Docket No.: FAA–2013–0061]

Unmanned Aircraft System Test Site Program

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of availability; request for comments

SUMMARY: On February 14, 2012, Congress mandated that the FAA, coordinating with the National Aeronautics and Space Administration and the Department of Defense, develop a test site program for the integration of unmanned aircraft systems in to the National Airspace System. The overall purpose of this test site program is to develop a body of data and operational experiences to inform integration and the safe operation of these aircraft in the National Airspace System. This proposed rule announces the process by which the FAA will select the test sites for the program and also solicits comments on the FAA's proposed approach for addressing the privacy questions raised by the public and Congress with regard to the operation of unmanned aircraft systems within the test site program.

DATES: The FAA values the input of the public and requests comment regarding the privacy approach discussed in this Notice. Please send your comments on or before April 23, 2013.

Once the public has had a chance to review the proposed privacy policy requirements to be levied on the Unmanned Aircraft Systems Test Site operators, but prior to the close of the comment period, the FAA will participate in a webinar to solicit comments from the public and interested stakeholders regarding the proposed privacy approach for the unmanned aircraft systems test site program. The FAA will publish a notice providing details (including the date and time) for the engagement session sufficiently in advance of the meeting to facilitate broad participation.

ADDRESSES: You may send comments identified by Docket No: FAA–2013–0061 using any of the following methods:

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

Privacy: The FAA will post all comments it receives, without change, to *http://www.regulations.gov*, including any personal information the commenter provides. Using the search function of the docket web site, anyone can find and read the electronic form of all comments received into any FAA docket, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). DOT's complete Privacy Act Statement can be found in the **Federal Register** published on April 11, 2000 (65 FR 19477–19478), as well as at *http://DocketsInfo.dot.gov*.

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

FOR FURTHER INFORMATION CONTACT: For technical questions concerning the test site program, contact Elizabeth Soltys, Unmanned Aircraft Systems Integration Office, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; email: *9-ACT-UASTSS@faa.gov*.

For questions concerning the FAA's proposed approach for addressing potential UAS privacy concerns, as set out herein, contact Gregory C. Carter, Office of the Chief Counsel, Federal Aviation Administration, 800 Independence Ave. SW., Washington, DC 20591; email: *9-AGC-UASPrivacy@faa.gov*.

Background

On February 14, 2012, the President signed the FAA Modernization and Reform Act, Public Law 112–95 (FMRA) into law. The statute contains a number of provisions pertaining to integration of unmanned aircraft systems (UAS) into the National Airspace System (NAS). To assist the agency in integrating UAS, section 332(c) of FMRA directs the FAA, in coordination with the National Aeronautics and Space Administration (NASA) and the Department of Defense (DoD), to develop a UAS test site program for purposes of gathering safety and technical information relevant to the safe and efficient integration of UAS into the NAS. Under the test site program, the FAA will select six test ranges, taking into consideration factors such as geographic and climatic diversity, as well as the location of necessary ground infrastructure to support the sites, and research needs.

The FAA has developed the UAS test site program with the input of the public. The FAA began an outreach effort to gather input on the criteria and processes the FAA should use to select the test sites. In March 2012, the FAA posted a Request for Comments (RFC) in the **Federal Register** [Docket No. FAA–2012–0252] and in April 2012, the FAA hosted two public webinars to interact directly with the public. This outreach effort informed the agency in developing its plan for designating the sites.

Based on the feedback received through this outreach effort, the FAA is using its Acquisition Management System (AMS) to solicit applications from entities interested in operating a

UAS test site. This system is the common process the FAA uses to obtain information, evaluate interested parties, and select successful providers for procurement matters. Although no federal funds will be distributed to the selected test site operators for the operation of these test sites (and selection of sites is not a procurement action), the FAA has determined that using this well-established system and process will ensure fair consideration of all applications and rigorous oversight of the selection process.

For individuals interested in submitting an application to operate a UAS test site, the FAA has published a Screening Information Request (SIR), which is also known as a Request for Proposals, or RFP, in other federal agencies. The SIR (and amendments, if any) is available on the FAA Contracting Opportunities Web site (*http://faaco.faa.gov*). Additional information about this SIR process and criteria for selecting the six test sites is contained within the SIR document itself. In order to be considered for selection, completed responses must be submitted via the FAA Contracting Opportunities Web site by the dates set out in the SIR.

Once the FAA has conducted and completed its consideration of the submissions, and the Administrator has issued an Order designating each successful applicant as a test site operator, each operator will be required to enter into an Other Transaction Agreement (OTA) with the FAA. Each OTA will set out the legally binding terms and conditions under which the entity will operate the UAS Test Site. The draft OTA is available for review via the FAA Contracting Opportunities Web site listed above. Before OTA parameters and reporting requirements are finalized, FAA will consider comments submitted as a result of this **Federal Register** Notice.

While the expanded use of UAS presents great opportunities, it also presents significant challenges as UAS are inherently different from manned aircraft. The UAS test site program will help the FAA gain a better understanding of operational issues, such as training requirements, operational specifications, and technology considerations, which are primary areas of concern with regard to our chief mission, which is ensuring the safety and efficiency of the entire aviation system. The FAA also acknowledges that the integration of UAS in domestic airspace raises privacy issues, which the FAA intends to address through engagement and collaboration with the public. To address privacy concerns relating to the operation of the test site program, the FAA intends to include in each final OTA privacy requirements applicable to all operations at a test site. This notice is specifically requesting comments on those potential privacy considerations, associated reporting requirements, and how the FAA can help ensure privacy considerations are addressed through mechanisms put in place as a result of the OTAs.

The proposed privacy requirements set forth in Article three of the DRAFT OTA are as follows:

(1) The Site Operator must ensure that there are privacy policies governing all activities conducted under the OTA, including the operation and relevant activities of the UASs authorized by the Site Operator. Such privacy policies must be available publically, and the Site Operator must have a mechanism to receive and consider comments on its privacy policies. In addition, these policies should be informed by Fair Information Practice Principles. The privacy policies should be updated as necessary to remain operationally current and effective. The Site Operator must ensure the requirements of this paragraph are applied to all operations conducted under the OTA.

(2) The Site Operator and its team members are required to operate in accordance with Federal, state, and other laws regarding the protection of an individual's right to privacy. Should criminal or civil charges be filed by the U.S. Department of Justice or a state's law enforcement authority over a potential violation of such laws, the FAA may take appropriate action, including suspending or modifying the relevant operational authority (e.g., Certificate of Operation, or OTA), until the proceedings are completed. If the proceedings demonstrate the operation was in violation of the law, the FAA may terminate the relevant operational authority.

(3) If over the lifetime of this Agreement, any legislation or regulation, which may have an impact on UAS or to the privacy interests of entities affected by any operation of any UAS operating at the Test Site, is enacted or otherwise effectuated, such legislation or regulation will be applicable to the OTA and the FAA may update or amend the OTA to reflect these changes.

(4) Transmission of data from the Site Operator to the FAA or its designee must only include those data listed in Appendix B to the OTA. (Appendix B to the OTA is available as part of the SIR at *http://faaco.faa.gov*.)

The FAA anticipates that test site operator privacy practices as discussed in their privacy policies will help inform the dialogue among policymakers, privacy advocates, and the industry regarding broader questions concerning the use of UAS technologies. The privacy requirements proposed here are specifically designed for the operation of the UAS Test Sites. They are not intended to pre-determine the long-term policy and regulatory framework under which commercial UASs would operate. Rather, they aim to assure maximum transparency of privacy policies associated with UAS test site operations in order to engage all stakeholders in discussion about which privacy issues are raised by UAS operations and how law, public policy, and the industry practices should respond to those issues in the long run.

Issued in Washington, DC on February 14, 2013.

Kathryn B. Thomson,

Chief Counsel, Federal Aviation Administration.

[FR Doc. 2013–03897 Filed 2–21–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2012–0876]

RIN 1625–AA11

Regulated Navigation Area—Weymouth Fore River, Fore River Bridge Construction, Weymouth and Quincy, MA

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard is proposing to establish a regulated navigation area (RNA) on the navigable waters of Weymouth Fore River under and surrounding the Fore River Bridge (Mile 3.5) between Weymouth and Quincy, MA until December 31, 2017. This proposed rule would allow the Coast Guard to enforce speed and wake restrictions and prohibit all vessel traffic through the RNA during bridge replacement operations, both planned and unforeseen, that could pose an imminent hazard to persons and vessels operating in the area. This rule is necessary to provide for the safety of life in the regulated area during the construction of the Fore River Bridge.

DATES: Comments and related material must be received by the Coast Guard on or before April 23, 2013.

Requests for public meetings must be received by the Coast Guard on or before March 15, 2013.

ADDRESSES: You may submit comments identified by docket number USCG–2012–0876 using any one of the following methods:

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

(2) *Fax:* 202–493–2251.

(3) *Mail:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001.

(4) *Hand delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

To avoid duplication, please use only one of these four methods. See the "Public Participation and Request for Comments" portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions on this proposed rule, call or email Mr. Mark Cutter, Coast Guard Sector Boston Waterways Management Division, telephone 617–223–4000, email *Mark.E.Cutter@uscg.mil;* or Lieutenant Isaac M. Slavitt, Waterways Management Division, U.S. Coast Guard First District, (617) 223–8385. If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Table of Acronyms

COTP Captain of the Port
DHS Department of Homeland Security
FR **Federal Register**
NPRM Notice of Proposed Rulemaking
RNA Regulated navigation area

A. Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted without change to *http://www.regulations.gov* and will include any personal information you have provided.

1. Submitting Comments

If you submit a comment, please include the docket number for this rulemaking (USCG–2012–0876), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online (via *http://www.regulations.gov*) or by fax, mail, or hand delivery, but please use only one of these means. If you submit a comment online via *www.regulations.gov*, it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand deliver, or mail your comment, it will be considered as having been received by the Coast Guard when it is received at the Docket Management Facility. We recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov*, type the docket number (USCG–2012–0876) in the "SEARCH" box and click "SEARCH." Click on "Submit a Comment" on the line associated with this rulemaking.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and may change the rule based on your comments.

2. Viewing comments and documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov*, type the docket number "USCG–2012–0876" in the "SEARCH" box and click "Search." Click and Open Docket Folder on the line associated with this rulemaking. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

3. Privacy Act

Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act notice regarding our public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

4. Public meeting

We do not now plan to hold a public meeting. But you may submit a request for one on or before March 15, 2013 using one of the methods specified under **ADDRESSES**. Please explain why you believe a public meeting would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

B. Basis and Purpose

Under the Ports and Waterways Safety Act, the Coast Guard has the authority to establish RNAs in defined water areas that are hazardous or in which hazardous conditions are determined to exist. See 33 U.S.C. 1231 and Department of Homeland Security Delegation No. 0170.1.

The purpose of this proposed rulemaking is to provide for safety on the navigable waters in the regulated area.

C. Discussion of Proposed Rule

The Coast Guard's proposed rule would give the Captain of the Port Boston (COTP) the authority to establish speed and wake restrictions and to prohibit vessel traffic on this portion of the river for limited periods when necessary for the safety of vessels and workers during construction work in the channel. The Coast Guard would enforce a three knot speed limit as well as a "NO WAKE" zone and be able to close the designated area to all vessel traffic during any circumstance, planned or unforeseen, that poses an imminent threat to waterway users or construction operations in the area. Complete waterway closures would be minimized to that period absolutely necessary and made with as much advanced notice as possible. During closures, mariners could request permission from the COTP to transit through the RNA.

The proposed rule was prompted by (but is not limited to) the navigation safety situation created by construction of the new Fore River Bridge (sometimes referred to as the Washington Street Bridge) and removal of the temporary bridge. This bridge carries State Road 3A over the Weymouth Fore River from Quincy to Weymouth MA. The present temporary Fore River Bridge was built in 2003 and was designed to be a 15 year temporary bridge until a new bridge could be built. The old Fore River Bridge that was built in 1936 was

found to be deteriorated beyond the point of restoration in the 1990's. After the temporary bridge was built, the old Fore River Bridge was removed. The new Fore River Bridge will be located in the approximate location of the old Fore River Bridge. The present temporary bridge will reach the end of its useable life span in 2018 and the Massachusetts Department of Transportation (MassDOT) has contracted J.F. White-Skanska Koch to construct a new vertical replacement bridge and remove the temporary Bridge. J.F. White-Skanska Koch has begun bridge construction and is scheduled to complete the new bridge and the removal of the old bridge in 2017.

The Coast Guard has discussed this project with MASS–DOT and J.F. White-Skanska Koch to determine whether the project can be completed without channel closures and, if possible, what impact that would have on the project timeline. Through these discussions, it became clear that while the majority of construction activities during the span of this project would not require waterway closures, there are certain tasks that can only be completed in the channel and will require closing the waterway.

Specifically, this includes the placement of the lift span. The lift span is large and constructed of extremely heavy steel support beams that will be built on land, then floated by barge to the site and lifted and connected to the towers that support and operate it. The temporary bridge, suspended 55 feet above the water, must also be dismantled into small sections and lowered on to a barge below. These two processes will be complex and present many safety hazards including overhead crane operations, overhead cutting operations, potential falling debris, and barges positioned in the channel with a restricted ability to maneuver.

In an email to the U.S. Coast Guard dated September 14, 2012, J.F. White-Skanska Koch outlined three phases of operations that require in-channel work, two of which will require waterway closures. J.F. White-Skanska Koch will notify the Coast Guard as far in advance as possible if additional closures are needed.

The first proposed closure period will be for three days during the winter of 2014–2015. The purpose of this closure is to float in the new bridge lift span system by barge and install the lift span system on to the two towers that support the lift span system. The barge will take up the width of the channel, causing a closure of the channel. Once the barge is in place and the installation of the lift span system begins the barge cannot move out of the channel until the lift span has been installed.

The second proposed closure period will be two separate periods for four to six days each starting fall of 2015 and extending to winter of 2016. The purpose of this closure is to remove the steel support beams of the two temporary existing bridge spans.

D. Regulatory Analyses

We developed this proposed rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 13 of these statutes or executive orders.

1. Regulatory Planning and Review

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

The Coast Guard determined that this rulemaking would not be a significant regulatory action for the following reasons: Vessel traffic would only be restricted from the RNA for limited durations and the RNA covers only a small portion of the navigable waterways. Furthermore, entry into this RNA during a closure may be authorized by the COTP Boston or designated representative.

Advanced public notifications will also be made to local mariners through appropriate means, which may include but are not limited to the Local Notice to Mariners and Broadcast Notice to Mariners.

2. Impact on Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this proposed 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 proposed rule would not have a significant economic impact on a substantial number of small entities. This rule will affect the following entities, some of which may be small entities: the owners or operators of vessels intending to enter, transit, anchor or moor within the regulated areas during a vessel restriction period.

The RNA will not have a significant economic impact on a substantial number of small entities for the following reasons: The RNA will be of limited size and any waterway closures will be of short duration, and entry into this RNA during a closure is possible if the vessel has Coast Guard authorization. Additionally, before the effective period of a waterway closure, notifications will be made to local mariners through appropriate means.

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

3. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact Mr. Mark Cutter, Coast Guard Sector Boston Waterways Management Division, telephone 617–223–4000, email *Mark.E.Cutter@uscg.mil*. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

4. Collection of Information

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

5. Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this proposed rule under that Order and have determined that it does not have implications for federalism.

6. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the

person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places or vessels.

7. Unfunded Mandates Reform Act

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

8. Taking of Private Property

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

9. Civil Justice Reform

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

10. Protection of Children

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

11. Indian Tribal Governments

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

12. Energy Effects

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

13. Technical Standards

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

14. Environment

We have analyzed this proposed rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule involves restricting vessel movement within a regulated navigation area. This rule is categorically excluded from further review under paragraph 34(g) of Figure 2–1 of the Commandant Instruction. A preliminary environmental analysis checklist supporting this determination is available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Add § 165.T01–0876 to read as follows:

§ 165.T01–0876 Regulated Navigation Area—Weymouth Fore River, Fore River Bridge Construction, Weymouth and Quincy, MA.

(a) *Boundaries.* The following is a regulated navigation area; all navigable waters surrounding the Weymouth Fore River (Mile 3.5), between Weymouth and Quincy, MA; from surface to bottom, within the following points (NAD 83): from a line extending from 42°14′46.392″ N, 070°58′2.964″ W, thence along a line 120°T to 42°14′44.376″ N, 070°57′52.992″ W, thence south along the shoreline to 42°14′35.052″ N, 070°57′59.364″ W, thence along a line 291°T to 42°14′38.58″ N, 070°58′15.348″ W, thence north along the shoreline to the first point.

(b) *Effective Dates and Enforcement Periods.* This rule is effective and enforceable from July 1, 2013 through December 31, 2017. Periods of enforcement will normally be publicized in advance via Local Notice to Mariners or Broadcast Notice to Mariners.

(c) *Regulations.*

(1) The general regulations contained in 33 CFR 165.10, 165.11, and 165.13 apply.

(2) In accordance with the general regulations, entry into, anchoring, or movement within the RNA, during periods of enforcement, is prohibited unless authorized by the Captain of the Port Boston (COTP) or the COTP's designated representative.

(3) During periods of enforcement, entry and movement within the RNA is subject to a "Slow-No Wake" speed limit. Vessels may not produce more than a minimum wake and may not attain speeds greater than three knots unless a higher minimum speed is necessary to maintain steerageway when traveling with a strong current. In no case may the wake produced by the vessel be such that it creates a danger of injury to persons, or damage to vessels or structures of any kind.

(4) During periods of enforcement, all persons and vessels must comply with all orders and directions from the COTP or the COTP's designated representative.

(5) During periods of enforcement, upon being hailed by a Coast Guard vessel by siren, radio, flashing light or other means, the operator of the vessel must proceed as directed.

(6) Vessel operators desiring to enter or operate within the regulated area when it is closed shall contact the COTP or the designated on-scene representative via VHF channel 16 or 617–223–3201 (Sector Boston command Center) to obtain permission.

(7) Notwithstanding anything contained in this section, the Rules of the Road (33 CFR part 84—Subchapter E, inland navigational rules) are still in effect and must be strictly adhered to at all times.

Dated: February 5, 2013.

D.B. Abel,

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

[FR Doc. 2013–04030 Filed 2–21–13; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 17

RIN 2900–AO21

Criteria for a Catastrophically Disabled Determination for Purposes of Enrollment

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to amend its regulation concerning the manner in which VA determines that a veteran is catastrophically disabled for purposes of enrollment in priority group 4 for VA health care. The current regulation relies on specific codes from the International Classification of Diseases, Ninth Revision, Clinical Modification (ICD–9–CM) and Current Procedural Terminology (CPT®). We propose to state the descriptions that would identify an individual as catastrophically disabled, instead of using the corresponding ICD–9–CM and CPT® codes. The revisions would ensure that our regulation is not out of date when new versions of those codes are published. The revisions would also broaden some of the descriptions for a finding of catastrophic disability. Additionally, we would eliminate the Folstein Mini Mental State Examination (MMSE) as a criterion for determining whether a veteran meets the definition of catastrophically disabled, because we have determined that the MMSE is no longer a necessary clinical assessment tool.

DATES: Comments on the proposed rule must be received by VA on or before April 23, 2013.

ADDRESSES: Written comments may be submitted through *http://www.regulations.gov;* by mail or hand-delivery to the Director, Regulations Management (02REG), Department of Veterans Affairs, 810 Vermont Avenue NW., Room 1068, Washington, DC 20420; or by fax to (202) 273–9026. Comments should indicate that they are submitted in response to "RIN 2900–AO21, Criteria for a Catastrophically Disabled Determination for Purposes of Enrollment." Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461–4902 (this is not a toll-free number) for an appointment. In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Margaret C. Hammond, M.D., Acting Chief Patient Care Services Officer (10P4), Veterans Health Administration, Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, (202) 461–7590 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: Pursuant to 38 U.S.C. 1705, VA established eight enrollment categories (in order of priority) for veterans eligible to enroll in VA's health care system. Under 38 CFR 17.36(b)(4), "veterans who are determined to be catastrophically disabled" are to be enrolled in enrollment priority group 4. For the purposes of enrollment, § 17.36(e) defines "catastrophically disabled" as having "a permanent severely disabling injury, disorder, or disease that compromises the ability to carry out the activities of daily living to such a degree that the individual requires personal or mechanical assistance to leave home or bed or requires constant supervision to avoid physical harm to self or others." The regulation states that the definition is met if the veteran is found "to have a permanent condition specified in [38 CFR 17.36(e)(1)]" or "to meet permanently one of the conditions specified in [38 CFR 17.36(e)(2)]." Current paragraph (e)(1) identifies the covered conditions in part by assignment of particular tabular diagnosis codes from Volume 1 of the ICD–9–CM, associated supplementary codes (V Codes), tabular procedure codes from Volume 3 of ICD–9–CM, and procedure codes from the CPT®. (CPT is a trademark of the American Medical Association. CPT codes and descriptions are copyrighted by the American Medical Association. All rights reserved.) This approach will soon be outdated; the ICD–9–CM and CPT will no longer be used for disease and inpatient procedure coding after October 1, 2014, when they will be replaced by tabular diagnosis and supplementary codes from the International Classification of Diseases, Tenth Revision, Clinical Modification (ICD–10–CM) and by procedure codes from the International Classification of Diseases, Tenth Revision, Procedure Coding System (ICD–10–PCS).

Fortunately, the current regulation also lists the descriptions that classify an individual as catastrophically disabled under paragraph (e)(1). Those descriptions are the actual basis for the various assigned diagnosis codes in the regulation. We believe those descriptions listed under current paragraph (e)(1) are sufficient to classify an individual as catastrophically disabled and that it is not necessary to require the assignment of the particular listed codes. The ICD–9–CM diagnostic codes and the ICD–9–CM or CPT® procedure codes are used to represent an actual clinical finding. An examining clinician, in practice, examines the veteran and determines the veteran's level of disability based on medical criteria or performs surgical procedures that are not dependent on the assignment of a particular code number. Once the medical criteria are met, the physician can match them to an appropriate code. In other words, the description of the veteran's medical condition—and not a particular code number—forms the basis for a determination of catastrophic disability.

It is fair to say that the new tabular diagnosis and supplementary codes from the ICD–10–CM and procedure codes from ICD–10–PCS will continue to be updated in future years to ensure accuracy of the codes. As a result, VA would need to update this regulation solely to reflect changes in those references. This is administratively burdensome, particularly when inclusion of such information is not necessary as we explained above. We therefore propose to eliminate the references to the ICD–9–CM and to the CPT® in current § 17.36(e)(1). Current § 17.36(e)(1) states that a veteran is catastrophically disabled if she or he has: "Quadriplegia and quadriparesis (ICD–9–CM Code 344.0x: 344.00, 344.01, 344.02, 344.03, 344.04, 3.44.09), paraplegia (ICD–9–CM Code 344.1), blindness (ICD–9–CM Code 369.4), persistent vegetative state (ICD–9–CM Code 780.03), or a condition resulting from two of the following procedures (ICD–9–CM Code 84.x or associated V Codes when available or Current Procedural Terminology (CPT) Codes) provided the two procedures were not on the same limb." As already discussed, we would revise paragraph (e)(1) to eliminate references to specific codes. The descriptions of quadriplegia

and quadriparesis, paraplegia, and persistent vegetative state would be unchanged. For this same reason, we would also eliminate the references to the ICD–9–CM and to the CPT codes from current § 17.36(e)(1)(i) through (e)(1)(xviii).

In addition, we would replace the word "blindness" with "legal blindness defined as visual impairment of 20/200 or less visual acuity in the better seeing eye with corrective lenses, or a visual field restriction of 20 degrees or less in the better seeing eye with corrective lenses." The term "blindness" in and of itself is ambiguous. The regulation associates "blindness" with ICD–9–CM Code 369.4, which applies to "blindness not otherwise specified according to [United States] definition." It also "excludes legal blindness with specification of impairment level (369.01–369.08, 369.11–369.14, 369.21–369.22)." This is not an accurate description of who we believe should be considered catastrophically disabled for purposes of enrollment. We believe that the more specific criterion of legal blindness in the proposed definition is more consistent with most accepted definitions of legal blindness, including the definition used by the Social Security Administration (SSA) for determining whether an individual is legally blind for purposes of SSA benefits. See 20 CFR 416.981. We believe that visual acuity greater than 20/200 or greater than 20 degrees in visual field restriction does not sufficiently compromise a veteran's "ability to carry out the activities of daily living."

Current § 17.36(e)(1)(i) lists one of the relevant descriptions for a determination of catastrophic disability as: "Amputation through hand (ICD–9–CM Code 84.03 or V Code V49.63 or CPT® Code 25927)." We propose, instead, to refer to: "Amputation, detachment, or re-amputation of or through the hand." Similarly, current § 17.36(e)(1)(ii) lists one of the relevant descriptions for a determination of catastrophic disability as: "Disarticulation of wrist (ICD–9–CM Code 84.04 or V Code V49.64 or CPT® Code 25920)." We propose, instead, to refer to: "Disarticulation, detachment, or re-amputation of or through the wrist." Again, these descriptions are listed under the codes currently listed in the regulation, and therefore there will be no substantive change to coverage of these descriptions under paragraph (e)(1). We would add detachment and re-amputation where appropriate in § 17.36(e)(1)(i) through (xvi) because we believe that these descriptions have similar clinical effects on a veteran's "ability to carry out the activities of daily living," as required by the definition of catastrophically disabled in current paragraph (e). Again, "catastrophically disabled means to have a permanent severely disabling injury, disorder, or disease that compromises the ability to carry out the activities of daily living to such a degree that the individual requires personal or mechanical assistance to leave home or bed or requires constant supervision to avoid physical harm to self or others." 38 CFR 17.36(e). Detachment or re-amputation of certain limbs or body parts listed under paragraph (e)(1) would likewise meet this definition of catastrophically disabled and so should be expressly included. It should also be noted that the ICD–9–CM or CPT® codes and the ICD–10–CM or ICD–10–PCS codes have different descriptions for the same medical condition. ICD–10–PCS also introduces new terminology. For example, the term "detachment" is not used in the ICD–9–CM codes, however, it is used in the ICD–10–PCS codes. Likewise, the term "amputation" is used in the ICD–9–CM codes, but it is not used in the ICD–10–PCS codes. Where applicable, we propose to use both terms so that descriptions can be readily identified regardless of what code system is used.

Current § 17.36(e)(1)(iii) lists one of the relevant descriptions for a determination of catastrophic disability as: "(iii) Amputation through forearm (ICD–9–CM Code 84.05 or V Code V49.65 or CPT® Codes 25900, 25905)." We propose, instead, to refer to: "(iii) Amputation, detachment, or re-amputation of the forearm at or through the radius and ulna." We would add "through the radius and ulna" because this specificity is used in the CPT® codes currently referenced in the regulation and, more importantly, removes any uncertainty about the amputation procedure being referred to in the proposed regulation. This specificity is currently provided by referencing the code number. Similarly, we would add anatomical specificity to proposed paragraphs (e)(1)(iv) through (viii) and (xi) through (xvi) to eliminate any confusion about the procedures being referred to in the proposed regulation once the code numbers are removed.

Current § 17.36(e)(1)(iv) lists one of the relevant descriptions for a determination of catastrophic disability as: "(iv) Disarticulation of forearm (ICD–9–CM Code 84.05 or V Code V49.66 or CPT® Codes 25900, 25905)." We would remove this criterion because it is redundant with paragraph (e)(1)(iii).

We propose to remove current paragraph (e)(2)(ii). Under current paragraph (e)(2)(ii), an individual must have a score of 10 or lower using the MMSE. However, an individual with a score of 10 or lower on the MMSE would always be found permanently dependent in at least 3 Activities of Daily Living with a rating of 1 using the Katz scale; or score 2 or lower on at least 4 of the 13 motor items using the Functional Independence Measure; or score 30 or lower using the Global Assessment of Functioning, which are covered by current paragraphs (e)(2)(i), (e)(2)(iii), and (e)(2)(iv). Use of the MMSE for purposes of paragraph (e)(2) is therefore redundant.

Current § 17.36(e)(1)(xv) lists one of the relevant descriptions for a determination of catastrophic disability as: "(xv) Disarticulation of knee (ICD–9–CM Code 84.16 or V Code V49.76 or CPT® Code 27598)." It should be noted that ICD–9–CM Code 84.16 refers to disarticulation of knee; V49.76 refers to status of amputation above knee; CPT® Code 27598 refers to disarticulation at knee; ICD–10–PCS Codes 0Y6F0ZZ and 0Y6G0ZZ refer to detachment of knee. We would combine these codes into one description in proposed § 17.36(e)(1)(xiii), amputation or detachment of the lower leg at or through the knee. We would, therefore, not list disarticulation of the knee as a separate description.

Effect of Rulemaking

The Code of Federal Regulations, as proposed to be revised by this proposed rulemaking, would represent the exclusive legal authority on this subject. No contrary rules or procedures are authorized. All VA guidance would be read to conform with this proposed rulemaking if possible or, if not possible, such guidance would be superseded by this rulemaking.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) defines a "significant

regulatory action," which requires review by the Office of Management and Budget (OMB), as "any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order."

The economic, interagency, budgetary, legal, and policy implications of this regulatory action have been examined and it has been determined not to be a significant regulatory action under Executive Order 12866.

Paperwork Reduction Act

This proposed rule contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521).

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any given year. This proposed rule would have no such effect on State, local, and tribal governments, or on the private sector.

Regulatory Flexibility Act

The Secretary hereby certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. This proposed rule would directly affect only individuals and would not directly affect any small entities. Therefore, pursuant to 5 U.S.C. 605(b), this rulemaking is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Catalog of Federal Domestic Assistance Numbers

The Catalog of Federal Domestic Assistance numbers and titles for the programs affected by this document are 64.007, Blind Rehabilitation Centers; 64.008, Veterans Domiciliary Care; 64.009, Veterans Medical Care Benefits; 64.010, Veterans Nursing Home Care; 64.011, Veterans Dental Care; 64.012, Veterans Prescription Service; 64.013, Veterans Prosthetic Appliances; 64.014, Veterans State Domiciliary Care; 64.015, Veterans State Nursing Home Care; 64.018, Sharing Specialized Medical Resources; 64.019, Veterans Rehabilitation Alcohol and Drug Dependence; and 64.022, Veterans Home Based Primary Care.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. John R. Gingrich, Chief of Staff, Department of Veterans Affairs, approved this document on February 12, 2013, for publication.

List of Subjects in 38 CFR Part 17

Administrative practice and procedure, Alcohol abuse, Alcoholism, Day care, Dental health, Drug abuse, Health care, Health facilities, Health professions, Health records, Homeless, Medical and dental schools, Medical devices, Medical research, Mental health programs, Nursing homes, Veterans.

Dated: February 19, 2013.

Robert C. McFetridge,

Director, Regulation Policy and Management, Office of the General Counsel, Department of Veterans Affairs.

For the reasons stated in the preamble, the Department of Veterans Affairs proposes to amend 38 CFR part 17 as follows:

PART 17—MEDICAL

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 38 U.S.C. 501, and as noted in specific sections.

■ 2. Amend § 17.36 as follows:

■ a. Revise paragraph (e)(1).

■ b. Remove paragraph (e)(2)(ii).

■ c. Redesignate paragraphs (e)(2)(iii) and (iv) as new paragraphs (e)(2)(ii) and (iii), respectively.

The revision reads as follows:

§ 17.36 Enrollment—provision of hospital and outpatient care to veterans.

* * * * *

(e) * * *

(1) Quadriplegia and quadriparesis; paraplegia; legal blindness defined as visual impairment of 20/200 or less visual acuity in the better seeing eye with corrective lenses, or a visual field restriction of 20 degrees or less in the better seeing eye with corrective lenses; persistent vegetative state; or a condition resulting from two of the following procedures, provided the two procedures were not on the same limb:

(i) Amputation, detachment, or re-amputation of or through the hand;

(ii) Disarticulation, detachment, or re-amputation of or through the wrist;

(iii) Amputation, detachment, or re-amputation of the forearm at or through the radius and ulna;

(iv) Amputation, detachment, or disarticulation of the forearm at or through the elbow;

(v) Amputation, detachment, or re-amputation of the arm at or through the humerus;

(vi) Disarticulation or detachment of the of the arm at or through the shoulder;

(vii) Interthoracoscapular (forequarter) amputation or detachment;

(viii) Amputation, detachment, or re-amputation of the leg at or through the tibia and fibula;

(ix) Amputation or detachment of or through the great toe;

(x) Amputation or detachment of or through the foot;

(xi) Disarticulation or detachment of the foot at or through the ankle;

(xii) Amputation or detachment of the foot at or through malleoli of the tibia and fibula;

(xiii) Amputation or detachment of the lower leg at or through the knee;

(xiv) Amputation, detachment, or re-amputation of the leg at or through the femur;

(xv) Disarticulation or detachment of the leg at or through the hip; and

(xvi) Interpelviaabdominal (hindquarter) amputation or detachment.

* * * * *

[FR Doc. 2013–04134 Filed 2–21–13; 8:45 am]

BILLING CODE 8320–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2012–0961; FRL–9782–7]

Approval and Promulgation of Air Quality Implementation Plans; Charlotte, Raleigh/Durham and Winston-Salem Carbon Monoxide Limited Maintenance Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve a limited maintenance plan update submitted by the State of North Carolina, through the North Carolina Department of Environment and Natural Resources, on August 2, 2012. The limited maintenance plan update is for the Charlotte, Raleigh/Durham and Winston-Salem carbon monoxide (CO) maintenance areas. Specifically, the State submitted a limited maintenance plan update for CO, showing continued attainment of the 8-hour CO National Ambient Air Quality Standard for the Charlotte, Raleigh/Durham and Winston-Salem Areas. The 8-hour CO NAAQS is 9 parts per million. EPA is proposing to approve the limited maintenance plan update because the State has demonstrated that it is consistent with the Clean Air Act and EPA's policy for limited maintenance plans.

DATES: Written comments must be received on or before March 25, 2013.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R04–OAR–2012–0961, by one of the following methods:

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

2. *Email: R4-RDS@epa.gov.*

3. *Fax:* (404) 562–9019.

4. *Mail:* EPA–R04–OAR–2012–0961, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960.

5. *Hand Delivery or Courier:* Lynorae Benjamin, Chief, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding federal holidays.

Please see the direct final rule which is located in the Rules section of this **Federal Register** for detailed instructions on how to submit comments.

FOR FURTHER INFORMATION CONTACT: Richard Wong, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. The telephone number is (404) 562–8726. Mr. Wong can also be reached via electronic mail at *wong.richard@epa.gov.*

SUPPLEMENTARY INFORMATION: For additional information see the direct final rule which is published in the Rules Section of this **Federal Register**. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this rule, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period on this document. Any parties interested in commenting on this document should do so at this time.

Dated: February 11, 2013.

A. Stanley Meiburg,

Acting Regional Administrator, Region 4.

[FR Doc. 2013–04012 Filed 2–21–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2013–0094; FRL–9783–2]

Revision of Air Quality Implementation Plan; California; Placer County Air Pollution Control District and Feather River Air Quality Management District; Stationary Source Permits

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing a limited approval and limited disapproval of permitting rules submitted by California as a revision to the Placer County Air Pollution Control District (PCAPCD) and Feather River Air Quality Management District (FRAQMD) portion of the California State Implementation Plan (SIP). These rules were adopted by the PCAPCD and FRAQMD to regulate the construction and modification of stationary sources of air pollution within each District. EPA is proposing to approve these SIP revisions based on the Agency's conclusion that the rules are consistent with applicable Clean Air Act (CAA) requirements, policies and guidance. Final approval of these rules would make the rules federally enforceable and correct program deficiencies identified in a previous EPA rulemaking (76 FR 44809, July 27, 2011).

DATES: Any comments must arrive by March 25, 2013.

ADDRESSES: Submit comments, identified by docket number EPA–R09–OAR–2013–0094, by one of the following methods:

1. *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions.

2. *Email: R9airpermits@epa.gov.*

3. *Mail or deliver:* Gerardo Rios (Air–3), U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901.

Instructions: All comments will be included in the public docket without change and may be made available online at *http://www.regulations.gov*, including any personal information provided, unless the comment includes Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider CBI or otherwise protected should be clearly identified as such and should not be submitted through *http://www.regulations.gov* or email. *http://www.regulations.gov* is an "anonymous access" system, and EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send email directly to EPA, your email address will be automatically captured and included as part of the public comment. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: EPA has established a docket for this action under EPA–R09–OAR–2013–0094. Generally, documents in the docket for this action are available electronically at *http://www.regulations.gov* or in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents are listed at *http://*

www.regulations.gov, some information may be publicly available only at the hard copy location (e.g., copyrighted material, large maps, multi-volume reports), and some may not be publicly available in either location (e.g., CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Laura Yannayon, EPA Region IX, (415) 972–3534, *yannayon.laura@epa.gov*.

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

Table of Contents

I. The State's Submittal

A. What rules did the State submit?

Table 1 lists the rules addressed by this proposal, including the dates they were adopted by the local air agency and submitted by the California Air Resources Board (CARB).

TABLE 1—SUBMITTED RULES

Local agency	Rule No.	Rule title	Amended	Submitted
PCAPCD	502	New Source Review	10/31/11	11/18/11
FRAQMD	10.1	New Source Review	2/7/12	9/21/12

CARB's SIP submittal includes evidence of public notice and adoption of these regulations. We find that the submittals for PCAPCD and FRAQMD Rules 502 and 10.1, respectively, meet the completeness criteria in 40 CFR part 51, appendix V, which must be met before formal EPA review.

B. Are there other versions of these rules?

EPA approved a previous version of Rules 502 and 10.1, into the SIP on July 27, 2011 (76 FR 44809).[1]

C. What is the purpose of the submitted rules?

Section 110(a)(2) of the CAA requires that each SIP include, among other things, a preconstruction permit program to provide for regulation of the construction and modification of stationary sources within the areas covered by the plan as necessary to assure that the National Ambient Air Quality Standards (NAAQS) are achieved, including a permit program as required in parts C and D of title I of the CAA. For areas designated as nonattainment for one or more NAAQS, the SIP must include preconstruction permit requirements for new or modified major stationary sources of such nonattainment pollutant(s), commonly referred to as "Nonattainment New Source Review" or "NSR." CAA 172(c)(5).

The Sacramento Valley Air Basin and Mountain Counties Air Basin portions of Placer County are currently designated and classified as severe nonattainment for the 1997 and 2008 8-hour ozone NAAQS. The Sacramento Valley Air Basin portion of Placer County is currently designated nonattainment for the 2006 24-hour $PM_{2.5}$ NAAQS. *See* 40 CFR 81.305.

The FRAQMD contains all or parts of the Sacramento Valley (Sutter County portion), the Yuba City-Marysville (all of Sutter County and a portion of Yuba County) and the Sutter Buttes (Sutter County portion) Air Basins. The Sacramento Valley portion is currently designated and classified as severe nonattainment for the 1997 and 2008 8-hour ozone NAAQS and designated nonattainment for the 2006 24-hour $PM_{2.5}$ NAAQS. The Sutter Buttes portion is currently designated and classified as moderate nonattainment for the 1997 8-hour ozone NAAQS and designated nonattainment for the 2006 24-hour $PM_{2.5}$ NAAQS. The Yuba City-Marysville portion is currently designated nonattainment for the 2006 24-hour $PM_{2.5}$ NAAQS. *See* 40 CFR 81.305.

Therefore, California is required under part D of title I of the Act to adopt and implement a SIP-approved NSR program for the nonattainment portions of each District that applies, at a minimum, to new or modified major stationary sources of the following pollutants: volatile organic compounds (VOCs), nitrogen oxides (NO_X), particular matter of 2.5 microns or less ($PM_{2.5}$) and sulfur oxides (SO_X).[2]

Rule 502 (New Source Review) and Rule 10.1 (New Source Review) implement the NSR requirements under part D of title I of the CAA for new or modified major stationary sources of these nonattainment pollutants within each District. The PCAPCD and FRAQMD amended Rules 502 and 10.1, respectively, to correct program deficiencies identified by EPA on July 27, 2011 (76 FR 44809).

II. EPA's Evaluation and Proposed Action

A. How is EPA evaluating the rules?

EPA has reviewed the submitted permitting rules for compliance with the CAA's general requirements for SIPs in CAA section 110(a)(2), EPA's regulations for stationary source permit programs in 40 CFR part 51, subpart I ("Review of New Sources and Modifications"), and the CAA requirements for SIP revisions in CAA section 110(l).[3] As explained below, EPA is proposing a limited approval and limited disapproval for each of the submitted rules.

B. Do the rules meet the evaluation criteria?

With respect to procedures, CAA sections 110(a) and 110(l) require that revisions to a SIP be adopted by the State after reasonable notice and public hearing. EPA has promulgated specific procedural requirements for SIP revisions in 40 CFR part 51, subpart F. These requirements include publication of notices, by prominent advertisement

[1] In our previous action, we stated that Rule 502, New Source Review would replace existing SIP approved Rule 508, New Source Review. However, in our final action, we did not include the proper regulatory text to remove Rule 508 from the SIP. As part of this action, we will include the necessary regulatory text to remove Rule 508 from the SIP, since it has already been replaced by Rule 502.

[2] VOCs and NO_X are subject to NSR as precursors to ozone, and NO_X and SO_X are subject to NSR as precursors to $PM_{2.5}$ in both Districts. *See* 40 CFR 51.165(a)(1)(xxxvii)(C).

[3] Section 110(l) of the CAA requires SIP revisions to be subject to reasonable notice and public hearing prior to adoption and submittal by states to EPA and prohibits EPA from approving any SIP revision that would interfere with any applicable requirement concerning attainment and reasonable further progress or any other applicable requirement of the Act.

in the relevant geographic area, of a public hearing on the proposed revisions, a public comment period of at least 30 days, and an opportunity for a public hearing.

Based on our review of the public process documentation included in the PCAPCD's November 18, 2011 and FRAQMD's September 21, 2012 rule submittals, we find that the State has provided sufficient evidence of public notice and opportunity for comment and public hearings prior to adoption and submittal of these rules to EPA.

With respect to substantive requirements, EPA has reviewed the submitted rules in accordance with the CAA and regulatory requirements that apply to NSR permit programs under part D of title I of the Act. Based on our evaluation of these rules, except for the deficiencies noted in the TSDs and summarized in the Proposed Action section of this notice, we are proposing to find that the rules meet the CAA and regulatory requirements for NSR permit programs in part D of title I of the Act and EPA's NSR implementing regulations in 40 CFR section 51.165 for new or modified major stationary sources proposing to locate within each District. Final approval of Rule 502 and Rule 10.1 would correct all deficiencies in PCAPCD's and FRAQMD's permit programs identified in our July 27, 2011 final rule. See 76 FR 44809. The Technical Support Documents (TSD) for this action contains a more detailed discussion of our evaluation.

C. Proposed Action and Request for Public Comment

For the reasons given above, under CAA section 110(k)(3) and 301(a), we are proposing a limited approval and limited disapproval of Rule 502 and Rule 10.1 because, although each rule would strengthen the SIP and they meet the applicable requirements for SIPs in general, they contain certain deficiencies related to NSR SIPs in particular that prevent our full approval. The primary deficiencies for Rule 502 pertain to an inadequate definition of the term "Regulated NSR Pollutant" and a missing justification for the stated $PM_{2.5}$ interpollutant offset ratios. The primary deficiencies for Rule 10.1 pertain to an inadequate definition of the term "Regulated NSR Pollutant" and certain language in new Sections B.4 and B.5 which exempts pollutants which are designated nonattainment when EPA approves a redesignation to attainment for that pollutant. As worded, the provision is too broad, in that it exempts such pollutants from all the requirements of Section E of the rule, rather than just those provisions which apply to major sources of nonattainment pollutants. Please refer to the TSD for this action for additional information. The deficiencies can be remedied by each District by revising their rule to update the definition of "Regulated Air Pollutant" and correcting the rule language cited above. If EPA finalizes the limited approval and limited disapproval action, as proposed, then a sanctions clock, and EPA's obligation to promulgate a Federal implementation plan, would be triggered because the revisions to the District rule for which a limited approval and limited disapproval is proposed is required under the 8-hour ozone standard and 24-hr $PM_{2.5}$ standard.

We will accept comments from the public on this proposal for the next 30 days.

III. Statutory and Executive Order Reviews

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

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

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

List of Subjects in 40 CFR Part 52

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

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

Dated: February 12, 2013.

Jared Blumenfeld,

Regional Administrator, Region IX.

[FR Doc. 2013–04000 Filed 2–21–13; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 54

[WC Docket No. 10–90; DA 13–193]

Wireline Competition Bureau Seeks Updates and Corrections to TelcoMaster Table for Connect America Cost Model

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Wireline Competition Bureau seeks comment to confirm the attribution of price cap carrier operating company wire centers to particular holding companies for purposes of Connect America Phase II implementation.

DATES: Comments are due on or before March 14, 2013. If you anticipate that you will be submitting comments, but

find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: You may submit comments, identified by WC Docket No. 10–90, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Federal Communications Commission's Web Site: http://fjallfoss.fcc.gov/ecfs2/*. Follow the instructions for submitting comments.
- *People with Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by email: *FCC504@fcc.gov* or phone: (202) 418–0530 or TTY: (202) 418–0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Heidi Lankau, Wireline Competition Bureau at (202) 418–2876 or TTY (202) 418–0484.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Wireline Competition Bureau's Public Notice in WC Docket No. 10–90; DA 13–193 released February 12, 2013. The complete text of the Public Notice is available for inspection and copying during normal business hours in the FCC Reference Information Center, Portals II, 445 12th Street SW., Room CY–A257, Washington, DC 20554. These documents may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc. (BCPI), 445 12th Street SW., Room CY–B402, Washington, DC 20554, telephone (800) 378–3160 or (202) 863–2893, facsimile (202) 863–2898, or via the Internet at *http://www.bcpiweb.com*.

1. The Wireline Competition Bureau (Bureau) hereby seeks comment to confirm the attribution of price cap carrier operating company wire centers to particular holding companies for purposes of Connect America Phase II implementation.

2. The *USF/ICC Transformation Order*, 76 FR 73830, November 29, 2011, adopted a framework for providing ongoing support to areas served by price cap carriers, including areas where broadband-capable infrastructure does not exist, known as Connect America Phase II. As a part of this framework, the Commission directed the Bureau to develop a forward-looking model to "estimate the cost of a modern voice and broadband capable network." The Bureau has sought public input on the design of the forward-looking cost model, and on January 17, 2013 the Bureau announced the release of Connect America Cost Model version two (CACM v2.0) that allows Commission staff and interested parties to calculate costs based on a series of inputs and assumptions for Connect America Phase II implementation.

3. Today, the Bureau solicits public input on an updated version of the TelcoMaster table that will be used in a subsequent version of CACM. CACM reflects the assigned serving wire center boundaries and subsequent state totals based on the boundary designations for each serving wire center. The TelcoMaster table provides the holding company name associated with the serving wire centers for the entire nation and lists the following data:

- Service Area
- State
- Operating Company Number
- Company Name
- Study Area Code
- Study Area Name
- Rate-of-Return or Price Cap—Connect America-Specific

4. We seek comment on whether any adjustments should be made to the TelcoMaster table data for the price cap carrier wire centers. Specifically, does the TelcoMaster table identify the correct holding company ownership of the listed price cap carrier wire centers?

5. There are also several Alaskan wire centers where the holding company is unknown and the company name is listed as "UnderStudyforCorrection." Which holding companies should be associated with these wire centers? To the extent carriers or other parties identify any errors or omissions in the TelcoMaster table data, please provide correct information.

6. Parties who have signed the Third Supplemental Protective Order may view the TelcoMaster table by accessing the model at *http://www.fcc.gov/encyclopedia/caf-phase-ii-models*, and visiting the Posted Data Sets.

I. Procedural Matters

A. Initial Regulatory Flexibility Act Analysis

7. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Bureau prepared an Initial Regulatory Flexibility Analysis (IRFA), included as part of the *Model Design PN*, 77 FR 38804, June 29, 2012, of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in these Public Notices and the information posted online in the Virtual Workshops. We have reviewed the IRFA and have determined that is does not need to be supplemented. We invite parties to file comments on the IRFA in light of this additional notice.

B. Paperwork Reduction Act

8. This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

C. Filing Requirements

9. *Comments and Replies.* Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415 and 1.419, interested parties may file comments on or before the date indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121, May 1, 1998.

- *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS: *http://fjallfoss.fcc.gov/ecfs2/*.
- *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th Street SW., Room TW–A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of *before* entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street SW., Washington DC 20554.

10. *People with Disabilities.* To request materials in accessible formats for people with disabilities (braille,

large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty).

In addition, we request that one copy of each pleading be sent to each of the following:

(1) Heidi Lankau, Telecommunications Access Policy Division, Wireline Competition Bureau, 445 12th Street SW., Room 5–B511, Washington, DC 20554; email: *Heidi.Lankau@fcc.gov*;

(2) Charles Tyler, Telecommunications Access Policy Division, Wireline Competition Bureau, 445 12th Street SW., Room 5–A452, Washington, DC 20554; email: *Charles.Tyler@fcc.gov*.

11. *Availability of Documents.* Comments, reply comments, and *ex parte* submissions will be publicly available online via ECFS. These documents will also be available for public inspection during regular business hours in the FCC Reference Information Center, which is located in Room CY–A257 at FCC Headquarters, 445 12th Street SW., Washington, DC 20554. The Reference Information Center is open to the public Monday through Thursday from 8:00 a.m. to 4:30 p.m. and Friday from 8:00 a.m. to 11:30 a.m.

12. The proceeding this Notice initiates shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules. Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

Federal Communications Commission.

Kimberly A. Scardino,

Acting Division Chief, Telecommunications Access Policy Division, Wireline Competition Bureau.

[FR Doc. 2013–03936 Filed 2–21–13; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 54

[WC Docket Nos. 10–90 and 05–337; DA 13–156]

Wireline Competition Bureau Seeks Additional Comment In Connect America Cost Model Virtual Workshop

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Wireline Competition Bureau seeks public input on additional questions relating to modeling voice capability and Annual Charge Factors.

DATES: Comments are due on or before March 14, 2013 and reply comments are due on or before March 25, 2013. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: You may submit comments, identified by WC Docket Nos. 10–90 and 05–337, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Federal Communications Commission's Web Site: http://fjallfoss.fcc.gov/ecfs2/.* Follow the instructions for submitting comments.
- *Virtual Workshop:* In addition to the usual methods for filing electronic comments, the Commission is allowing comments, reply comments, and ex parte comments in this proceeding to be filed by posting comments at *http://www.fcc.gov/blog/wcb-cost-model-virtual-workshop-2012.*
- *People with Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by email: *FCC504@fcc.gov* or phone: (202) 418–0530 or TTY: (202) 418–0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Katie King, Wireline Competition Bureau at (202) 418–7491 or TTY (202) 418–0484.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Wireline Competition Bureau's Public Notice in WC Docket Nos. 10–90, 05–337; DA 13–156 released February 5, 2013, as well as information posted online in the Wireline Competition Bureau's Virtual Workshop. The complete text of the Public Notice is available for inspection and copying during normal business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. These documents may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc. (BCPI), 445 12th Street SW., Room CY–B402, Washington, DC 20554, telephone (800) 378–3160 or (202) 863–2893, facsimile (202) 863–2898, or via the Internet at *http://www.bcpiweb.com.* In addition, the Virtual Workshop may be accessed via the Internet at *http://www.fcc.gov/blog/wcb-cost-model-virtual-workshop-2012.*

1. On Tuesday, October 9, 2012, the Wireline Competition Bureau (Bureau) announced the commencement of the Connect America Cost Model (CACM) virtual workshop to solicit input and facilitate discussion on topics related to the development and adoption of the forward-looking cost model for Connect America Phase II.

2. In addition, the Bureau has continued to develop CACM. The Bureau notes that while CACM shares common components with the CQBAT model, there are a number of differences between the CQBAT model and versions 1 and 2 of CACM. Specifically, version 1 of CACM uses updated input data, adds voice costs assuming carrier grade VoIP technology, enhances the Brownfield capability of the model, and includes fixed wireless broadband

providers using State Broadband Initiative data and a more accurate reflection of which areas are served by price cap carriers. Similarly, version 2 improves on version 1 by using updated residential, business, coverage, network topology, and study area data, as well as increasing reporting capabilities, modifying the hosting and processing environment, and expanding documentation and support files.

3. To date, parties have commented on 18 different topics in the virtual workshop, including whether any modifications to functionalities, capabilities, or data sets, not included in the versions of CACM released to date, should be addressed in or added to subsequent versions of the model.

4. The Bureau now seeks public input on additional questions relating to modeling voice capability and Annual Charge Factors (ACFs). The follow-up questions, which appear in the comment sections of the "Voice Capability" and "Determining the Annualized Cost of Capital Investments" topics, ask:

- Is it reasonable to model voice capability based on a per subscriber basis? Are there any alternative ways to model the cost?
- Are the specific inputs that CACM version two uses for the cost of voice capability reasonable? If proposing an alternative method, what specific sources and values should be used?
- Is the specific approach in CACM version two of calculating ACFs by taking into account the economic life of the assets using Gompertz-Makeham curves reasonable?
- Are the ACFs used in CACM version two reasonable?

5. Commenters should address these new questions focusing specifically on CACM version two. We encourage commenters to submit responses in the virtual workshop.

6. The Bureau may continue to add discussion topics or follow-up questions, which will be announced by Public Notice. Parties can participate in the virtual workshop by visiting the Connect America Fund Web page, *http://www.fcc.gov/encyclopedia/connecting-america*, and following the link to the virtual workshop.

7. The virtual workshop will take place over a period of weeks sufficient to allow public input on all material issues. Discussion of additional topics or follow-up questions may start and end at specific times that will be announced in advance. Comments from the virtual workshop will be included in the official public record of this proceeding. The Bureau will not rely on anonymous comments posted during the workshop in reaching decisions regarding the model. Participants should be aware that identifying information from parties that post material in the virtual workshop will be publicly available for inspection upon request, even though such information may not be posted in the workshop forums.

I. Procedural Matters

A. Initial Regulatory Flexibility Act Analysis

8. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Bureau prepared an Initial Regulatory Flexibility Analysis (IRFA), included as part of the *Model Design PN*, 77 FR 38804, June 29, 2012, of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in these Public Notices and the information posted online in the Virtual Workshops. We have reviewed the IRFA and have determined that is does not need to be supplemented.

B. Paperwork Reduction Act

9. This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

C. Filing Requirements

10. *Comments and Replies.* Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415 and 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121, May 1, 1998.

- *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS: *http://fjallfoss.fcc.gov/ecfs2/*.
- *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th Street SW., Room TW–A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of *before* entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street SW., Washington DC 20554.

11. *Virtual Workshop.* In addition to the usual methods for filing electronic comments, the Commission is allowing comments in this proceeding to be filed by posting comments at *http://www.fcc.gov/blog/urch-cost-model-virtual-workshop-2012*. Persons wishing to examine the record in this proceeding are encouraged to examine the record on ECFS and the Virtual Workshop. Although Virtual Workshop commenters may choose to provide identifying information or may comment anonymously, anonymous comments will not be part of the record in this proceeding and accordingly will not be relied on by the Commission in reaching its conclusions in this rulemaking. The Commission will not rely on anonymous postings in reaching conclusions in this matter because of the difficulty in verifying the accuracy of information in anonymous postings. Should posters provide identifying information, they should be aware that although such information will not be posted on the blog, it will be publicly available for inspection upon request.

12. *People with Disabilities.* To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty).

13. *Availability of Documents.* Comments, reply comments, and *ex parte* submissions will be publicly available online via ECFS. These documents will also be available for public inspection during regular business hours in the FCC Reference Information Center, which is located in

Room CY–A257 at FCC Headquarters, 445 12th Street SW., Washington, DC 20554. The Reference Information Center is open to the public Monday through Thursday from 8:00 a.m. to 4:30 p.m. and Friday from 8:00 a.m. to 11:30 a.m.

Federal Communications Commission.

Kimberly A. Scardino,

Acting Division Chief, Telecommunications Access Policy Division, Wireline Competition Bureau.

[FR Doc. 2013–03890 Filed 2–21–13; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 600 and 635

[Docket No. 120627194–3097–01]

RIN 0648–BC31

Highly Migratory Species; 2006 Consolidated Atlantic Highly Migratory Species Fishery Management Plan; Amendment 8

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

ACTION: Proposed rule; request for comments.

SUMMARY: This proposed rule to implement Amendment 8 to the 2006 Consolidated Atlantic Highly Migratory Species (HMS) Fishery Management Plan (FMP) addresses North Atlantic swordfish commercial fishery management measures. In recent years, the North Atlantic swordfish stock has experienced significant growth due to ongoing domestic and international conservation measures designed to reduce mortality, protect juvenile swordfish, monitor international trade, reduce bycatch, and improve data collection. The most recent stock assessment, conducted in 2009, indicates that the North Atlantic swordfish population is fully rebuilt ("not overfished") and overfishing is no longer occurring. Despite ongoing efforts to revitalize the U.S. North Atlantic swordfish fishery, domestic catches have remained below the U.S. North Atlantic swordfish quota allocated by the International Commission for the Conservation of Atlantic Tunas (ICCAT). Fishing gears such as rod and reel, handline, harpoon, bandit gear, and green-stick are highly selective when compared to other gears, have low bycatch interaction rates with protected species and marine mammals, and may have low post-release mortality rates on non-target species and undersized swordfish. However, the current swordfish Handgear permit is a limited access permit, and is often difficult or expensive to obtain. Based upon the rebuilt status of North Atlantic swordfish, renewed interest in commercial handgears that are lower in bycatch and bycatch mortality, and the availability of swordfish quota, through Amendment 8 to the 2006 Consolidated HMS FMP NFMS proposes to provide additional commercial fishing opportunities for persons using swordfish handgears.

DATES: Written comments will be accepted until April 23, 2013.

ADDRESSES: You may submit comments on this proposed rule to implement Amendment 8 to the 2006 Consolidated Atlantic HMS FMP, identified by NOAA–NMFS–2013–0026, by any of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *www.regulations.gov/#!docketDetail;D=NOAA–NMFS–2013–0026*, click the "Comment Now!" icon, complete the required fields, and enter or attach your comments.
- *Mail:* Submit written comments to Highly Migratory Species Management Division, NMFS Office of Sustainable Fisheries, 1315 East-West Highway, Silver Spring, MD 20910. Please mark on the outside of the envelope "Comments on Amendment 8 to the HMS FMP."
- *Fax:* 301–713–1917; Attn: Michael Clark or Jennifer Cudney

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and generally will be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (e.g., name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. Do not submit confidential business information, or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, or Adobe PDF file formats only.

NMFS will hold five public hearings on this proposed rule with two being conducted on March 11, 2013, and the others on March 14, 2013, March 28, 2013, and April 10, 2013. The public hearings will be held in St. Petersburg, FL; Silver Spring, MD; Gloucester, MA; Fort Lauderdale, FL; and via a public conference call and webinar. NMFS will also hold a conference call and webinar on this proposed rule to consult with the HMS Advisory Panel (HMS AP) on April 18, 2013. These public hearings may be combined with public hearings for other relevant highly migratory species management actions. For specific locations, dates and times see the **SUPPLEMENTARY INFORMATION** section of this document.

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this proposed rule may be submitted to Michael Clark, Highly Migratory Species Management Division, NMFS Office of Sustainable Fisheries, 1315 East-West Highway, Silver Spring, MD 20910, and by email to *OIRA_submission@omb.eop.gov* or fax to (202) 395–7285

FOR FURTHER INFORMATION CONTACT: Rick Pearson at 727–824–5399; Michael Clark or Jennifer Cudney at 301–427–8503; or Steve Durkee at 202–670–6637.

SUPPLEMENTARY INFORMATION: Atlantic tunas and swordfish are managed under the dual authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) and the Atlantic Tunas Convention Act (ATCA). Under the Magnuson-Stevens Act, NMFS must, consistent with the National Standards, prevent overfishing while achieving, on a continuing basis, the optimum yield (OY) from each fishery and rebuild overfished fisheries. Under ATCA, the Secretary of Commerce (Secretary) shall promulgate regulations as may be necessary and appropriate to carry out recommendations by ICCAT. The authority to issue regulations under the Magnuson-Stevens Act and ATCA has been delegated from the Secretary to the Assistant Administrator for Fisheries, NOAA (AA). On May 28, 1999, NMFS published in the **Federal Register** (64 FR 29090) final regulations, effective July 1, 1999, implementing the Fishery Management Plan for Atlantic Tunas, Swordfish, and Sharks (1999 FMP). On October 2, 2006, NMFS published in the **Federal Register** (71 FR 58058) final regulations, effective November 1, 2006, implementing the 2006 Consolidated Highly Migratory Species (HMS) FMP, which details the management measures for Atlantic HMS fisheries, including the North Atlantic swordfish handgear fishery.

Background

A brief summary of the background of this proposed action is provided below. A more complete summary of Atlantic HMS management measures can be found in the 2006 Consolidated Atlantic HMS FMP, in the annual HMS Stock Assessment and Fishery Evaluation (SAFE) Reports, and online at *http://www.nmfs.noaa.gov/sfa/hms/*.

On June 1, 2009 (74 FR 26174), NMFS published an Advance Notice of Proposed Rulemaking (ANPR) to inform the public about and request comments concerning actions that NMFS was considering to increase opportunities for U.S. fisheries to more fully harvest the U.S. North Atlantic swordfish quota. One of the items contained in the ANPR was the potential establishment of a new commercial permit to harvest swordfish using handgear. The comment period for the ANPR ended on August 31, 2009. In addition to issuing an ANPR, NMFS publicly discussed a commercial swordfish handgear permit concept during HMS Advisory Panel (AP) meetings from 2009–2012. A pre-draft of Amendment 8, including specific management alternatives, was presented to the HMS AP and made publicly available online in March of 2012. NMFS received numerous comments both in support of, and opposed to, the concept of a new commercial swordfish handgear permit, and many suggestions for how a new permit should be administered. All of the comments received on the 2009 ANPR, the 2009–2012 HMS AP meetings, and the pre-draft to Amendment 8, have been considered in the preparation of this proposed rule. Based upon those comments and discussions, NMFS has decided not to further analyze a swordfish body tagging program that was preliminarily discussed in the pre-draft to Amendment 8 due to concerns about its effectiveness at reliably identifying commercially-harvested swordfish and, in particular, preventing the illegal sale of recreationally-harvested fish.

NMFS anticipates that the proposed action would have a low level of potential environmental impacts due to the relatively low swordfish retention limits (zero to six fish) that are being considered for a new permit and by restricting the authorized gears to traditional handgears. Additionally, the potential impacts on protected and non-target species and essential fish habitat (EFH) are expected to be minimal due to the selective nature and low bycatch associated with the handgears being considered in this proposed rule. Therefore, after considering the potential environmental effects of the proposed measures and substantive comments received through the ANPR, HMS AP meetings, and the pre-draft for Amendment 8, NMFS has preliminarily determined that an environmental assessment would provide an appropriate level of review for Amendment 8, and that preparing an environmental impact statement is not necessary.

The 1999 FMP established a limited access permit program for vessels in the commercial Atlantic swordfish, shark, and tuna longline fisheries to keep harvesting capacity consistent with the available quotas and to reduce latent effort while preventing overcapitalization. As a result, since 1999, persons interested in entering the commercial swordfish fishery have had to obtain a limited access vessel permit from an existing permit holder leaving the fishery. Two of the three types of swordfish limited access permits (the directed and incidental permits) also require vessel owners to obtain a shark limited access permit and an Atlantic tunas Longline category permit to fish for, or retain, North Atlantic swordfish. In addition to the Directed and Incidental swordfish permits, which allow the use of longline and most handgears, there is also a separate swordfish Handgear limited access permit, which restricts gear use to most handgears (i.e., rod and reel, handline, harpoon, buoy gear, and bandit gear, but not speargun gear). Since 2005, the number of swordfish Handgear limited access permits that have been renewed or transferred has ranged from 75–92 per year. Because no new commercial swordfish vessel permits have been issued since 1999, many of these limited access permits have substantially increased in value and can be difficult to obtain, thereby presenting a barrier to entry into the commercial swordfish handgear fishery.

In recent years, the North Atlantic swordfish stock has experienced significant growth in biomass due largely to ongoing domestic and international conservation measures designed to reduce mortality, protect juvenile swordfish, monitor international trade, reduce bycatch, and improve data collection. Several strong year classes in the late 1990s and an overall reduction in catch since 1987 have supported the recovery of the North Atlantic swordfish stock. The most recent stock assessment for North Atlantic swordfish was conducted in 2009 by ICCAT's Standing Committee on Research and Statistics (SCRS), using data through 2008. The SCRS found that fishing mortality had been below F_{MSY} (the fishing mortality that produces maximum sustainable yield) since 2005. The trend for estimated relative biomass showed a consistent increase since 2000 and was at or above B_{MSY} (1.05, range = 0.94–1.24). The SCRS indicated that there was a greater than 50-percent probability that the stock is above B_{MSY} (sustainable biomass), and thus ICCAT's rebuilding objective had been achieved. In 2009, NMFS declared the North Atlantic swordfish population fully rebuilt ("not overfished") with no overfishing occurring, based upon the SCRS stock assessment.

NMFS believes that there is high interest in providing additional access to the commercial swordfish fishery. Before, and since, the North Atlantic swordfish stock was declared fully rebuilt in 2009, NMFS has made significant efforts to restructure its fisheries and adjust regulatory constraints on its swordfish fishermen while not increasing the incidental catch of sea turtles, marine mammals, or other protected and non-target species. As a result of these "revitalization" efforts and the increased availability of fish due to stock rebuilding, U.S. swordfish catches have increased by nearly 40 percent since 2006. However, domestic catches have continued to remain below the North Atlantic swordfish quota recommended for the United States by ICCAT. There has been a recent re-emergence of interest in using handgear, including rod and reel, handline, harpoon, green-stick, and bandit gear, to fish commercially for swordfish. These gears are tended and, when compared to other gears, are highly selective, have low bycatch interaction rates with protected species and marine mammals, and may have low post-release mortality rates on non-target species and undersized swordfish. The potential expansion of the commercial swordfish handgear fishery is consistent with making steady progress toward fully harvesting the United States' domestic swordfish quota allocation while continuing to minimize the bycatch of protected species, marine mammals, non-target species, and undersized swordfish.

As the swordfish stock has been declared rebuilt and more fish have recruited to larger sizes, rod and reel, handline, harpoon, and bandit gear have increasingly become more economically viable for commercial swordfish fishing over a larger geographic range. Additionally, these gears have the benefit of low bycatch and bycatch mortality rates. Additionally, there is now adequate swordfish quota available to provide additional access to the fishery. From 2007–2011, on average,

the United States caught approximately 70 percent of its baseline quota allocation of North Atlantic swordfish. From 2006–2011, the ICCAT recommendation allowed the United States to carry over up to half of its baseline quota of uncaught swordfish to the following year. This carryover was reduced to a 25-percent rollover allowance starting in 2012. In 2011, the most recent year for which complete data are available, the United States caught approximately 74 percent of its baseline swordfish quota and approximately 50 percent of its adjusted quota. For these reasons, NMFS is proposing increasing commercial access to the swordfish resource by establishing a new commercial swordfish handgear permit, and through modifications to existing permits. NMFS recognizes that newly implemented swordfish management measures and recent fishery behavior in 2012 and beyond could affect the amount of quota available for the new and modified commercial handgear permits. During the first half of 2012, changes to the ICCAT quota rollover allowance, a new minimum size requirement (77 FR 45273; July 31, 2012), and a continuing increase in landings have occurred. Therefore, NMFS will continue to carefully monitor the swordfish fishery to determine if, and how, these recent changes in the fishery could affect the establishment of new and modified commercial swordfish handgear permits.

The primary purpose of the proposed action is to provide additional opportunities for U.S. fishermen to harvest swordfish using selective gears that result in lower bycatch rates, given the rebuilt status of swordfish and their resulting increased availability. The goal is for the United States to more fully utilize its domestic swordfish quota allocation, which is based upon the ICCAT recommendation. A secondary purpose of the proposed rule is to implement regulatory adjustments to update a telephone number and remove outdated references in the HMS regulations at 50 CFR part 635. Consistent with the 2006 Consolidated HMS FMP objectives, the Magnuson-Stevens Act, and other relevant Federal laws, the specific objectives for this action are to:

- Implement conservation and management measures that prevent overfishing while achieving, on a continuing basis, the optimum yield (OY) from the U.S. North Atlantic swordfish fishery;
- Provide increased opportunities for the United States to more fully utilize its ICCAT-recommended domestic swordfish quota allocation;
- Implement a North Atlantic swordfish management system to make fleet capacity commensurate with resource status to improve both economic efficiency and biological conservation, and provide additional access for traditional fishing gears;
- Provide commercial swordfish fishing opportunities for U.S. fishermen within established quota levels using selective fishing gears that have minimal bycatch and maximize the survival of any released species;
- Enact management measures to establish new and modified commercial vessel permits that would allow for a limited number of swordfish to be caught on rod and reel, handline, harpoon, bandit gear, or green-stick gear and sold commercially;
- Examine and implement regionally tailored North Atlantic swordfish management strategies, as appropriate; and
- Improve the Agency's capability to monitor and sustainably manage the North Atlantic swordfish fishery.

The proposed action would implement new and modified commercial vessel permits that allow fishermen to retain and sell a limited number of swordfish caught on rod and reel, handline, harpoon, bandit gear, and green-stick. Specifically this action proposes to implement: (1) New and modified swordfish vessel permits and authorized gears; and, (2) swordfish retention limits associated with the new and modified permits. Current swordfish reporting requirements, including the submission of monthly logbooks if a vessel is selected for reporting, would be applicable to any new or modified vessel permit. The alternatives that have been analyzed represent a range of options that NMFS has considered to allow for a limited number of swordfish (zero to six) caught on handgear (rod & reel, handline, harpoon, bandit gear, and green-stick) to be retained and sold commercially, as well as to provide NMFS with an improved ability to sustainably manage the North Atlantic swordfish fishery.

With respect to vessel permitting and authorized gears, NMFS considered three alternatives and four sub-alternatives, ranging from a no-action alternative, which maintains the current swordfish permit structure, to creating a new and/or modified commercial swordfish handgear permit. Alternative 1.1 would maintain the current swordfish limited access permit structure and would not create a new and/or modified commercial swordfish permit. Alternative 1.2, a preferred alternative, would establish a new open access commercial swordfish permit and modify existing open access HMS permits to allow for the commercial retention of swordfish. Current swordfish reporting requirements, including the submission of monthly loghooks if a vessel is selected for reporting, would apply to all of the sub-alternatives for Alternative 1.2. Sub-alternative 1.2.1 would modify the existing open access Atlantic Tunas General category permit to allow for the commercial retention of swordfish using handgears. Sub-alternative 1.2.2 would modify the existing open-access Atlantic tunas Harpoon category permit to allow for the commercial retention of swordfish using harpoon. Sub-alternative 1.2.3, a preferred alternative, would modify the existing HMS Charter/Headboat permit holder requirements to allow fishing under open access swordfish commercial regulations (with rod and reel and handline only) when fishing commercially (i.e., not on a for-hire trip with paying passengers). Sub-Alternative 1.2.4, a preferred alternative, would create a new, separate open-access commercial swordfish permit to allow landings of swordfish using handgears. Alternative 1.3 would establish a new limited-access commercial swordfish permit that authorizes using rod and reel, handline, bandit gear, harpoon, and green-stick gear. Current swordfish reporting requirements, including the submission of monthly logbooks if a vessel is selected for reporting, would also apply under Alternative 1.3.

The preferred alternative and sub-alternatives for permitting (1.2, 1.2.3, and 1.2.4) are anticipated to have minor to neutral ecological impacts in the short and long-term. However, these alternatives could result in a minor increase in rod and reel, handline, harpoon, bandit gear, and green-stick gear commercial fishing effort if previously inactive fishermen obtain the new and modified permits and begin fishing. Preferred Alternatives 1.2.3 and 1.2.4 could also cause a minor increase in swordfish discards and discard mortality if fishing effort increases in areas with large concentrations of swordfish. Although the preferred alternative would establish a new open-access commercial swordfish permit, NMFS expects that most new permit applicants would be current recreational swordfish fishery participants with HMS Angling category permits, resulting in a shift of effort from the recreational fishery to the commercial fishery. Some current Atlantic Tunas

General category and Harpoon category permit holders could also obtain the new permit, and current HMS Charter/Headboat permit holders' existing permits would be modified to allow them to fish commercially for swordfish with rod and reel and handline on non for-hire trips. These permit holders would likely participate in the commercial swordfish fishery to supplement their primary fishing activities (i.e., tuna fishing and charter fishing). All new commercial swordfish fishery participants would be restricted to using only authorized handgears and would be required to comply with applicable regional retention limits (ranging from zero to six swordfish per vessel per trip). Thus, NMFS anticipates only a minor increase in overall swordfish fishery effort because of the low proposed retention limits and the authorization of handgears exclusively. Overall, NMFS anticipates that direct and indirect, short- and long-term ecological impacts on swordfish, non-target species, ESA-protected species, essential fish habitat, and marine mammals from handgear and green-stick gear would be minor to neutral, primarily because these gears are closely tended and rarely interact with benthic habitat.

Swordfish handgear is very selective because it is deployed at times, depths, and locations where swordfish, as opposed to other coastal species, are typically encountered. Hooks and bait are designed to target large pelagics exclusively. Thus, bycatch in the fishery is very low and bycatch mortality is presumably low as well, with most non-target species released immediately. Any landings associated with the new or modified permits would be reported through weekly dealer reports to ensure that they remain within the ICCAT-recommended U.S. swordfish quota, which has already been analyzed.

The effects of most handgear fishing on ESA-listed species was most recently analyzed under a Biological Opinion (BiOp) issued on June 14, 2001, entitled "Reinitiation of Consultation on the Atlantic Highly Migratory Species Fishery Management Plan and its Associated Fisheries" (*http://www.nmfs.noaa.gov/sfa/hms/HMS060801.pdf*). In the 2001 BiOp, NMFS indicated that it anticipates that, because the potential for take in these fisheries (i.e., harpoon/handgear fisheries, hook and line, etc.) was low, the continued operation of these fisheries would result in documented takes of no more than three ESA-listed sea turtles, of any species, in combination, per calendar year. Additionally, the Atlantic HMS hook and line/harpoon fishery and green-stick fishery are classified as Category III under the MMPA (76 FR 73912, November 29, 2011), meaning that these fisheries have a remote likelihood of incidental mortality or serious injury to marine mammals. Also, as described in Amendment 1 to the Consolidated HMS FMP (74 FR 28018, June 12, 2009), minimal impacts on EFH are anticipated because handgears are deployed in the water column and rarely interact with ocean bottom substrate. Some handgears such as rod and reel and bandit gear may have the ability to contact the ocean bottom, depending upon the method selected to fish; however, this contact was determined to not produce significant effects on EFH, including benthic habitats. Overall, the swordfish handgear fishery has negligible adverse physical impacts on mid-water environments, the substrate, and most sensitive benthic habitats. For this reason, Alternative 1.2 is anticipated to have neutral short- and long-term ecological impacts in the Atlantic. Under Alternative 1.2, NMFS considers four sub-alternatives. Ecological impacts on target, non-target, and ESA-protected species, marine mammals, and EFH would be the same as Alternative 1.2 under each of the four sub-alternatives.

The preferred alternatives and sub-alternatives for permitting (1.2, 1.2.3, and 1.2.4) are expected to have direct economic benefits in the short- and long-term through increased opportunities to commercially fish for swordfish, and through increased gross revenues from swordfish sales for fishermen that obtain the new permit, or for HMS Charter/Headboat permit holders that could fish commercially for swordfish on non for-hire trips. Indirect minor beneficial economic impacts are expected in the short- and long-term for seafood dealers, marinas, bait, tackle, and ice suppliers, restaurants, and similar establishments which could experience a minor increase in sales due to increased participation in the commercial swordfish fishery. There may be potential short- and long-term negative economic impacts on existing swordfish limited access permit holders due to a reduction in permit values and ex-vessel swordfish prices, but any such impacts are expected to be minor due to the low retention limits being established for the new and modified permits. Swordfish retention limits for existing limited access permit holders are much higher or, in some cases, unlimited. NMFS has proposed low retention limits for the new and modified permits, in part to help maintain the value of existing limited access permits.

NMFS considered three main alternatives and five sub-alternatives with respect to swordfish retention limits applicable to the new and modified permits. Alternative 2.1 would establish a fishery-wide zero-to-six swordfish retention limit range for the new and modified permits, and codify a specific fishery-wide retention limit within that range. The upper limit, for this alternative and all others, is equal to the current maximum swordfish retention limit for the open access HMS Charter/Headboat permit with six paying passengers onboard. Alternative 2.2 would establish a fishery-wide zero-to-six swordfish retention limit range for the new and modified permits, and codify a specific fishery-wide retention limit within that range with in-season adjustment authority to change the limit based on pre-established criteria (e.g., dealer reports, landing trends, available quota, variations in seasonal distribution, abundance, or migration patterns, etc.).

Alternative 2.3, a preferred alternative, would establish a zero-to-six swordfish retention limit range for the new and modified permits, and establish swordfish management regions with specific retention limits with authority to adjust the regional retention limits in-season based on pre-established criteria (e.g., dealer reports, landing trends, available quota, variations in seasonal distribution, abundance, or migration patterns, etc.). For all of the sub-alternatives under Alternative 2.3, NMFS is proposing to require that vessels may not possess, retain, or land any more swordfish than is specified for the region in which the vessel is located. For swordfish captured outside of the regions, vessels may not land any more swordfish than is specified for the region in which the swordfish are landed. This restriction will aid in the effectiveness and enforcement of the proposed retention limits by ensuring that vessels comply with the retention limits associated with the region in which they are located and in which the fish are landed.

Alternative 2.3 has five sub-alternatives, which consider different geographic options for the swordfish management regions.

Sub-alternative 2.3.1 would base the regions upon existing major United States domestic HMS fishing areas as reported to ICCAT (Northeast Distant area (NED), Northeast Coastal area (NEC), Mid-Atlantic Bight area (MAB), South Atlantic Bight (SAB), Florida East Coast (FEC), Gulf of Mexico (GOM),

Caribbean (CAR), and the Sargasso Sea (SAR)).

Sub-alternative 2.3.2, a preferred alternative, would establish larger regions by merging the major domestic regions discussed in Alternative 2.3.1 into three larger regions (Northwest Atlantic, Gulf of Mexico, and Caribbean) and then adding a separate Florida Swordfish Management Area. NMFS is proposing to codify a retention limit of one swordfish per vessel per trip in the Florida Swordfish Management Area, two swordfish per vessel per trip in the Caribbean region (consistent with the swordfish retention limit for the U.S. Caribbean established in Amendment 4 to the 2006 Consolidated HMS FMP), and three swordfish per vessel per trip in the Northwest Atlantic and Gulf of Mexico regions. These regional retention limits fall within the range of zero to six swordfish discussed for all of the alternatives and, if selected, could be adjusted, either upward or downward, in the future through in-season adjustment procedures similar to those currently codified for bluefin tuna at § 635.27 (a)(8).

A one-fish initial default limit is proposed for the Florida Swordfish Management Area to provide for the orderly establishment of a small-scale commercial swordfish handgear fishery off Florida's east coast while potentially limiting the number of vessels participating and any associated ecological impacts. A two-fish initial default limit is proposed for the Caribbean region to be consistent with the limit recently implemented for the Caribbean Commercial Small Boat permit. The small-scale commercial HMS fishery in the Caribbean consists primarily of small vessels that are limited by hold capacity, crew size, trip length, fishing gears, and market infrastructure. A higher initial default limit of three swordfish per vessel per trip is being proposed for the Northwest Atlantic and the Gulf of Mexico to compensate for higher operating costs in these regions because a greater distance is required to travel to productive fishing grounds. A three-fish retention limit is in the middle of the range being considered for all of the alternatives. NMFS believes it is an appropriate default limit for these regions, based upon the size and hold capacity of most vessels participating in the swordfish handgear fishery. For many small- to medium-sized vessels, three swordfish would be considered a successful trip. It could become difficult to properly handle and store more than three large swordfish aboard a smaller vessel to ensure that the product maintains its quality and safety. The initial proposed default retention limits are purposefully conservative for the proposed implementation of a new open-access swordfish permit. As additional fishery information becomes available, they could be reconsidered in the future. For these reasons, NMFS proposes initial default limits of one, two, and three swordfish for the Florida Swordfish Management Area, Caribbean region, and the Northwest Atlantic and Gulf of Mexico regions, respectively. There are three different sub-alternatives that consider a potential Florida Swordfish Management Area (under sub-alternative 2.3.2).

Sub-alternative 2.3.2.1, a preferred sub-alternative, would establish a Florida Swordfish Management Area in the Atlantic Ocean area seaward of the inner boundary of the U.S. EEZ from a point intersecting the inner boundary of the U.S. EEZ at 31°00′ N. lat. near Jekyll Island, GA, and proceeding due east to connect by straight lines the following coordinates in the order stated: 31°00′ N. lat., 78°00′ W. long.; 28°17′10″ N. lat., 79°11′24″ W. long.; then proceeding along the outer boundary of the EEZ to the intersection of the EEZ with 24°00′ N. lat.; then proceeding due west to 24°00′ N. lat., 82°0′ W. long, then proceeding due north to intersect the inner boundary of the U.S. EEZ at 82°0′ W. long. near Key West, FL. This management area also includes the area west of Monroe County, Florida, from 82°0′ W. long., 25°48′ N. lat.; then proceeding clockwise east along the inner boundary of the U.S. EEZ to a point located at 82°0′ W. long., 24°46′ N. lat.; and then proceeding due north to 82°0′ W. long., 25°48′ N. lat.

Sub-alternative 2.3.2.2 would establish a Florida Swordfish Management Area in Federal waters extending from the Georgia-Florida border to Federal waters off the westernmost tip of Key West, FL (81°48′ W longitude).

Sub-alternative 2.3.2.3 would establish a Florida Swordfish Management Area in Federal waters adjacent to the Florida counties of St. Lucie, Martin, Palm Beach, Broward, Dade and Monroe (including the Federal waters of Florida Bay).

The creation of a special swordfish management area off Florida is expected to have positive ecological impacts. The east coast of Florida, and in particular the Florida Straits, contains one of the richest concentrations of marine life in the Atlantic Ocean. A 2003 United Nations Food and Agriculture Organization study stated that the Florida Straits had the highest biodiversity in the Atlantic Ocean, and is home to 25 endemic species. A special swordfish management area with a lower retention limit is being considered due to its unique importance as juvenile swordfish habitat and as a migratory corridor. This area was closed to pelagic longline gear in 2001 to reduce the bycatch of several species. It provides important habitat for many highly migratory species and protected species, including swordfish, marlin, sailfish, sea turtles and marine mammals. A separate Florida Swordfish Management Area would help to conserve juvenile and adult swordfish in and near the Florida Straits and help to reduce gear conflicts that could potentially occur due to the large number of fishermen in, and in proximity to, the area. Comments received from the public and the HMS Advisory Panel indicated a concern about increased fishing mortality in this area. For these reasons, NMFS is proposing a low default initial retention limit of one swordfish per vessel per trip in this area. This low retention limit would provide for the orderly establishment of a small-scale commercial swordfish handgear fishery off Florida's east coast while potentially limiting the number of vessels participating and any associated ecological impacts, including swordfish discards, discard mortality, and the incidental catch of non-target and protected species.

Preferred sub-alternative 2.3.2.1 would establish swordfish management regions in the Northwest Atlantic, Gulf of Mexico, Caribbean, and a Florida Swordfish Management Area encompassing the East Florida Coast Pelagic Longline Closed Area and Federal waters adjacent to Monroe County, FL (including Florida Bay). This preferred sub-alternative would also establish a zero-to-six swordfish retention limit range within each region for the new and modified permits and codify specific regional retention limits with authority to adjust the regional limits in-season based on pre-established criteria. Establishing unique swordfish regions would allow NMFS to tailor management practices geographically to the specific biological and other factors affecting a particular region, and would likely have positive direct and indirect ecological benefits. Providing authority to adjust the regional swordfish retention limits in-season (from zero to six fish) using regulatory procedures similar to those codified for bluefin tuna at § 635.27 (a)(8) would provide NMFS with the ability to quickly modify the retention limit, so any potential adverse ecological impacts (e.g., higher than

anticipated landings) that are detected could be addressed expeditiously, as necessary.

The six-fish limit is equivalent to the current maximum swordfish retention limit for the open-access HMS Charter/Headboat permit with six paying passengers onboard. If the regional retention limit is set at zero, no change in fishing effort or ecological impacts is anticipated. If the regional limit is set at any level above zero, sub-alternative 2.3.2.1 could provide for the additional harvest of swordfish—a species that is fully rebuilt and of which the U.S. quota has not been fully caught in recent years. It could cause a minor increase in rod and reel, handline, harpoon, bandit gear, and green-stick commercial fishing effort if previously inactive fishermen obtain the new and modified permits and begin fishing. Also, this sub-alternative could cause a minor increase in swordfish discards and discard mortality if fishing effort increases substantially in areas with large concentrations of juvenile swordfish. For these reasons, NMFS is proposing low initial default swordfish retention limits for the new and modified permits, including a one-fish limit in the Florida Swordfish Management Area.

Overall, NMFS anticipates only neutral to minor ecological impacts on ESA-listed species, non-target species, marine mammals, and undersized swordfish associated with all of the preferred alternatives and sub-alternatives. As indicated in the June 14, 2001 BiOp issued for the Atlantic HMS handgear fishery, since the potential for takes in these fisheries (i.e., harpoon/handgear fisheries, hook and line, etc.) is low, NMFS anticipates that the continued operation of these fisheries would result in documented takes of no more than three ESA-listed sea turtles, of any species, in combination, per calendar year. Additionally, the Atlantic swordfish and pelagic hook and line/harpoon fisheries are classified as Category III under the Marine Mammal Protection Act (MMPA), meaning that these fisheries have a remote likelihood of incidental mortality or serious injury to marine mammals (see MMPA List of Fisheries for 2012, 76 FR 73912, November 29, 2011). Finally, minimal impacts on EFH are anticipated from the preferred alternatives because handgears rarely interact with the ocean bottom substrate or benthic habitat.

Establishing regions under preferred alternative 2.3.2 would allow NMFS to address region-specific management concerns. Providing NMFS with in-season adjustment authority would allow for timely adjustments to regional retention limits; however, it could provide less certainty than Alternative 2.1 to fishermen and law enforcement regarding changes to the swordfish retention limit. Conversely, positive economic benefits could occur if the retention limit were adjusted upward based upon information indicating that ample quota was available, or upon other pre-established criteria. Generally, the impacts associated with a region would depend upon its size, the number of fishery participants in the region, and the swordfish retention limits established for the region.

Establishing a retention limit range of zero to six swordfish is anticipated to provide a seasonal, or secondary, fishery for most participants. For example, current Atlantic tunas General category permit holders could fish for swordfish overnight while targeting bluefin tuna at other times. Similarly, they could harpoon a swordfish if one were spotted during a tuna trip. A zero-to-six fish retention limit range is not likely to facilitate a full-time, year-round fishery, with the possible exception of some fishery participants in south Florida, where swordfish can be available on a year-round basis. However, it would provide some fishermen with the ability to commercially land swordfish, thereby resulting in positive economic benefits if the limit were set above zero. If a regional retention limit is set at zero, no change in socio-economic impacts is anticipated. The Agency received some comments, particularly in response to the 2009 ANPR, raising concerns about the potential for over-capitalization to occur in the swordfish fishery, potentially leading to depressed market prices and other adverse socio-economic impacts. Increasing the number of swordfish permits and the amount of swordfish in the market could potentially reduce the value of existing swordfish limited access permits and ex-vessel swordfish prices. However, any potential negative impacts on current swordfish limited access permit holders are expected to be mitigated by establishing lower retention limits for the new open-access permit than those that exist for swordfish limited access permits.

For preferred sub-alternative 2.3.2.1, NMFS proposes an initial swordfish retention limit of one per vessel per trip for the Florida Swordfish Management Area, two swordfish per vessel per trip for the U.S. Caribbean, and three swordfish per vessel per trip for the Northwest Atlantic and Gulf of Mexico. These limits fall within the range discussed under Alternative 2.3 above, and could be modified in the future using in-season adjustment procedures similar to those codified at § 635.27(a)(8). Under all of the retention limit alternatives, NMFS anticipates direct and indirect positive economic benefits if the limits are set above zero.

Administrative Adjustments

There are two regulatory administrative adjustments in this proposed rule. NMFS is proposing to remove a portion of the last sentence in § 635.4(j)(3), which contains outdated language referencing dates in 2008. Also, NMFS proposes to update a telephone number for the HMS Division Chief in the definitions at § 635.2. These administrative adjustments would have no impact on the public or the environment.

Request for Comments

Comments on this proposed rule may be submitted via *http://www.regulations.gov*, mail, or fax. Comments may also be submitted at a public hearing (see Public Hearings and Special Accommodations below). These comments will be used to assist in the development and finalization of Amendment 8 to the Consolidated HMS FMP. NMFS solicits comments on this proposed rule by April 23, 2013 (see **DATES** and **ADDRESSES**).

NMFS requests specific public comment on the following issues:

(1) What are the appropriate boundaries for the regions and for the Florida Swordfish Management Area?

(2) What are appropriate swordfish retention limits under the new and modified permits? For all vessels issued the new and modified permits under preferred sub-alternative 2.3.2, should NMFS implement initial retention limits of one swordfish per vessel per trip for the Florida Swordfish Management Area, two swordfish per vessel per trip for the U.S. Caribbean, and three swordfish per vessel per trip limit for the Northwest Atlantic and Gulf of Mexico regions?

(3) Are the criteria for inseason adjustment of the regional retention limits proposed at § 635.24 (b)(4)(iv) sufficiently inclusive?

(4) Is the proposed requirement to comply with the regional swordfish retention limits both at sea and upon landing at § 635.24(b)(4)(ii) clear and sufficient for the purposes of this rulemaking?

Public Hearings and Special Accommodations

NMFS will hold public hearings in Massachusetts, Florida (2), Maryland, and hold a public conference call and webinar to provide the public with an opportunity to comment on the proposed management measures. NMFS

will also hold a public conference call and webinar to consult with the HMS AP. NMFS expects to consult with the HMS AP on April 18, 2013, as the scheduled public comment period does not overlap with an HMS Advisory Panel meeting. These public hearings may be combined with public hearings for other relevant highly migratory species management actions. These public hearings will be physically accessible to people with disabilities.

TABLE 1—TIME AND LOCATIONS OF UPCOMING PUBLIC HEARINGS AND PHONE CONFERENCES

Date	Time	Meeting locations	Address
March 11, 2013	1:00–3:00 p.m.	Public Conference Call & Webinar.	To participate in conference call, call: (800) 369–8439 Passcode: 69854. To participate in webinar, RSVP at: *https://www1.gotomeeting.com/register/958913664* A confirmation email with webinar log-in information will be sent after RSVP is registered.
March 11, 2013	5:00–7:00 p.m.	NMFS Southeast Regional Office (SERO) 1st Floor Conference Room.	263 13th Avenue South, St. Petersburg, FL 33701. Phone: 727–824–5301.
March 14, 2013	1:00–4:00 p.m.	NMFS Headquarters Science Center Auditorium.	1301 East-West Highway, Silver Spring, MD 20910.
March 28, 2013	5:30–7:30 p.m.	NMFS Northeast Regional Office (NERO) 1st Floor Conference Room.	55 Great Republic Drive Gloucester, MA 01930. Phone: 978–281–9300.
April 10, 2013	5:00–7:00 p.m.	Broward County Main Library Auditorium.	100 South Andrews Ave., Fort Lauderdale, Florida 33301. Phone: 954–357–7544.
April 18, 2013	2:30–4:30 p.m.	HMS Advisory Panel Consultation Call.	To participate in conference call, call: (800) 369–8439, Passcode: 69854 To participate in webinar, RSVP at: *https://www1.gotomeeting.com/register/592965928* A confirmation email with webinar log-in information will be sent after RSVP is registered.

Requests for sign language interpretation or other auxiliary aids should be directed to Rick Pearson at (727) 824–5399 at least 7 days prior to the workshop date. The public is reminded that NMFS expects participants at public hearings, council meetings, and phone conferences to conduct themselves appropriately. At the beginning of each meeting, a representative of NMFS will explain the ground rules (e.g., alcohol is prohibited from the meeting room; attendees will be called to give their comments in the order in which they registered to speak; each attendee will have an equal amount of time to speak; attendees may not interrupt one another; etc.). The NMFS representative will structure the meeting so that all attending members of the public will be able to comment, if they so choose, regardless of the controversial nature of the subject(s). Attendees are expected to respect the ground rules, and those that do not will be asked to leave the meeting.

Classification

The NMFS Assistant Administrator has determined that the proposed rule is consistent with the 2006 Consolidated Atlantic HMS FMP, Amendment 8 and other amendments to that FMP, the Magnuson-Stevens Act, ATCA, and other applicable law, subject to further consideration after public comment.

NMFS prepared an environmental assessment that discusses the impact on the environment as a result of this rule. In this proposed action, NMFS is considering options to provide additional commercial swordfish fishing opportunities using selective fishing gears that have minimal bycatch and few discards to allow the United States to more fully utilize its domestic swordfish quota allocation. A copy of the environmental assessment is available from NMFS (see **ADDRESSES**).

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

An initial regulatory flexibility analysis (IRFA) was prepared, as required by section 603 of the Regulatory Flexibility Act (RFA). The IRFA describes the economic impact this proposed rule, if adopted, would have on small entities. A description of the action, why it is being considered, and the legal basis for this action are contained at the beginning of this section in the preamble and in the **SUMMARY** section of the preamble. A summary of the analysis follows. A copy of this analysis is available from NMFS (see **ADDRESSES**).

The proposed action is being considered to provide additional opportunities to harvest swordfish using selective gears that have low rates of bycatch, given the rebuilt status of the swordfish stock and resulting increased availability of swordfish and availability of U.S. quota. The goal is for the United States to more fully utilize its domestic swordfish quota allocation, which is based upon the recommendation of ICCAT, and provide economic benefits to U.S. fishermen with minimal adverse environmental impacts.

Section 603(b)(2) of the RFA requires that we describe the action's objectives. This proposed rulemaking is intended to implement conservation and management measures that prevent overfishing while achieving, on a continuing basis, the optimum yield (OY) from the U.S. North Atlantic swordfish fishery; provide increased opportunities to more fully utilize the ICCAT-recommended domestic North Atlantic swordfish quota allocation; implement North Atlantic swordfish management measures to make fleet capacity commensurate with resource status; provide additional commercial fishing opportunities for U.S. fishermen using selective fishing gears that have minimal bycatch rates and maximize the survival of any released species; provide additional access for traditional swordfish fishing gears; implement regionally-tailored North Atlantic swordfish management strategies, as appropriate; and, improve the Agency's ability to monitor and sustainably manage the North Atlantic swordfish fishery. The proposed action is consistent with the Magnuson-Stevens Act and the 2006 Consolidated HMS FMP and its amendments to implement recommendations of ICCAT pursuant to ATCA and to achieve domestic management objectives under the Magnuson-Stevens Act.

Section 603(b)(3) of the RFA requires Federal agencies to provide an estimate of the number of small entities to which the rule would apply. The current U.S. North Atlantic commercial swordfish fishery is comprised of 334 fishing vessel owners who hold either a limited access swordfish Handgear permit, or a limited access directed or incidental swordfish permit, and the related industries of seafood dealers and processors, fishing gear manufacturers and distributors, marinas, bait houses, restaurants, and other equipment suppliers. Specifically, the proposed rule would apply to small-scale handgear vessel owners that fish in the Atlantic Ocean, including the Gulf of Mexico and the U.S. Caribbean, that do not currently hold a commercial swordfish limited access permit. Using the number of current Atlantic tunas General category permit holders as a proxy, NMFS estimates that the universe of fishermen who might purchase and fish under a new commercial swordfish permit would be approximately 4,084 individuals, with some potential shift of fishermen currently permitted in the recreational HMS Angling category. These calculations are explained in greater detail below. This estimate is based upon the number of persons currently issued an Atlantic tunas General category permit, which is the commercial permit most similar to the ones being considered in the proposed action. NMFS used the following thresholds from the Small Business Administration (SBA) size standards to determine if an entity regulated under this action would be considered a small entity: average annual receipts less than $4.0 million for fish-harvesting, average annual receipts less than $6.5 million for charter/party boats, 100 or fewer employees for wholesale dealers, or 500 or fewer employees for seafood processors. Based on these thresholds, NMFS determined that all HMS permit holders are small entities.

This proposed rule contains new reporting, recordkeeping, or other compliance requirements. The proposed Federal open-access commercial swordfish handgear permit would allow NMFS to collect additional data regarding participants in the swordfish fishery and landings through Federal dealer reports. The new permit would require an application similar to some other current HMS permits. The information collected on the application would include vessel information and owner identification and contact information. A modest fee to process the application and annual renewal fee of approximately $25 may be required. The proposed rule also would also adopt standard commercial HMS permit reporting requirements for this permit. Currently, in Atlantic HMS fisheries, all commercial fishing vessels and Charter/Headboat vessels are required to submit logbooks for all HMS trips if they are selected for reporting. Selected permit holders are required to submit logbooks to NMFS postmarked no later than seven days after unloading a trip. If no fishing activity occurred during a calendar month, a "no fishing" report must be submitted to NMFS, and be postmarked within seven days after the end of the month. Currently, the permits most similar to the ones being considered in this action (HMS Charter/Headboat, Atlantic tunas General category, and Atlantic tunas Harpoon category permit) are not selected for submitting logbooks, although they are eligible for selection.

This proposed rule would not conflict, duplicate, or overlap with other relevant Federal rules. Fishermen, dealers, and managers in these fisheries must comply with a number of international agreements, domestic laws, and other FMPs. These include, but are not limited to, the Magnuson-Stevens Act, the Atlantic Tunas Convention Act, the High Seas Fishing Compliance Act, the Marine Mammal Protection Act, the Endangered Species Act, the National Environmental Policy Act, the Paperwork Reduction Act, and the Coastal Zone Management Act. NMFS does not believe that the proposed regulations duplicate, overlap, or conflict with any relevant regulations, Federal or otherwise.

Under 5 U.S.C. 603(c), agencies are required to describe any alternatives to the proposed rule that accomplish the stated objectives and which minimize any significant economic impacts. These impacts are discussed below and in the draft Environmental Assessment for the proposed action. Additionally, the RFA (5 U.S.C. 603(c)(1)–(4)) lists four general categories of significant alternatives that would assist an agency in the development of significant alternatives: (1) Establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) use of performance rather than design standards; and (4) exemptions from coverage of the rule for small entities.

In order to meet the objectives of this proposed rule, consistent with the Magnuson-Stevens Act, NMFS cannot exempt small entities or change the reporting requirements only for small entities because all the entities affected are considered small entities. Thus, there are no alternatives discussed that fall under the first and fourth categories described above. NMFS does not know of any performance or design standards that would satisfy the aforementioned objectives of this rulemaking while, concurrently, complying with the Magnuson-Stevens Act. Thus, there are no alternatives considered under the third category. All of the permit alternatives being considered, except for the no-action alternative, could result in additional reporting requirements (category two above) due to the issuance of new permits if new permit holders are selected for reporting. These are standard reporting requirements required of all HMS commercial permit holders. Thus, there are no alternatives discussed that fall under the second category described above. This proposed action would improve information collection by allowing NMFS to collect important fishery dependent data, if necessary, that could be used for quota monitoring and stock assessments.

In this rulemaking, NMFS considered two different categories of issues to address swordfish management measures where each issue had its own range of alternatives and sub-alternatives that would meet the objectives of the Magnuson-Stevens Act and the 2006 Consolidated HMS FMP. The first category of alternatives (Alternatives 1.1–1.3 and sub-alternatives) addresses swordfish permitting alternatives. The second category of alternatives (Alternatives 2.1–2.3 and sub-alternatives) addresses swordfish retention limits. The expected economic impacts these alternatives and sub-alternatives may have on small entities are summarized below. The full IRFA and all its analyses can be found in draft Amendment 8. In total, NMFS analyzed 15 different alternatives and sub-alternatives, and provided rationales for identifying the preferred alternatives. The seven permit alternatives range from maintaining the status quo for U.S. North Atlantic swordfish fisheries to creating a new commercial swordfish handgear permit and modifying the HMS Charter/Headboat permit to allow fishing for and sales of swordfish under specific limitations. NMFS analyzed eight alternatives that would allow NMFS to implement swordfish retention limits applicable to the new permit in a range from zero-to-six fish. Seven of these alternatives would allow NMFS to modify daily trip limits using in-season

adjustment procedures similar to those codified for bluefin tuna at § 635.27(a)(8). NMFS assessed the impacts of the retention limit alternatives on both a fishery-wide basis and utilizing an approach which could be tailored on a regional basis.

Alternative 1.1, the no action alternative, maintains the existing swordfish limited access permit program and would not establish a new swordfish permit. Under Alternative 1.1, NMFS does not anticipate any substantive change in economic impacts as the U.S. swordfish fishery is already operating under the current regulations. Entry into the commercial swordfish fishery would remain difficult due to high limited access permit costs and the current scarcity of available permits. In terms of available and unutilized swordfish quota, this alternative could contribute to a loss of potential income for fishermen who would like to fish commercially for swordfish, but are not able to obtain limited access permits. Under ATCA (16 U.S.C. 971 *et. seq.*) and the Magnuson-Stevens Act, NMFS is required to provide U.S. fishing vessels with a reasonable opportunity to harvest the ICCAT-recommended quota. Although there is sufficient quota to allow U.S. fishermen to catch more swordfish and remain within the ICCAT-recommended quota, current difficulties associated with obtaining a limited access permit may be a constraining factor. For this reason, the "no action" alternative is not preferred at this time.

Alternative 1.2, a preferred alternative, would establish a new open-access commercial swordfish permit and modify existing open access HMS permits to allow for the commercial retention of swordfish using handgears. NMFS anticipates positive economic impacts for some U.S. fishermen under alternative 1.2. It would allow small-scale U.S. fishermen to use handgear (rod and reel, handline, harpoon, bandit gear, and green-stick), to fish for and commercially sell a limited amount of swordfish (zero to six fish per vessel per trip) to permitted swordfish dealers. This alternative would reduce economic barriers to the commercial swordfish fishery, provide more opportunities to fish commercially for swordfish, and potentially provide economic benefits to some fishermen. For example, if a new entrant landed 10 swordfish per year under this alternative, they could realize an increase in annual gross revenues of approximately $4,329.60. One trip landing six swordfish could yield $2,598 in gross revenues.

NMFS received comments from some current swordfish limited access permit holders during public meetings to discuss the 2009 ANPR (74 FR 26174, June 1, 2009) expressing concern that establishing a new swordfish permit could reduce ex-vessel swordfish prices and the value of existing limited access swordfish permits. It is not possible to precisely predict the number of new applicants for open access commercial swordfish permits, but NMFS expects that some current recreational fishermen with HMS Angling permits will remain recreational, rather than shift to commercial fishing. There are numerous commercial fishing vessel safety requirements and management regulations to comply with when operating a commercial fishing business that may discourage some recreational fishermen from obtaining a commercial permit. Under the proposed regulations, similar to the regulations that apply to the Atlantic tunas General category permit, fishermen issued a new Swordfish General Commercial permit would not be able to obtain an HMS Angling category permit. Therefore, a recreational fisherman who obtains a Swordfish General Commercial permit would forfeit the ability to fish for Atlantic billfishes, unless they are fishing in a registered HMS tournament, because fishing for these species is permissible only when issued an HMS Angling or Charter/Headboat permit. Additionally, the ability to fish recreationally for Atlantic tunas and sharks would be forfeited unless they are fishing in a registered HMS tournament or hold appropriate commercial tuna and/or shark permits. Negative impacts on current swordfish limited access permit holders could be mitigated by establishing lower retention limits for the new open access permit than the limits that currently exist for limited access permits. NMFS prefers Alternative 1.2 at this time, because it would increase access to the commercial swordfish fishery, would have positive socio-economic impacts for fishermen who are currently unable to obtain a swordfish limited access permit, and would have neutral to minor ecological impacts. Additionally, this alternative would provide increased opportunities to more fully utilize the ICCAT-recommended domestic North Atlantic swordfish quota allocation and thus could have long-term benefits to all swordfish fisherman by improving the United States' position with regard to maintaining its quota share at ICCAT.

Sub-alternative 1.2.1 would modify the existing open-access Atlantic tunas General category permit to allow for the commercial retention of swordfish using handgears (rod and reel, handline, harpoon, bandit gear, and green-stick) and rename the modified permit as, potentially, the Atlantic tunas and swordfish General category permit. It would result in many of the same socio-economic impacts as Alternative 1.2. In addition, sub-alternative 1.2.1 would minimize the costs associated with obtaining the new swordfish permit for persons that have already been issued the Atlantic Tunas General category permit because they would only need to obtain one permit rather than two.

Sub-alternative 1.2.2 would modify the existing open-access Atlantic tunas Harpoon category permit to allow for the commercial retention of swordfish using harpoon gear. This alternative would result in many of the same impacts as Alternative 1.2. Additionally, it would minimize the costs associated with obtaining the new permit for persons that have already been issued the Atlantic Tunas Harpoon category permit because they would only need to obtain one permit rather than two. Specifically, it would provide economic benefits to current Atlantic tunas Harpoon category permit holders that want to both harpoon swordfish and also fish for tunas under Atlantic tunas Harpoon category regulations.

Sub-alternative 1.2.3, a preferred alternative, would allow HMS Charter/Headboat permit holders to fish under open access swordfish commercial regulations using rod and reel and handlines when fishing commercially (*i.e.*, not on a for-hire trip with paying passengers). It would result in many of the same impacts as Alternative 1.2 and provide economic benefits to CHB permit holders when fishing commercially (*i.e.*, not on a for-hire trip). It could also streamline permit issuance because CHB vessels would not need to obtain another permit.

Sub-alternative 1.2.4, a preferred alternative, would create a separate open access commercial swordfish permit to allow landings using handgear. This alternative would have similar impacts as Alternative 1.2, above. However, it would increase the costs associated with obtaining the permit for persons that have already been issued an Atlantic Tunas General or Harpoon category permit. This alternative would not streamline permit issuance for persons that want to commercially fish for both tunas and swordfish, because they would need to obtain two different permits to conduct these activities. NMFS prefers sub-alternative 1.2.4 at this time, because it would increase access to the commercial swordfish fishery, would have positive socio-economic impacts for fishermen who are currently unable

to obtain a swordfish limited access permit, and would have neutral to minor ecological impacts. Additionally, sub-alternative 1.2.4 would better enable NMFS to differentiate between tuna and swordfish handgear fishermen in order to better monitor and assess these fisheries.

Alternative 1.3 would allow for an unspecified number of new swordfish limited access permits to be issued. Depending upon the qualification criteria, this alternative could improve access to the fishery and provide economic benefits to some fishermen that qualify for the new limited access permit. However, it could also adversely affect some fishermen who do not qualify for a limited access permit. This alternative could limit any negative economic and social impacts on current commercial swordfish limited access permit holders by limiting the number of new swordfish permits issued. Selection of this alternative may require, among other things, the establishment of qualification criteria, control dates, application deadlines, application procedures, and grievance/appeals procedures for persons who have initially been determined as not eligible to qualify for a limited access permit. These aspects could increase administrative costs for NMFS and increase the reporting burden for the public to demonstrate that they meet qualifying criteria.

Alternative 2.1 would establish a fishery-wide zero to six swordfish retention limit range for the new and modified permits, and codify a specific retention limit within that range. This alternative could provide some fishermen with the ability to commercially land swordfish, thereby resulting in positive economic benefits if the limit were set above zero. Additionally, economic benefits are anticipated for swordfish dealers and processors, fishing tackle manufacturers and suppliers, bait suppliers, restaurants, marinas, and fuel providers. NMFS anticipates a retention limit range of zero-to-six swordfish would provide a seasonal, or secondary, fishery for most participants. This alternative is not expected to facilitate a year-round fishery in most areas, with the possible exception of south Florida, where swordfish can be available year-round. There is a notable difference in the ex-vessel revenue produced by a one swordfish/trip limit versus a six swordfish/trip limit. A single swordfish is estimated to be worth $432.96 ex-vessel, on average, whereas six swordfish would produce $2,597.76 ex-vessel. For a vessel making 10 trips per year and retaining the maximum allowable number of swordfish on each trip, annual gross revenue derived from swordfish would range from $4,329.60 under a one-fish limit to $25,977.60 under a six-fish limit. Codifying a single coast-wide swordfish retention limit would provide certainty to both fishermen and law enforcement regarding the swordfish retention limit for the new open access permit. However, this alternative would not provide in-season adjustment authority to quickly modify the swordfish retention limit regionally by using pre-established criteria and thus would limit NMFS' management flexibility.

Alternative 2.2 would establish a coast-wide zero-to-six swordfish retention limit range for the new and modified permits and codify a specific retention limit within that range. In addition, it would provide in-season adjustment authority for NMFS to modify the swordfish retention limit within the range (zero to six) using in-season adjustment procedures similar to those codified at § 635.27 (a)(8). This alternative would have the same social and economic impacts as Alternative 2.1, but would provide less certainty to fishermen and law enforcement regarding possible in-season changes to the swordfish retention limit. Positive economic benefits could occur if the retention limit was increased during the fishing season based upon information indicating that sufficient quota was available, or upon other pre-established criteria.

Alternative 2.3, a preferred alternative, would establish swordfish management regions and a zero-to-six swordfish retention limit range within each region for the new and modified permits and codify specific regional limits within that range with authority to adjust the regional limits in-season based on pre-established criteria. This alternative would have similar social and economic impacts as Alternative 2.1. If a regional retention limit is set at zero, NMFS expects no change in socio-economic impacts. If a regional limit is set at any level above zero, this alternative could provide economic benefits to some commercial handgear fishermen if they were previously inactive and obtain the new and modified permits and begin fishing. NMFS prefers Alternative 2.3 at this time, because it would allow swordfish retention limits to be quickly modified using in-season adjustment authority and provide additional flexibility to manage swordfish regionally.

Sub-Alternative 2.3.1 would establish regions based upon existing major U.S. domestic fishing areas as reported to ICCAT (Northeast Distant area, Northeast Coastal area, Mid-Atlantic Bight area, South Atlantic Bight area, Florida East Coast area, Gulf of Mexico area, Caribbean area, and the Sargasso Sea area). Socio-economic impacts would be the same as Alternative 2.3 above. If this sub-alternative were implemented, NMFS is considering an initial swordfish retention limit of one swordfish per vessel per trip for the Florida East Coast area, two swordfish per vessel per trip for the Caribbean area, and a limit of three swordfish per vessel per trip for the Northwest Atlantic and Gulf of Mexico regions. For vessels making 10 trips per year and retaining the maximum allowable limit on each trip, annual gross revenue derived from swordfish would range from $4,329.60 under a one-fish limit, $8,659.20 under a two-fish limit, and $12,988.80 under a three-fish limit.

Sub-Alternative 2.3.2, a preferred alternative, would establish larger regions than sub-alternative 2.3.1, with the addition of a separate Florida Swordfish Management Area (Northwest Atlantic, Gulf of Mexico, Caribbean, and a Florida Swordfish Management Area as defined below). Under this sub-alternative, swordfish management measures could still be tailored geographically to the biological factors affecting a particular region; however, the regions would be larger (with the possible exception of the separate Florida Swordfish Management Area). Under this alternative, NMFS would propose an initial swordfish retention limit of one swordfish per vessel per trip for the Florida Swordfish Management Area, two swordfish per vessel per trip for the Caribbean area, and a limit of three swordfish per vessel per trip for the Northwest Atlantic and Gulf of Mexico regions. These retention limits fall within the range discussed under Alternative 2.3 above, and could be modified in the future using in-season adjustment procedures similar to those codified at § 635.27(a)(8). For a vessel making 10 trips per year and retaining the maximum allowable limit on each trip, annual gross revenue derived from swordfish would range from $4,329.60 under a one-fish limit, $8,659.20 under a two-fish limit, and $12,988.80 under a three-fish limit.

To estimate the number of entities affected by a special Florida Swordfish Management Area, NMFS first determined the number of Atlantic tunas General category permits issued. In 2011, there were 4,084 Atlantic tunas General category permits issued. This number was used as a proxy to estimate the total number of new Swordfish General Commercial permits that could be issued fishery-wide. In 2011, 44

percent of all Directed and Incidental swordfish limited access permits were issued in Florida. Additionally, in 2011, 63 percent of all swordfish Handgear limited access permits were issued in Florida. Taking the average of these two numbers provided an estimate of 53.5 percent, which is used as an estimate of the percent of new swordfish permits that could be issued in Florida. Using an estimated rate of 53.5 percent of 4,084 potential new permits provides an estimate of 2,185 potential new commercial swordfish handgear permits that could be issued in Florida. Assuming that two-thirds of these permits are issued to vessels on the east coast of Florida, potentially 1,455 new open-access swordfish permits could be issued on the east coast of Florida (0.666 * 2,185 = 1,455).

Sub-Alternative 2.3.2.1, a preferred alternative, would establish a Florida Swordfish Management Area that includes the East Florida Coast pelagic longline closed area through the northwestern boundary of Monroe County, FL, in the Gulf of Mexico (see § 635.2 for bounding coordinates). Approximately 1,455 new permit holders could derive up to $4,329.60 annually under a one-fish limit, assuming they each took 10 trips per year and landed one fish on each trip. NMFS prefers sub-alternative 2.3.2.1 at this time, because it provides flexibility to manage the Florida commercial handgear swordfish fishery using boundaries that are already established and which correspond to an area that provides important habitat for many HMS and protected species, including swordfish, marlin, sailfish, sea turtles, and marine mammals. This area is also very accessible for large numbers of commercial and recreational fishing vessels.

Sub-Alternative 2.3.2.2 would establish a Florida Swordfish Management Area that extends from the Georgia/Florida border to Key West, FL. This area is larger than, and includes, the East Florida Coast pelagic longline closed area. Therefore, the economic impacts described for sub-alternative 2.3.2.1 would also occur within this area. Additionally, because this special management area would be larger than sub-alternative 2.3.2.1, slightly more than 1,455 vessels could potentially be affected by a one-fish retention limit.

Sub-Alternative 2.3.2.3 would establish a Florida Swordfish Management Area that includes the Florida counties of St. Lucie, Martin, Palm Beach, Broward, Dade, and Monroe. This area is smaller than the previous two sub-alternatives, but specifically includes oceanic areas with concentrations of swordfish that are readily accessible to many anglers. Because this special management area would be smaller than the areas in sub-alternative 2.3.2.1, slightly fewer than 1,455 vessels would potentially be affected by the one-swordfish per vessel per trip retention limit.

This proposed rule contains a collection-of-information requirement subject to review and approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (PRA). This requirement has been submitted to OMB for approval. This collection-of-information requirement would modify an existing (0648–0327) collection subject to review and approval by OMB under the Paperwork Reduction Act (PRA). Public reporting burden for a new Swordfish General Commercial permit is estimated to average 30 minutes per application. This burden estimate includes the time for reviewing instructions, gathering and maintaining the data needed, submitting the permit application, and completing and reviewing the collection information. On an annual basis, the new Swordfish General Commercial permit would increase the existing collection by 4,084 respondents/responses, 2,042 hours, and costs by $81,706. In total, 0648–0327 would include 41,261 responses/respondents, 11,843 hours, and cost $738,917 per year. Public comment is sought regarding: Whether this proposed collection of information is necessary for the proper performance of the functions of NMFS, including whether the information shall have practical utility; the accuracy of the burden estimate; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection of information, including through the use of automated collection techniques or other forms of information technology. Send comments on these or any other aspects of the collection of information to Michael Clark, the Highly Migratory Species Management Division, at the **ADDRESSES** above, and by email to *OIRA_submission@omb.eop.gov* or fax to (202) 395–7285. Notwithstanding any other provision of the law, no person is required to respond to, and no person shall be subject to penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB control number.

List of Subjects

50 CFR Part 600

Administrative practice and procedure, Confidential business information, Fisheries, Fishing, Fishing vessels, Foreign relations, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Statistics.

50 CFR Part 635

Fisheries, Fishing, Fishing vessels, Penalties, Reporting and recordkeeping requirements, Retention limits.

Dated: February 14, 2013.

Alan D. Risenhoover,

Director, Office of Sustainable Fisheries, performing the functions and duties of the Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR parts 600 and 635 are proposed to be amended as follows:

PART 600—MAGNUSON–STEVENS ACT PROVISIONS

■ 1. The authority citation for part 600 is revised to read as follows:

Authority: 5 U.S.C. 561 and 16 U.S.C. 1801 *et seq.*

■ 2. In § 600.725, paragraph (v), under the heading "IX. Secretary of Commerce," entry 1, revise A to read as follows:

§ 600.725 General prohibitions.

* * * * *

(v) * * *

IX—SECRETARY OF COMMERCE

* * * * *	
A. Swordfish handgear fishery.	A. Rod and reel, harpoon, handline, bandit gear, buoy gear, green-stick gear.
* * * * *	

* * * * *

PART 635—ATLANTIC HIGHLY MIGRATORY SPECIES

■ 3. The authority citation for part 635 continues to read as follows:

Authority: 16 U.S.C. 971 *et seq.*; 16 U.S.C. 1801 *et seq.*

■ 4. In § 635.2, revise the definition for "Division Chief" and add the definition for "Florida Swordfish Management Area" in alphabetical order to read as follows:

§ 635.2 Definitions.

* * * * *

Division Chief means the Chief, Highly Migratory Species Management Division, NMFS (F/SF1), 1315 East-West Highway, Silver Spring, MD, 20910; (301) 427–8503.

* * * * *

Florida Swordfish Management Area means the Atlantic Ocean area seaward of the inner boundary of the U.S. EEZ from a point intersecting the inner boundary of the U.S. EEZ at 31° 00′ N. lat. near Jekyll Island, GA, and proceeding due east to connect by straight lines the following coordinates in the order stated: 31° 00′ N. lat., 78° 00′ W. long.; 28° 17′10″ N. lat., 79° 11′24″ W. long.; then proceeding along the outer boundary of the EEZ to the intersection of the EEZ with 24° 00′ N. lat.; then proceeding due west to 24° 00′ N. lat., 82° 0′ W. long, then proceeding due north to intersect the inner boundary of the U.S. EEZ at 82° 0′ W. long. near Key West, FL. This management area also includes the area west of Monroe County, Florida, from 82° 0′ W. long., 25° 48′ N. lat.; then proceeding clockwise east along the inner boundary of the U.S. EEZ to a point located at 82° 0′ W. long., 24° 46′ N. lat.; and then proceeding due north to 82° 0′ W. long., 25° 48′ N. lat. For purposes of § 635.24(b)(4)(ii), the area in which the retention limit applies extends from the inner boundary of the U.S. EEZ to the shore between 31° 00′ N. lat. (southward of Jekyll Island, GA) through the Florida Keys and northward along the Florida west coast to 25° 48′ N. lat. (southward of the northwest boundary of Monroe County, FL near Chokoloskee, FL).

* * * * *

■ 5. In § 635.4, paragraphs (b)(1), (c)(1), (c)(2), revise introductory paragraph (f), (f)(1), (f)(2), (f)(4), introductory paragraph (h)(1), (j)(3), and (m)(2), and add paragraphs (c)(4) and (f)(5) to read as follows:

§ 635.4 Permits and fees.

* * * * *

(b) * * *

(1) The owner of a charter boat or headboat used to fish for, take, retain, or possess any Atlantic HMS must obtain an HMS Charter/Headboat permit. A vessel issued an HMS Charter/Headboat permit for a fishing year shall not be issued an HMS Angling permit, a Swordfish General Commercial permit, or an Atlantic Tunas permit in any category for that same fishing year, regardless of a change in the vessel's ownership.

* * * * *

(c) * * *

(1) The owner of any vessel used to fish recreationally for Atlantic HMS or on which Atlantic HMS are retained or possessed recreationally, must obtain an HMS Angling permit, except as provided in § 635.4(c)(2). Atlantic HMS caught, retained, possessed, or landed by persons on board vessels with an HMS Angling permit may not be sold or transferred to any person for a commercial purpose. A vessel issued an HMS Angling permit for a fishing year shall not be issued an HMS Charter/Headboat permit, a Swordfish General Commercial permit, or an Atlantic Tunas permit in any category for that same fishing year, regardless of a change in the vessel's ownership.

(2) A vessel with a valid Atlantic Tunas General category permit issued under paragraph (d) of this section or with a valid Swordfish General Commercial permit issued under paragraph (f) of this section, may fish in a recreational HMS fishing tournament if the vessel has registered for, paid an entry fee to, and is fishing under the rules of a tournament that has registered with NMFS' HMS Management Division as required under § 635.5(d). When a vessel issued a valid Atlantic Tunas General category permit or a valid Swordfish General Commercial permit is fishing in such a tournament, such vessel must comply with HMS Angling category regulations, except as provided in paragraphs (c)(3) and (c)(4) of this section.

* * * * *

(4) A vessel issued a Swordfish General Commercial permit fishing in a tournament, as authorized under § 635.4(c)(2), shall comply with Swordfish General Commercial permit regulations when fishing for, retaining, possessing, or landing Atlantic swordfish.

* * * * *

(f) *Swordfish vessel permits.* —(1) Except as specified in paragraphs (n) and (o) of this section, the owner of a vessel of the United States used to fish for or take swordfish commercially from the management unit, or on which swordfish from the management unit are retained, possessed with an intention to sell, or sold must obtain, an HMS Charter/Headboat permit issued under paragraph (b) of this section, or one of the following swordfish permits: A swordfish directed limited access permit, swordfish incidental limited access permit, swordfish handgear limited access permit, or Swordfish General Commercial permit. These permits cannot be held in combination with each other on the same vessel, except that an HMS Charter/Headboat permit may be held in combination with a swordfish handgear limited access permit on the same vessel. It is a rebuttable presumption that the owner or operator of a vessel on which swordfish are possessed in excess of the recreational retention limits intends to sell the swordfish.

(2) The only valid commercial Federal vessel permits for swordfish are the HMS Charter/Headboat permit issued under paragraph (b) of this section (and only when on a non for-hire trip), the Swordfish General Commercial permit issued under paragraph (f), a swordfish limited access permit issued consistent with paragraphs (l) and (m), or permits issued under paragraphs (n) and (o).

* * * * *

(4) A directed or incidental limited access permit for swordfish is valid only when the vessel has on board a valid limited access permit for shark and a valid Atlantic Tunas Longline category permit issued for such vessel.

(5) A Swordfish General Commercial permit may not be held on a vessel in conjunction with an HMS Charter/Headboat permit issued under paragraph (b) of this section, an HMS Angling category permit issued under paragraph (c), a swordfish limited access permit issued consistent with paragraphs (l) and (m), an Incidental HMS Squid Trawl permit issued under paragraph (n), or an HMS Commercial Caribbean Small Boat permit issued under paragraph (o). Except for the 2013 fishing year, a vessel issued a Swordfish General Commercial open access permit for a fishing year shall not be issued an HMS Angling permit or an HMS Charter/Headboat permit for that same fishing year, regardless of a change in the vessel's ownership. During the 2013 fishing year, vessel owners applying for a Swordfish General Commercial permit must abandon their HMS Angling or HMS Charter/Headboat permit if their vessel has been issued either of these permits.

* * * * *

(h) * * *

(1) Atlantic Tunas, HMS Angling, HMS Charter/Headboat, Swordfish General Commercial, Incidental HMS Squid Trawl, and HMS Commercial Caribbean Small Boat vessel permits.

* * * * *

(j) * * *

(3) A vessel owner issued an Atlantic tunas permit in the General, Harpoon, or Trap category or an Atlantic HMS permit in the Angling or Charter/Headboat category under paragraph (b), (c), or (d) of this section may change the category of the vessel permit once within 10 calendar days of the date of

issuance of the permit. After 10 calendar days from the date of issuance of the permit, the vessel owner may not change the permit category until the following fishing season.

* * * * *

(m) * * *

(2) *Shark and swordfish permits.* The owner of a vessel of the United States used to fish for or take sharks commercially from the management unit, or on which sharks from the management unit are retained, possessed with an intention to sell, or from which sharks from the management unit are sold must obtain the applicable limited access permit(s) issued pursuant to the requirements in paragraphs (e) and (f) of this section, or an HMS Commercial Caribbean Small Boat permit issued under paragraph (o) of this section. The owner of a vessel of the United States used to fish for or take swordfish commercially from the management unit, or on which swordfish from the management unit are retained, possessed with an intention to sell, or from which swordfish from the management unit are sold must obtain the applicable limited access permit(s) issued pursuant to the requirements in paragraphs (e) and (f) of this section, a Swordfish General Commercial permit issued under paragraph (f) of this section, an Incidental HMS Squid Trawl permit issued under paragraph (n) of this section, an HMS Commercial Caribbean Small Boat permit issued under paragraph (o) of this section, or an HMS Charter/Headboat permit issued under paragraph (b) of this section which authorizes a Charter/Headboat to fish commercially for swordfish on a non for-hire trip subject to the retention limits at§ 635.24(b)(4) . The commercial retention and sale of swordfish for vessels issued an HMS Charter/Headboat permit is permissable only when the vessel is on a non for-hire trip. Only persons holding non-expired shark and swordfish limited access permit(s) in the preceding year are eligible to renew those limited access permit(s). Transferors may not renew limited access permits that have been transferred according to the procedures in paragraph (l) of this section.

* * * * *

■ 6. In § 635.21, revise paragraphs (e)(2)(i), (e)(2)(ii), (e)(4)(i), (e)(4)(iv), and (g) and add paragraph (e)(4)(v) to read as follows:

§ 635.21 Gear operation and deployment restrictions.

* * * * *

(e) * * *

(2) * * *

(i) Only persons who have been issued a valid HMS Angling or valid Charter/Headboat permit, or who have been issued a valid Atlantic Tunas General category or Swordfish General Commercial permit and are participating in a tournament as provided in 635.4 (c) of this part, may possess a blue marlin, white marlin, or roundscale spearfish in, or take a blue marlin, white marlin, or roundscale spearfish from, its management unit. Blue marlin, white marlin, or roundscale spearfish may only be harvested by rod and reel.

(ii) Only persons who have been issued a valid HMS Angling or valid Charter/Headboat permit, or who have been issued a valid Atlantic Tunas General category or Swordfish General Commercial permit and are participating in a tournament as provided in § 635.4(c) of this part, may possess or take a sailfish shoreward of the outer boundary of the Atlantic EEZ. Sailfish may only be harvested by rod and reel.

* * * * *

(4) * * *

(i) No person may possess north Atlantic swordfish taken from its management unit by any gear other than handgear, green-stick, or longline, except that such swordfish taken incidentally while fishing with a squid trawl may be retained by a vessel issued a valid Incidental HMS squid trawl permit, subject to restrictions specified in § 635.24(b)(2). No person may possess south Atlantic swordfish taken from its management unit by any gear other than longline.

* * * * *

(iv) Except for persons aboard a vessel that has been issued a directed, incidental, or handgear limited access swordfish permit, a Swordfish General Commercial permit, an Incidental HMS squid trawl permit, or an HMS Commercial Caribbean Small Boat permit under § 635.4, no person may fish for North Atlantic swordfish with, or possess a North Atlantic swordfish taken by, any gear other than handline or rod and reel.

(v) A person aboard a vessel issued or required to be issued a valid Swordfish General Commercial permit may only possess North Atlantic swordfish taken from its management unit by rod and reel, handline, bandit gear, green-stick, or harpoon gear.

* * * * *

(g) *Green-stick gear.* Green-stick gear may only be utilized when fishing from vessels issued a valid Atlantic Tunas General, Swordfish General Commercial, HMS Charter/Headboat, or Atlantic Tunas Longline category permit. The gear must be attached to the vessel, actively trolled with the mainline at or above the water's surface, and may not be deployed with more than 10 hooks or gangions attached.

* * * * *

■ 7. In § 635.22, paragraphs (f), (f)(1) and (f)(2) are revised to read as follows:

§ 635.22 Recreational retention limits.

* * * * *

(f) *North Atlantic swordfish.* The recreational retention limits for North Atlantic swordfish apply to persons who fish in any manner, except to persons aboard a vessel that has been issued an HMS Charter/Headboat permit under § 635.4(b) and only when on a non for-hire trip, a directed, incidental or handgear limited access swordfish permit under § 635.4(e) and (f), a Swordfish General Commercial permit under § 635.4(f), an Incidental HMS Squid Trawl permit under § 635.4(n), or an HMS Commercial Caribbean Small boat permit under § 635.4(o).

(1) When on a for-hire trip as defined at § 635.2, vessels issued an HMS Charter/Headboat permit under § 635.4(b), that are charter boats as defined under § 600.10 of this chapter, may retain, possess, or land no more than one North Atlantic swordfish per paying passenger and up to six North Atlantic swordfish per vessel per trip. When such vessels are on a non for-hire trip, they must comply with the commercial retention limits for swordfish specified at § 635.24(b)(4).

(2) When on a for-hire trip as defined at § 635.2, vessels issued an HMS Charter/Headboat permit under § 635.4(b), that are headboats as defined under § 600.10 of this chapter, may retain, possess, or land no more than one North Atlantic swordfish per paying passenger and up to 15 North Atlantic swordfish per vessel per trip. When such vessels are on a non for-hire trip, they may land no more than the commercial retention limits for swordfish specified at § 635.24(b)(4).

* * * * *

■ 8. In § 635.24, paragraph (b)(4) is added to read as follows:

§ 635.24 Commercial retention limits for sharks, swordfish, and BAYS tunas.

* * * * *

(b) * * *

(4) Persons aboard a vessel that has been issued a Swordfish General Commercial permit or an HMS Charter/Headboat permit (and only when on a non for-hire trip) are subject to the regional swordfish retention limits specified at paragraph (b)(4)(iii), which may be adjusted during the fishing year

based upon the inseason regional retention limit adjustment criteria identified in paragraph (b)(4)(iv) below.

(i) *Regions.* Persons aboard a vessel that has been issued a Swordfish General Commercial permit or an HMS Charter/Headboat permit (and only when on a non for-hire trip) may fish for or retain swordfish in the management unit. Regional retention limits for swordfish apply in four regions. For purposes of this section, these regions are: The Florida Swordfish Management Area as defined in § 635.2; the Northwest Atlantic region (federal waters along the entire Atlantic coast of the United States north of 28° 17′ N. latitude, but not inclusive of any water located in the Florida Swordfish Management Area as defined in § 635.2); the Gulf of Mexico region (any water located in the EEZ in the entire Gulf of Mexico west of 82° W. longitude, but not inclusive of any water located in the Florida Swordfish Management Area as defined in § 635.2); and the Caribbean region (the U.S. territorial waters within the Caribbean as defined in § 622.2 of this chapter).

(ii) *Possession, retention, and landing restrictions.* Vessels that have been issued a Swordfish General Commercial permit or an HMS Charter/Headboat permit (and only when on a non for-hire trip), as a condition of these permits, may not possess, retain, or land any more swordfish than is specified for the region in which the vessel is located.

(iii) *Regional retention limits.* The swordfish regional retention limits for each region will range between zero to six swordfish per vessel per trip. At the start of each fishing year, the default regional retention limits will apply. During the fishing year, NMFS may adjust the default retention limits per the inseason regional retention limit adjustment criteria listed in § 635.24(b)(4)(iv), if necessary. The default retention limits for the regions set forth under paragraph (b)(4)(i) are:

(A) one swordfish per vessel per trip for the Florida Swordfish Management Area.

(B) two swordfish per vessel per trip for the Caribbean region.

(C) three swordfish per vessel per trip for the Northwest Atlantic region.

(D) three swordfish per vessel per trip for the Gulf of Mexico region.

(iv) *Inseason regional retention limit adjustment criteria.* NMFS will file with the Office of the Federal Register for publication notification of any inseason adjustments to the regional retention limits. Before making any inseason adjustments to regional retention limits, NMFS will consider the following criteria and other relevant factors:

(A) The usefulness of information obtained from biological sampling and monitoring of the North Atlantic swordfish stock;

(B) The estimated ability of vessels participating in the fishery to land the amount of swordfish quota available before the end of the fishing year;

(C) The estimated amounts by which quotas for other categories of the fishery might be exceeded;

(D) Effects of the adjustment on accomplishing the objectives of the fishery management plan and its amendments;

(E) Variations in seasonal distribution, abundance, or migration patterns of swordfish;

(F) Effects of catch rates in one region precluding vessels in another region from having a reasonable opportunity to harvest a portion of the overall swordfish quota; and

(G) Review of dealer reports, landing trends, and the availability of swordfish on the fishing grounds.

* * * * *

■ 9. In § 635.27, paragraphs (c)(1)(i)(A) and (c)(1)(i)(B) are revised to read as follows:

§ 635.27 Quotas.

* * * * *

(c) * * *

(1) * * *

(i) * * *

(A) A swordfish from the North Atlantic stock caught prior to the directed fishery closure by a vessel for which a directed swordfish limited access permit, a swordfish handgear limited access permit, a HMS Commercial Caribbean Small Boat permit, a Swordfish General Commercial open access permit, or an HMS Charter/Headboat permit (and only when on a non for-hire trip) has been issued or is required to have been issued is counted against the directed fishery quota. The total baseline annual fishery quota, before any adjustments, is 2,937.6 mt dw for each fishing year. Consistent with applicable ICCAT recommendations, a portion of the total baseline annual fishery quota may be used for transfers to another ICCAT contracting party. The annual directed category quota is calculated by adjusting for over- or underharvests, dead discards, any applicable transfers, the incidental category quota, the reserve quota and other adjustments as needed, and is subdivided into two equal semi-annual periods: One for January 1 through June 30, and the other for July 1 through December 31.

(B) A swordfish from the North Atlantic swordfish stock landed by a vessel for which an incidental swordfish limited access permit, an incidental HMS Squid Trawl permit, an HMS Angling permit, or an HMS Charter/Headboat permit (and only when on a for-hire trip) has been issued, or a swordfish from the North Atlantic stock caught after the effective date of a closure of the directed fishery from a vessel for which a swordfish directed limited access permit, a swordfish handgear limited access permit, a HMS Commercial Caribbean Small Boat permit, a Swordfish General Commercial open access permit, or an HMS Charter/Headboat permit (when on a non for-hire trip) has been issued, is counted against the incidental category quota. The annual incidental category quota is 300 mt dw for each fishing year.

* * * * *

■ 10. In § 635.28, paragraphs (c)(1)(i)(C) and (c)(1)(i)(D) are added to read as follows:

§ 635.28 Closures.

* * * * *

(c) * * *

(1) * * *

(i) * * *

(C) No swordfish may be possessed, landed, or sold by vessels issued a Swordfish General Commercial open access permit.

(D) No swordfish may be sold by vessels issued an HMS Charter/Headboat permit.

* * * * *

■ 11. In § 635.34, paragraph (a) is revised to read as follows:

§ 635.34 Adjustment of management measures.

(a) NMFS may adjust the catch limits for BFT, as specified in § 635.23; the quotas for BFT, shark and swordfish, as specified in § 635.27; the regional retention limits for Swordfish General Commercial permit holders, as specified at § 635.23; the marlin landing limit, as specified in § 635.27(d); and the minimum sizes for Atlantic blue marlin, white marlin, and roundscale spearfish as specified in § 635.20.

* * * * *

■ 12. In § 635.71, paragraphs (e)(8) and (e)(15) are revised, and paragraph (e)(18) is added to read as follows:

§ 635.71 Prohibitions.

* * * * *

(e) * * *

(8) Fish for North Atlantic swordfish from, possess North Atlantic swordfish on board, or land North Atlantic swordfish from a vessel using or having on board gear other than longline, green-stick gear, or handgear, except as specified at § 635.21(e)(4)(i).

* * * * *

(15) As the owner of a vessel permitted, or required to be permitted, in the Atlantic HMS Angling or the Atlantic HMS Charter/Headboat category (and only when on a for-hire trip), fail to report a North Atlantic swordfish, as specified in § 635.5(c)(2) or (c)(3).

* * * * *

(18) As the owner of a vessel permitted, or required to be permitted, in the Swordfish General Commercial permit category, possess North Atlantic swordfish taken from its management unit by any gear other than rod and reel, handline, bandit gear, green-stick, or harpoon gear.

* * * * *

[FR Doc. 2013–03990 Filed 2–21–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 300 and 679

RIN 0648–BB94

Amendment 94 to the Fishery Management Plan for Groundfish of the Gulf of Alaska

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

ACTION: Notice of availability of a proposed fishery management plan amendment; request for comments.

SUMMARY: The National Marine Fisheries Service (NMFS) announces that the North Pacific Fishery Management Council (Council) has submitted Amendment 94 to the Fishery Management Plan for Groundfish of the Gulf of Alaska (GOA FMP) for review by the Secretary of Commerce (Secretary). Amendment 94 would revise the sablefish individual fishing quota program (IFQ Program) to align the annual harvest, or use caps that apply to vessels fishing IFQ leased from a community quota entity (CQE) with vessel use caps applicable to non-CQE participants in the IFQ Program. The proposed amendment would not change the sablefish vessel use cap applicable to the overall IFQ Program. Amendment 94 is necessary to increase the flexibility of the CQE and CQE community residents to participate in the IFQ Program. This action is intended to promote the goals and objectives of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), the GOA FMP, and other applicable laws.

DATES: Written comments on Amendment 94 must be received no later than 5:00 p.m., Alaska local time (A.l.t.), on April 23, 2013.

ADDRESSES: You may submit comments on this document, identified by FDMS Docket Number NOAA–NMFS–2012–0040, by any of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2012-0040*, click the "Comment Now!" icon, complete the required fields, and enter or attach your comments.
- *Mail:* Address written comments to Glenn Merrill, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region, NMFS, Attn: Ellen Sebastian. Mail comments to P.O. Box 21668, Juneau, AK 99802–1668.
- *Fax:* Address written comments to Glenn Merrill, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region, NMFS, Attn: Ellen Sebastian. Fax comments to (907) 586–7557.
- *Hand delivery to the Federal Building:* Address written comments to Glenn Merrill, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region, NMFS, Attn: Ellen Sebastian. Deliver comments to 709 West 9th Street, Room 420A, Juneau, AK.

Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (e.g., name, address, etc.), confidential business information or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word or Excel, WordPerfect, or Adobe PDF file formats only.

Electronic copies of the Regulatory Impact Review (RIR) for Amendment 94 and the RIRs for the regulatory amendments are available from *http://www.regulations.gov* or from the NMFS Alaska Region Web site at *http://alaskafisheries.noaa.gov*.

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this rule may be submitted to NMFS at the above address or by email to *OIRA_Submission@omb.eop.gov* or fax to (202) 395–7285.

FOR FURTHER INFORMATION CONTACT: Peggy Murphy, 907–586–7228.

SUPPLEMENTARY INFORMATION: The Magnuson-Stevens Act requires that each regional fishery management council submit any FMP or FMP amendment it prepares to the Secretary for review and approval, disapproval, or partial approval. The Magnuson-Stevens Act also requires the Secretary, upon receiving an FMP, to immediately publish a notice in the **Federal Register** that the FMP or amendment is available for public review and comment.

Amendment 94 to the GOA FMP would revise the individual fishing quota program (IFQ Program) for sablefish fisheries. The IFQ program for the fixed-gear commercial fisheries for halibut and sablefish in waters in and off Alaska is a limited access privilege program implemented in 1995 (58 FR 59375, November 9, 1993). The IFQ Program limits access to the GOA halibut and sablefish fisheries to those persons holding quota share (QS) in specific management areas. The amount of halibut and sablefish that each QS holder may harvest is calculated annually and issued as IFQ in pounds.

In 2002, the North Pacific Fishery Management Council (Council) recommended revisions to IFQ Program regulations and policy to explicitly allow a non-profit entity to hold QS on behalf of residents of specific rural communities located adjacent to the coast of the GOA. NMFS implemented the Council's recommendations as Amendment 66 to the GOA FMP in 2004 (69 FR 23681, April 30, 2004). Amendment 66 implemented the community quota entity program (CQE Program) to allow these specific communities to form non-profit corporations called CQEs to purchase catcher vessel QS under the IFQ Program. CQEs that purchase QS on behalf of an eligible community may lease the resulting annual IFQ to fishermen who are residents of the community. The CQE Program was developed to allow a distinct set of small, remote coastal communities to benefit from CQE purchase of QS through sustained community participation in the IFQ fisheries.

The Council reviewed the IFQ Program and the CQE Program beginning in February 2010 and considered proposed changes to both programs. The Council adopted Amendment 94 on October 2, 2011.

Amendment 94 would amend the GOA FMP to make the vessel use caps applicable to vessels fishing sablefish IFQ derived from CQE-held sablefish QS similar to the use caps that apply to vessels fishing sablefish IFQ derived from individually-held QS. The current vessel use cap that applies to vessels fishing sablefish IFQ derived from CQE-held sablefish QS can be more restrictive than the vessel use caps that apply to vessels harvesting individually-held IFQ. Amendment 94 would provide community residents additional access to vessels to fish sablefish IFQ leased from CQEs and may promote more CQE participation in the IFQ Program.

The existing FMP and IFQ CQE regulations provide that a vessel may not be used to harvest more than 50,000 pounds (22.7 mt) of sablefish IFQ from any sablefish QS source if the vessel is used to harvest IFQ derived from sablefish QS held by a CQE. As a result, community residents leasing sablefish IFQ from a CQE may use the IFQ only on vessels that harvest annually no more than 50,000 pounds of IFQ in total; sablefish IFQ derived from CQE-held QS plus sablefish IFQ derived from individually-held QS count towards the cap. The Council established these limitations in the original CQE Program to prevent consolidation of IFQ harvest on a small number of vessels and to broadly distribute the benefits from fishing activities among CQE community residents.

Amendment 94 would revise the FMP to exclude sablefish IFQ derived from individually-held QS from the 50,000-pound vessel use cap. Only sablefish IFQ derived from CQE-held sablefish QS would be included in the vessel use cap. The effect of Amendment 94 would be that the following annual vessel use caps would apply to all vessels harvesting sablefish IFQ: no vessel could be used to harvest (1) more than 50,000 pounds (22.7 mt) of sablefish IFQ leased from a CQE, and (2) more sablefish IFQ than the IFQ Program's overall sablefish IFQ vessel use caps. Under Amendment 94, the existing IFQ Program vessel use caps would remain the same at 1 percent of the Southeast sablefish IFQ total allowable catch (TAC) and 1 percent of the combined sablefish TAC in all sablefish regulatory areas off Alaska (GOA and BSAI).

Under proposed Amendment 94, if, during any fishing year, a vessel harvested sablefish IFQ derived from CQE-held QS and individually-held QS, the harvests of IFQ derived from the individually-held sablefish QS would not accrue against the 50,000-pound vessel use cap for sablefish IFQ leased from a CQE. Instead, it would accrue against the overall vessel use caps that currently apply to all vessels harvesting sablefish IFQ. In effect, a vessel could not use more than 50,000 pounds of sablefish IFQ derived from sablefish QS held by a CQE during the fishing year. However, it could use additional sablefish IFQ from individually-held QS up to the overall vessel use caps applicable in the IFQ Program, if the overall vessel use caps were greater than 50,000 pounds. If any of the vessel use caps in the IFQ Program were lower than 50,000 pounds in a given year, then the lowest vessel use cap would apply.

CQE representatives testified to the Council that the existing 50,000-pound (22.7 mt) sablefish IFQ vessel use cap is restrictive because there is less flexibility and opportunity for community residents to use IFQ leased from CQEs on larger vessels. The use of CQE-leased sablefish IFQ on larger vessels could increase the employment of community members as crew and increase safety at sea during inclement weather. As discussed in the Purpose and Need section of the analysis prepared for Amendment 94, representatives of CQEs also testified to the Council that the ability to use CQE-leased sablefish IFQ on vessels owned by non-CQE community residents is important to the success of the CQE Program because many of the eligible CQE community residents may be entry-level fishermen or fishermen with no vessels or very small vessels. Changing the vessel use cap would provide CQEs the flexibility to lease IFQ to community residents who do not own vessels and allow them to find employment as crew members and fish the sablefish IFQ derived from the CQE-held QS on other vessels. The ability of community residents to lease IFQ from CQEs in the short-term could allow them to gain revenue from the sale of fish and could allow them to purchase QS from the CQEs over the longer term. Community residents then could work their way into the fishery. Enhancing individual resident holdings and CQE holdings is part of the purpose of the CQE Program.

Additional opportunities for a CQE to lease sablefish IFQ to community residents would likely result under Amendment 94, as the pool of potential resident applicants for IFQ would increase if there were a larger pool of potential vessels upon which the community residents could use the leased IFQ. CQEs and residents leasing IFQ from CQEs may benefit from the availability of vessels that could not use additional CQE-leased IFQ onboard under the current use cap that includes individually-held IFQ. Anticipating these opportunities for potential CQE purchases of QS are important for communities to develop shorter and longer term plans to finance and develop community-based fisheries.

An RIR was prepared for Amendment 94 that describes the CQE Program, the purpose and need for this action, the management alternatives evaluated to address this action, and the economic and socioeconomic effects of the alternatives (see **ADDRESSES**).

Amendment 94 and its proposed implementing regulations are designed to comply with the Magnuson-Stevens Act mandate that regional fishery management councils must take into account the importance of fishery resources to communities in order to provide for the sustained participation of such communities, and to the extent practicable, minimize adverse economic impacts on such communities. The IFQ Program for Pacific halibut is implemented under the authority of the Northern Pacific Halibut Act of 1982 (Halibut Act). The Council does not have a halibut fishery management plan. The Council and Secretary, however, consider the impacts of all the IFQ management measures on fishery-dependent communities. If Amendment 94 is approved, then sablefish and halibut components would be implemented in one rule. Amendment 94 is intended to promote the goals and objectives of the Magnuson-Stevens Act, the GOA FMP, and other applicable laws.

Public comments are being solicited on Amendment 94 and associated documents through the end of the comment period stated in this notice of availability. A proposed rule that would implement Amendment 94 will be published in the **Federal Register** for public comment following NMFS evaluation under Magnuson-Stevens Act procedures. Public comments, whether specifically directed to the amendment or the proposed rule, must be received, not just postmarked or otherwise transmitted, by 5 p.m. A.l.t. on the last day of the comment period (see **DATES**). Comments received by the end of the comment period will be considered in the approval/disapproval decision on Amendment 94. Comments received after that date will not be considered in the decision to approve or disapprove Amendment 94.

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

Dated: February 19, 2013.

James P. Burgess,

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

[FR Doc. 2013–04157 Filed 2–21–13; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register
Vol. 78, No. 36
Friday, February 22, 2013

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Forest Service

Annual List of Newspapers Used for Publication of Legal Notice of Decisions Appealable Under 36 CFR Part 215 or Subject to the Objection Process at 36 CFR 218 for the Rocky Mountain Region; Colorado, Wyoming, South Dakota, Nebraska, Kansas

AGENCY: Forest Service, USDA.

ACTION: Notice.

SUMMARY: This notice lists the newspapers that Ranger Districts, Forests, and the Regional Office of the Rocky Mountain Region will use to publish notices for pubic comments on actions subject to the provisions of 36 CFR part 215 or 218. The intended effect of this action is to inform interested members of the public which newspapers will be used to publish legal notices of actions subject to public comment and decisions subject to appeal under 36 CFR part 215 or objection under 36 CFR part 218.

Responsible Officials in the Rocky Mountain Region of the USDA Forest Service will publish notices of availability for comment and notices of decisions that may be subject to administrative appeal under 36 CFR part 215. These notices will be published in the legal notice section of the newspapers listed in the Supplementary Information section of this notice. As provided in 36 CFR 215.5, 215.6, and 215.7, such notice shall constitute legal evidence that the agency has given timely and constructive notice for comment and notice of decisions that may be subject to administrative appeal. Newspaper publication of notices of decisions is in addition to direct notice to those who have requested notice in writing and to those known to be interested in or affected by a specific decision.

Additionally, Responsible Officials in the Rocky Mountain Region of the USDA Forest Service will publish notices of availability for comment and notices of decisions that may be subject to the objection process under 36 CFR part 218. These notices will be published in the legal notice section of the newspapers listed in the Supplementary Information section of this notice. As provided in 36 CFR 218.4 and 218.9, such notice shall constitute legal evidence that the agency has given timely and constructive notice for comment and notice of decisions that may be subject to the objection process. Newspaper publication of notices of decisions is in addition to direct notice to those who have requested notice in writing and to those known to be interested in or affected by a specific decision.

DATES: Use of these newspapers for the purpose of publishing legal notices for comment and decisions that may be subject to appeal under 36 CFR part 215 or subject to objection under 36 CFR part 218 shall begin February 22, 2013 and continue until further notice.

ADDRESSES: USDA Forest Service, Rocky Mountain Region; ATTN: Regional Appeals Manager; 740 Simms Street, Golden, Colorado, 80401.

FOR FURTHER INFORMATION CONTACT: John Rupe, 303 275–5148 Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8:00 a.m. and 8:00 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: Responsible Officials in the Rocky Mountain Region of the USDA Forest Service will give legal notice of decisions that may be subject to appeal under 36 CFR part 215 or subject to the objection process under 36 CFR part 218 in the following newspapers which are listed by Forest Service administrative unit. Where more than one newspaper is listed for any unit, the first newspaper listed is the primary newspaper which shall be used to constitute legal evidence that the agency has given timely and constructive notice for comment and for decisions that may be subject to administrative appeal or objection process. As provided in 36 CFR 215.15, the time frame for appeal shall be based on the date of publication of a notice for decision in the primary newspaper. As provided in 36 CFR 218.9, the time frame for an objection shall be based on the date of publication of a notice for decision in the primary newspaper.

Notice by Regional Forester of Availability for Comment and Decisions

The Denver Post, published daily in Denver, Denver County, Colorado, for decisions affecting National Forest System lands in the States of Colorado, Nebraska, Kansas, South Dakota, and eastern Wyoming and for any decision of Region-wide impact. For those Regional Forester decisions affecting a particular unit, the day after notice will also be published in the newspaper specific to that unit.

Arapaho and Roosevelt National Forests and Pawnee National Grassland, Colorado

Notice by Forest Supervisor of Availability for Comment and Decisions

Coloradoan, published daily in Fort Collins, Larimer County, Colorado.

Notice by District Rangers of Availability for Comment and Decisions

Canyon Lakes District: *Coloradoan*, published daily in Fort Collins, Larimer County, Colorado.

Pawnee District: *Greeley Tribune*, published daily in Greeley, Weld County, Colorado.

Boulder District: *Daily Camera*, published daily in Boulder, Boulder County, Colorado.

Clear Creek District: *Clear Creek Courant*, published weekly in Idaho Springs, Clear Creek County, Colorado.

Sulphur District: *Middle Park Times*, published weekly in Granby, Grand County, Colorado.

Grand Mesa, Uncompahgre, and Gunnison National Forests, Colorado

Notice by Forest Supervisor of Availability for Comment and Decisions

Grand Junction Daily Sentinel, published daily in Grand Junction, Mesa County, Colorado.

Notice by District Rangers of Availability for Comment and Decisions

Grand Valley District: *Grand Junction Daily Sentinel*, published daily in Grand Junction, Mesa County, Colorado.

Paonia District: *Delta County Independent*, published weekly in Delta, Delta County, Colorado.

Gunnison Districts: *Gunnison Country Times*, published weekly in Gunnison, Gunnison County, Colorado.

Norwood District: *Telluride Daily Planet*, published daily in Telluride, San Miguel County, Colorado.

Ouray District: *Montrose Daily Press*, published daily in Montrose, Montrose County, Colorado.

Pike and San Isabel National Forests and Cimarron and Comanche National Grasslands

Notice by Forest Supervisor of Availability for Comment and Decisions

Pueblo Chieftain, published daily in Pueblo, Pueblo County, Colorado.

Notice by District Rangers of Availability for Comment and Decisions

San Carlos District: *Pueblo Chieftain*, published daily in Pueblo, Pueblo County, Colorado.

Comanche District-Carrizo Unit: *Plainsman Herald*, published weekly in Springfield, Baca County, Colorado.

Comanche District-Timpas Unit: *Tribune Democrat*, published daily in La Junta, Otero County, Colorado.

Cimarron District: The Elkhart *Tri-State News*, published weekly in Elkhart, Morton County, Kansas.

South Platte District: *News Press*, published weekly in Castle Rock, Douglas County, Colorado.

Leadville District: *Herald Democrat*, published weekly in Leadville, Lake County, Colorado.

Salida District: *The Mountain Mail*, published daily in Salida, Chaffee County, Colorado.

South Park District: *Fairplay Flume*, published weekly in Bailey, Park County, Colorado.

Pikes Peak District: *The Gazette*, published daily in Colorado Springs, El Paso County, Colorado.

Rio Grande National Forest, Colorado

Notice by Forest Supervisor of Availability for Comment and Decisions

Valley Courier, published daily in Alamosa, Alamosa County, Colorado.

Notice by District Rangers of Availability for Comment and Decisions

Valley Courier, published daily in Alamosa, Alamosa County, Colorado.

Routt National Forest, Colorado

Notice by Forest Supervisor of Availability for Comment and Decisions

Laramie Daily Boomerang, published daily in Laramie, Albany County, Wyoming.

Notice by District Rangers of Availability for Comment and Decisions

San Juan National Forest, Colorado

Notice by Forest Supervisor of Availability for Comment and Decisions

Durango Herald, published daily in Durango, La Plata County, Colorado.

Notice by District Rangers of Availability for Comment and Decisions

Durango Herald, published daily in Durango, La Plata County, Colorado.

White River National Forest, Colorado

Notice by Forest Supervisor of Availability for Comment and Decisions

The Glenwood Springs Post Independent, published daily in Glenwood Springs, Garfield County, Colorado.

Notice by District Rangers of Availability for Comment and Decisions

Aspen-Sopris District: *Aspen Times*, published daily in Aspen, Pitkin County, Colorado.

Blanco District: *Rio Blanco Herald Times*, published weekly in Meeker, Rio Blanco County, Colorado.

Dillon District: *Summit Daily*, published daily in Frisco, Summit County, Colorado.

Eagle-Holy Cross District: *Vail Daily*, published daily in Vail, Eagle County, Colorado.

Rifle District: *Citizen Telegram*, published weekly in Rifle, Garfield County, Colorado.

Nebraska National Forest, Nebraska and South Dakota

Notice by Forest Supervisor of Availability for Comment and Decisions

The Rapid City Journal, published daily in Rapid City, Pennington County, South Dakota.

Notice by District Rangers of Availability for Comment and Decisions:

Bessey District/Charles E. Bessey Tree Nursery: *The North Platte Telegraph*, published daily in North Platte, Lincoln County, Nebraska.

Pine Ridge District: *The Rapid City Journal*, published daily in Rapid City, Pennington County, South Dakota.

Samuel R. McKelvie National Forest: *The North Platte Telegraph*, published daily in North Platte, Lincoln County, Nebraska.

Fall River and Wall Districts, Buffalo Gap National Grassland: *The Rapid City Journal*, published daily in Rapid City, Pennington County, South Dakota.

Fort Pierre National Grassland: *The Capital Journal*, published Monday through Friday in Pierre, Hughes County, South Dakota.

Black Hills National Forest, South Dakota and Eastern Wyoming

Notice by Forest Supervisor of Availability for Comment and Decisions

The Rapid City Journal, published daily in Rapid City, Pennington County, South Dakota.

Notice by District Rangers of Availability for Comment and Decisions

The Rapid City Journal, published daily in Rapid City, Pennington County, South Dakota.

Bighorn National Forest, Wyoming

Notice by Forest Supervisor of Availability for Comment and Decisions

Casper Star-Tribune, published daily in Casper, Natrona County, Wyoming.

Notice by District Rangers of Availability for Comment and Decisions

Casper Star-Tribune, published daily in Casper, Natrona County, Wyoming.

Medicine Bow-Routt National Forests and Thunder Basin National Grassland, Colorado and Wyoming

Notice by Forest Supervisor of Availability for Comment and Decisions

Laramie Daily Boomerang, published daily in Laramie, Albany County, Wyoming.

Notice by District Rangers of Availability for Comment and Decisions

Laramie District: *Laramie Daily Boomerang*, published daily in Laramie, Albany County, Wyoming.

Douglas District: *Casper Star-Tribune*, published daily in Casper, Natrona County, Wyoming.

Brush Creek—Hayden District: *Rawlins Daily Times*, published daily in Rawlins, Carbon County, Wyoming.

Hahns Peak-Bears Ears District: *Steamboat Pilot*, published weekly in Steamboat Springs, Routt County, Colorado.

Yampa District: *Steamboat Pilot*, published weekly in Steamboat Springs, Routt County, Colorado.

Parks District: *Jackson County Star*, published weekly in Walden, Jackson County, Colorado.

Shoshone National Forest, Wyoming

Notice by Forest Supervisor of Availability for Comment and Decisions

Cody Enterprise, published twice weekly in Cody, Park County, Wyoming.

Notice by District Rangers of Availability for Comment and Decisions

Clarks Fork District: *Powell Tribune*, published twice weekly in Powell, Park County, Wyoming.

Wapiti and Greybull Districts: *Cody Enterprise*, published twice weekly in Cody, Park County, Wyoming.

Wind River District: *The Dubois Frontier*, published weekly in Dubois, Fremont County, Wyoming.

Washakie District: *Lander Journal*, published twice weekly in Lander, Fremont County, Wyoming.

Dated: January 9, 2013.

Brian Ferebee,

Deputy Regional Forester, Resources, Rocky Mountain Region.

[FR Doc. 2013–04086 Filed 2–21–13; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: Bureau of Industry and Security (BIS).

Title: Chemical Weapons Convention (CWC) Declaration and Report Handbook and Forms.

OMB Control Number: 0694–0091.

Form Number(s): Form 1–1; Form 1–2; Form 1–2A; Form 1–2B, etc.

Type of Request: Regular submission (extension of a currently approved information collection).

Burden Hours: 14,813.

Number of Respondents: 779.

Average Hours per Response: 10 minutes to 577 hours.

Needs and Uses: This information is required for the United States to comply with its obligations under the Chemical Weapons Convention, an international arms control treaty. The Chemical Weapons Convention Implementation Act of 1998 and Commerce Chemical Weapons Convention Regulations specify the rights, responsibilities and obligations for submission of declarations, reports and inspections.

Affected Public: Business and other for-profit organizations.

Frequency: On occasion.

Respondent's Obligation: Mandatory.

OMB Desk Officer: Jasmeet Seehra, (202) 395–3123.

Copies of the above information collection proposal can be obtained by calling or writing Jennifer Jessup, Departmental Paperwork Clearance Officer, (202) 482–0336, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *jjessup@doc.gov*.

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Jasmeet Seehra, OMB Desk Officer, by email to *Jasmeet_K._Seehra@omb.eop.gov* or by fax to (202) 395–5167.

Dated: February 15, 2013.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2013–04071 Filed 2–21–13; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Atlantic Highly Migratory Species Recreational Landings Reports.

OMB Control Number: 0648–0328.

Form Number(s): NA.

Type of Request: Regular submission (revision and extension of a current information collection).

Number of Respondents: 10,435.

Average Hours per Response: Maryland and North Carolina catch cards, 10 minutes; other landings reports, 5 minutes; verifications of bluefin tuna landed over 73 inches, 5 minutes; monthly state reports, 1 hour; annual state reports, 4 hours.

Burden Hours: 1,384.

Needs and Uses: This request is for revision and extension of a currently approved information collection.

Recreational catch reporting provides important data used to monitor catches of Atlantic highly migratory species (HMS) and supplements other existing data collection programs. Data collected through this program are used for both domestic and international fisheries management and stock assessment purposes.

Atlantic bluefin tuna (BFT) catch reporting provides real-time catch information used to monitor the recreational BFT fishery. Under the Atlantic Tunas Convention Act of 1975 (ATCA, 16 U.S.C. 971), the United States is required to adopt regulations, as necessary and appropriate, to implement recommendations of the International Commission for the Conservation of Atlantic Tunas (ICCAT), including recommendations on a specified BFT quota. BFT catch reporting helps the U.S. monitor this quota monitoring and supports scientific research consistent with ATCA and the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act, 16 U.S.C. 1801 et seq.). Recreational anglers are required to report specific information regarding their catch after they land a BFT.

Atlantic billfish and swordfish are managed internationally by ICCAT and nationally under ATCA and the Magnuson-Stevens Act. This collection provides information needed to monitor the recreational catch of Atlantic blue and white marlin, which is applied to the recreational limit established by ICCAT, and the recreational catch of North Atlantic swordfish, which is applied to the U.S. quota established by ICCAT. This collection also provides information on recreational landings of West Atlantic sailfish which is unavailable from other established monitoring programs. Collection of sailfish catch information is authorized under the Magnuson-Stevens Act for purposes of stock management.

Affected Public: Individuals or households.

Frequency: Monthly, annually and on occasion.

Respondent's Obligation: Mandatory.

OMB Desk Officer: *OIRA_Submission@omb.eop.gov*.

Copies of the above information collection proposal can be obtained by calling or writing Jennifer Jessup, Departmental Paperwork Clearance Officer, (202) 482–0336, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *Jjessup@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *OIRA_Submission@omb.eop.gov*.

Dated: February 18, 2013.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2013–04073 Filed 2–21–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

U.S. Census Bureau

Proposed Information Collection; Comment Request; Survey of Income and Program Participation (SIPP) 2014 Panel

AGENCY: U.S. Census Bureau, Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

DATES: To ensure consideration, written comments must be submitted on or before April 23, 2013.

ADDRESSES: Direct all written comments to Jennifer Jessup, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *jjessup@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Jason M. Fields, Census Bureau, Room HQ–7H069 Washington, DC 20233–8400, (301) 763–2465 (or via the Internet at *jason.m.fields@census.gov*).

SUPPLEMENTARY INFORMATION:

I. Abstract

The Census Bureau plans to conduct the Survey of Income and Program Participation 2014 Panel (SIPP) in 4 waves beginning in February 2014. Wave 1 of the SIPP 2014 Panel will be conducted from February to May of 2014. Wave 2 is scheduled to be conducted from January to April of 2015. Wave 3 is scheduled to be conducted from January to April of 2016. Wave 4 is scheduled to be conducted from January to April of 2017. The SIPP is a household-based survey designed as a continuous series of national panels. The SIPP represents a source of information for a wide variety of topics and allows the integration of information for separate topics to form a single, unified database allowing for the examination of the interaction between tax, transfer, and other government and private policies. Government domestic policy formulators depend heavily upon SIPP information concerning the distribution of income received either directly as money or indirectly as in-kind benefits and the effect of tax and transfer programs on that distribution. They also need improved and expanded data on the income and general economic and financial situation of the U.S. population, which the SIPP has provided on a continuing basis since 1983. The SIPP has measured levels of economic well-being and permitted measurement of changes in these levels over time.

A portion of the 2014 SIPP Panel will use an Event History Calendar (EHC) that facilitates the collection of dates of events and spells of coverage. The EHC should assist the respondent's ability to recall events accurately over the one year reference period and provide increased data quality and inter-topic consistency for dates reported by respondents. The EHC is intended to help respondents recall information in a more natural "autobiographical" manner by using life events as triggers to recall other economic events. The EHC was previously used in the 2010, 2011, 2012, and 2013 SIPP–EHC field tests. The content of the 2014 SIPP Panel will match that of the 2013 SIPP–EHC very closely. The 2014 Panel SIPP design does not contain freestanding topical modules; however, a portion of traditional SIPP topical module content is integrated into the 2014 SIPP Panel interview. Examples of this content include questions on medical expenses, child care, retirement and pension plan coverage, marital history, adult and child well-being, and others.

The 2014 SIPP Panel is a brand new "wave 1" sample with new survey respondents who were not interviewed in the previous 2010–2013 SIPP–EHC field tests. The 2014 SIPP Panel wave 1 will interview respondents using the previous calendar year 2013 as the reference period and will proceed with annual interviewing going forward. The 2014 SIPP Panel will use a revised interviewing method structure that will follow adults (age 15 years and older) who move from the prior wave household. Consequently, future waves will incorporate dependent data, which is information collected from the prior wave interview brought forward to the current interview.

The Census Bureau plans to use Computer Assisted Recorded Interview (CARI) technology for some of the respondents during the 2014 SIPP Panel. CARI is a data collection method that captures audio along with response data during computer-assisted personal and telephone interviews (CAPI & CATI). With the respondent's consent, a portion of each interview is recorded unobtrusively and both the sound file and screen images are returned with the response data to a central location for coding.

By reviewing the recorded portions of the interview, quality assurance analysts can evaluate the likelihood that the exchange between the field representative and respondent is authentic and follows critical survey protocol as defined by the sponsor and based on best practices. The 2014 SIPP Panel instrument will utilize the CARI Interactive Data Access System (CARI System), an innovative, integrated, multifaceted monitoring system that features a configurable web-based interface for behavior coding, quality assurance, and coaching. This system assists in coding interviews for measuring question and interviewer performance and the interaction between interviewers and respondents.

Approximately 45,000 households are expected to be interviewed for the 2014 SIPP Panel. We estimate that each household contains 2.1 people aged 15 and above, yielding approximately 94,500 person-level interviews per wave in this panel. Interviews take approximately 60 minutes per adult on average, consequently the total annual burden for 2014 SIPP–EHC interviews will be 94,500 hours per year in FY 2014, 2015, 2016, and 2017.

II. Method of Collection

The 2014 SIPP Panel instrument will consist of one interview per person per wave (year) resulting in four total interviews over the life of the panel. Each interview will reference the previous calendar year depending on the wave. The interview is conducted in person with all household members 15 years old or over using regular proxy-respondent rules. In the instances where the residence is not accessible or the respondent makes a request the interview may be conducted by telephone.

III. Data

OMB Control Number: 0607–0957.

Form Number: SIPP/CAPI Automated Instrument.

Type of Review: Regular.

Affected Public: Individuals or Households.

Estimated Number of Respondents: 94,500 people per wave.

Estimated Time per Response: 60 minutes per person on average.

Estimated Total Annual Burden Hours: 94,500 hours per wave.

Estimated Total Annual Cost: The only cost to respondents is their time.

Respondent's Obligation: Voluntary.

Legal Authority: Title 13, United States Code, Section 182.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: February 15, 2013.

Glenna Mickelson,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2013–04067 Filed 2–21–13; 8:45 am]

BILLING CODE 3511–07–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Proposed Information Collection; Comment Request; Defense Priorities and Allocations System

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before April 23, 2013.

ADDRESSES: Direct all written comments to Jennifer Jessup, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *JJessup@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Larry Hall, BIS ICB Liaison, (202) 482–4895, *Lawrence.Hall@bis.doc.gov*.

SUPPLEMENTARY INFORMATION:

I. Abstract

This recordkeeping requirement is necessary for administration and enforcement of delegated authority under the Defense Production Act of 1950, as amended (50 U.S.C. App. 2061, et seq.) and the Selective Service Act of 1948 (50 U.S.C. App. 468). Any person who receives a priority-rated order under the implementing Defense Priorities and Allocations System regulation (15 CFR part 700) must retain the records for at least 3 years.

II. Method of Collection

Submitted electronically or on paper.

III. Data

OMB Control Number: 0694–0053.

Form Number(s): None.

Type of Review: Regular submission (extension of a currently approved information collection).

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 1,407,000.

Estimated Time per Response: 5 seconds to 16 minutes.

Estimated Total Annual Burden Hours: 14,477.

Estimated Total Annual Cost to Public: $0.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: February 15, 2013.

Gwettnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2013–04072 Filed 2–21–13; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC516

Gulf of Mexico Fishery Management Council (Council); Public Meetings

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

ACTION: Notice of public meetings.

SUMMARY: The Gulf of Mexico and South Atlantic Fishery Management Councils will convene a Science Workshop of the Goliath Grouper Joint Council Steering Committee.

DATES: The meeting will convene at 9 a.m. to 4 p.m. EST on Tuesday, March 12, 2013.

ADDRESSES: The meeting will be held at the Gulf of Mexico Fishery Management Council, 2203 North Lois Avenue, Suite 1100, Tampa, FL 33607; telephone: (813) 348–1630.

Council address: Gulf of Mexico Fishery Management Council, 2203 North Lois Avenue, Suite 1100, Tampa, FL, 33607.

FOR FURTHER INFORMATION CONTACT: Dr. Stephen Bortone, Executive Director, Gulf of Mexico Fishery Management Council; telephone: (813) 348–1630.

SUPPLEMENTARY INFORMATION: The Ad Hoc Goliath Grouper Joint Council Steering Committee will hold a workshop to afford experts the opportunity to offer suggestions as to the scientific goals and objectives of any future management of Goliath Grouper. These goals and objectives will be based on what is currently known about the species and what needs to be known. Based on this input, both the Gulf of Mexico and South Atlantic Fishery Management Councils will provide additional guidance to the Joint Steering Committee as to further directions that should be taken to meet the identified objectives for both councils; and a discussion of future activities by the Steering Committee.

Copies of the agenda and other related materials can be obtained by calling (813) 348–1630 or can be downloaded from the Council's ftp site, *ftp.gulfcouncil.org*.

Although other non-emergency issues not on the agenda may come before the Ad Hoc Goliath Grouper Joint Council Steering Committee for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act, those issues may not be the subject of formal action during this meeting. Actions of the Ad Hoc Goliath Grouper Joint Council Steering Committee will be restricted to those issues specifically identified in the agenda 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 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 Kathy Pereira at the Council (see **ADDRESSES**) at least 5 working days prior to the meeting.

Dated: February 19, 2013.

Tracey L. Thompson,

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

[FR Doc. 2013–04090 Filed 2–21–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC517

Fisheries of the South Atlantic; Southeast Data, Assessment, and Review (SEDAR); Public Meeting

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

ACTION: Notice of SEDAR 32 post Data Workshop webinar.

SUMMARY: The SEDAR 32 assessments of the South Atlantic stocks of blueline tilefish and gray triggerfish will consist of a series of workshops and webinars: a Data Workshop; a series of Assessment webinars; and a Review Workshop. See **SUPPLEMENTARY INFORMATION**.

DATES: A SEDAR 32 post Data Workshop webinar will be held on Tuesday, March 12, 2013, from 9 a.m. until 1 p.m.

ADDRESSES:

Meeting address: The meeting will be held via webinar. The webinar is open to members of the public. Those interested in participating should contact Julia Byrd at SEDAR (see **FOR FURTHER INFORMATION CONTACT**) to request an invitation providing webinar access information. Please request webinar invitations at least 24 hours in advance of each webinar.

SEDAR address: 4055 Faber Place Drive, Suite 201, N. Charleston, SC 29405.

FOR FURTHER INFORMATION CONTACT: Julia Byrd, SEDAR Coordinator; telephone: (843) 571–4366; email: *julia.byrd@safmc.net*.

SUPPLEMENTARY INFORMATION: The Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils, in conjunction with NOAA Fisheries and the Atlantic and Gulf States Marine Fisheries Commissions, have implemented the Southeast Data, Assessment and Review (SEDAR) process, a multi-step method for determining the status of fish stocks in the Southeast Region. SEDAR is a three-step process including: (1) Data Workshop; (2) Assessment Process utilizing webinars; and (3) Review Workshop. The product of the Data Workshop is a data report which compiles and evaluates potential datasets and recommends which datasets are appropriate for assessment analyses. The product of the Assessment Process is a stock assessment report which describes the fisheries, evaluates the status of the stock, estimates biological benchmarks, projects future population conditions, and recommends research and monitoring needs. The assessment is independently peer reviewed at the Review Workshop. The product of the Review Workshop is a Summary documenting panel opinions regarding the strengths and weaknesses of the stock assessment and input data. Participants for SEDAR Workshops are appointed by the Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils and NOAA Fisheries Southeast Regional Office, Highly Migratory Species Management Division, and Southeast Fisheries Science Center. Participants include: data collectors and database managers; stock assessment scientists, biologists, and researchers; constituency representatives including fishermen, environmentalists, and non-governmental organizations (NGOs); international experts; and staff of Councils, Commissions, and state and federal agencies.

The items of discussion in the post Data Workshop are as follows:

Participants will finalize data recommendations from the Data Workshop and provide early modeling advice.

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 identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

This meeting is accessible to people with disabilities. Requests for auxiliary aids should be directed to the SEDAR office (see **ADDRESSES**) at least 10 business days prior to the meeting.

Note: The times and sequence specified in this agenda are subject to change.

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

Dated: February 19, 2013.

Tracey L. Thompson,

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

[FR Doc. 2013–04091 Filed 2–21–13; 8:45 am]

BILLING CODE 3510–22–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Additions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Additions to the Procurement List.

SUMMARY: This action adds products and services to the Procurement List that will be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

DATES: *Effective Date:* March 25, 2013.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia 22202–3259.

FOR FURTHER INFORMATION CONTACT: Barry S. Lineback, Telephone: (703) 603–7740, Fax: (703) 603–0655, or email *CMTEFedReg@AbilityOne.gov*.

SUPPLEMENTARY INFORMATION:

Additions

On 11/27/2012 (77 FR 70737–70738); 11/30/2012 (77 FR 71400–71401); 12/14/2012 (77 FR 74469–74470); 12/21/2012 (77 FR 75616); and 12/31/2012 (77 FR 77038), the Committee for Purchase

From People Who Are Blind or Severely Disabled published notices of proposed additions to the Procurement List.

After consideration of the material presented to it concerning capability of qualified nonprofit agencies to provide the products and services and impact of the additions on the current or most recent contractors, the Committee has determined that the products and services listed below are suitable for procurement by the Federal Government under 41 U.S.C. 8501–8506 and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the products and services to the Government.

2. The action will result in authorizing small entities to furnish the products and services to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 8501–8506) in connection with the products and services proposed for addition to the Procurement List.

End of Certification

Accordingly, the following products and services are added to the Procurement List:

Products

NSN: 6135–01–414–8831—Battery, Non-Rechargeable, 3V, Lithium/Manganese Dioxide
NSN: 6135–01–447–0949—Battery, Non-Rechargeable, 9V, Alkaline
NSN: 6135–01–524–7621—Battery, 3.6V, A, Lithium
NSN: 6140–01–032–1326—Battery, Storage, 12V, Lead Acid, Wet Charged
NSN: 6140–01–505–1940—Battery, Storage, 12V, Lead Acid, Wet Charged
NSN: 6140–01–528–2975—Battery, Storage, 12V, Lead Acid, Wet Charged
NPA: Eastern Carolina Vocational Center, Inc., Greenville, NC
Contracting Activity: Defense Logistics Agency Land and Maritime, Columbus, OH
Coverage: C-List for 100% of the requirement of the Department of Defense, as aggregated by the Defense Logistics Agency Land and Maritime, Columbus, OH.

NSN: MR 1146—Serving Set, Stand and Bowl, 16oz
NPA: Industries for the Blind, Inc., West Allis, WI
Contracting Activity: Defense Commissary Agency, Fort Lee, VA
Coverage: C-List for the requirements of military commissaries and exchanges as aggregated by the Defense Commissary Agency.
NSN: 7510–00–NIB–1886—Tape, Vinyl Backing, Rubber Adhesive, Yellow, 36 yards
NSN: 7510–00–NIB–1891—Tape, Safety Stripe, Rubber Adhesive, Black/Yellow, 36 yards
Coverage: The NSNs listed above will be A-List for the Total Government Requirement as aggregated by the General Services Administration.
NSN: 7510–00–NIB–1890—Tape, Safety Stripe, Rubber Adhesive, Black/White, 36 yards
Coverage: The NSN listed above will be B-List for the Broad Government Requirement as aggregated by the General Services Administration.
NPA: Cincinnati Association for the Blind, Cincinnati, OH
Contracting Activity: General Services Administration, New York, NY
NSN: 7420–00–NIB–0023—Talking Calculator, 508 Compliant, 12 Digit, Portable, Desktop, Battery Operated
NPA: MidWest Enterprises for the Blind, Inc., Kalamazoo, MI
Contracting Activity: General Services Administration, New York, NY
Coverage: B-List for the Broad Government Requirement as aggregated by the General Services Administration.
NSN: 7105–00–NIB–0064—Round Table, Folding Legs, 60″ x 29″
NSN: 7105–00–NIB–0065—Bi-fold Table, 60″ x 30″
NSN: 7105–00–NIB–0066—Personal Table, 30″ x 20″
NSN: 7105–00–NIB–0067—Folding Table with Heavy Duty Legs, 72″ x 30″
NSN: 7105–00–NIB–0068—Picnic Table, 72″ x 30″
NSN: 7105–00–NIB–0069—Utility Table, 60″ x 18″
NSN: 7105–00–NIB–0070—Utility Table, 72″ x 18″
NPA: MidWest Enterprises for the Blind, Inc., Kalamazoo, MI
Contracting Activity: General Services Administration, Arlington, VA
Coverage: B-List for the Broad Government Requirement as aggregated by the General Services Administration.
NSN: MR 10618—Stickers, Easter Themed, Assorted, 200ct
NPA: Winston-Salem Industries for the Blind, Inc., Winston-Salem, NC
Contracting Activity: Defense Commissary Agency, Fort Lee, VA
Coverage: C-List for the requirements of military commissaries and exchanges as aggregated by the Defense Commissary Agency.

Services

Service Type/Location: E911 Dispatch Service, Directorate of Emergency Services (DES) Emergency Call Center & Military Police Station, 6940 Marchant Street, Building 216, Fort Benning, GA.
NPA: Bobby Dodd Institute, Inc., Atlanta, GA.
Contracting Activity: Dept of the Army, W6QM MICC—Ft Benning, Ft Benning, GA.
Service Type/Location: Water System Hydrant Maintenance Service, Joint Base Lewis-McChord, WA.
NPA: Skookum Educational Programs, Bremerton, WA.
Contracting Activity: Dept of the Army, W6QM MICC—JB Lewis—MC Chord, Fort Lewis, WA.
Service Type/Location: Grounds Maintenance Service, U.S. Coast Guard Facility, 9640 Clinton Drive, Houston, TX.
NPA: On Our Own Services, Inc., Houston, TX.
Contracting Activity: Dept of Homeland Security, U.S. Coast Guard, Base New Orleans, New Orleans, LA.
Service Type/Location: Grounds Maintenance Service, Joint Interagency Task Force South (JIATFS), Truman Annex, Key West, FL.
NPA: Goodwill Industries of South Florida, Inc., Miami, FL.
Contracting Activity: Dept of the Army, W453 JIATFS, Key West, FL.
Service Type/Location: Hospital Housekeeping Service, Weed Army Community Hospital (WACH), 2nd Street, Building 166, Fort Irwin, CA.
NPA: Job Options, Inc., San Diego, CA.
Contracting Activity: Dept of the Army, W40M USA MEDCOM HCAA, Fort Sam Houston, TX.

Barry S. Lineback,

Director, Business Operations.

[FR Doc. 2013–04088 Filed 2–21–13; 8:45 am]

BILLING CODE 6353–01–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed Additions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed Additions to the Procurement List.

SUMMARY: The Committee is proposing to add products and services to the Procurement List that will be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

Comments Must Be Received on or Before: 3/25/2013.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia 22202–3259.

FOR FURTHER INFORMATION OR TO SUBMIT COMMENTS CONTACT: Barry S. Lineback,

Telephone: (703) 603–7740. Fax: (703) 603–0655, or email *CMTEFedReg@AbilityOne.gov*.

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C. 8503 (a)(2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions.

Additions

If the Committee approves the proposed additions, the entities of the Federal Government identified in this notice will be required to procure the products and services listed below from nonprofit agencies employing persons who are blind or have other severe disabilities.

The following products and services are proposed for addition to the Procurement List for production by the nonprofit agencies listed:

Products

NSN: 7930–00–NIB–0645—Detergent, Liquid, High-foaming, Car and Truck Washing, (4) 1–GL Container/BX

NSN: 7930–00–NIB–0647—Liquid Solution, Truck and Trailer Wash, 5 GL

NSN: 7930–00–NIB–0653—Protectant, Liquid, Water-Based, Vehicle Interior Surface, (4) 1–GL Container/BX

Coverage: A-List for the Total Government Requirement as aggregated by the General Services Administration.

NSN: 7930–00–NIB–0646—Detergent, Liquid, High-foaming, Car and Truck Washing, 5 GL

NSN: 7930–00–NIB–0648—Liquid Solution, Truck and Trailer Wash, 55 GL

NSN: 7930–00–NIB–0649—Cleaner/Degreaser, Heavy Duty, Biodegradable, Car and Trucks, 5 GL

NSN: 7930–00–NIB–0650—Cleaner/Degreaser, Heavy Duty, Biodegradable, Car and Trucks, 55 GL

NSN: 7930–00–NIB–0651—Liquid Solution, Concentrated, Vehicle, Wash and Shine, With Wax polymer, (4) 1–GL Container/BX

NSN: 7930–00–NIB–0652—Liquid Solution, Concentrated, Vehicle, Wash and Shine, W/Wax polymer, 5 GL

NSN: 7930–00–NIB–0654—Protectant, Liquid, Water-Based, Vehicle Interior Surface, 5 GL

NSN: 7930–00–NIB–0655—Cleaner, Wheel and Tire, 5 GL

NSN: 7930–00–NIB–0657—Bug Remover, Concentrated, Gelling, Vehicle, 5 GL

NSN: 7930–00–NIB–0666—Detergent, Oil and Water Separating, Heavy Duty, Biodegradable, Trucks and Trailers, 5 GL

NSN: 7930–00–NIB–0667—Detergent, Oil and Water Separating, Heavy Duty, Biodegradable, Trucks and Trailers, 55 GL

Coverage: B-List for the Broad Government Requirement as aggregated by the General Services Administration.

NPA: Susquehanna Association for the Blind and Vision Impaired, Lancaster, PA

Contracting Activity: General Services Administration, Fort Worth, TX.

NSN: 7530–00–NIB–0988—Cover, Record Book, Digital Camo, 6″ x 9″

NPA: New York City Industries for the Blind, Inc., Brooklyn, NY

Contracting Activity: General Services Administration, New York, NY.

Coverage: A-List for the Total Government Requirement as aggregated by the General Services Administration.

Services

Service Type/Location: Base Supply Center, Barnes Federal Building, 495 Summer Street, Boston, MA.

NPA: Industries for the Blind, Inc., West Allis, WI.

Contracting Activity: Defense Contract Management Agency (DCMA), DCMA Procurement Center, Boston, MA.

Service Type/Location: Laundry Service, Weed Army Community Hospital (WACH), 2nd Street, Building 166, Fort Irwin, CA.

NPA: Job Options, Inc., San Diego, CA.

Contracting Activity: Dept of the Army, W40M Western Rgnl Cntrg OFC, Tacoma, WA.

Service Type/Location: Custodial Service, Harrisonburg Courthouse, 116 North Main Street, Harrisonburg, VA.

NPA: Portco, Inc., Portsmouth, VA.

Contracting Activity: Public Buildings Service, GSA/PBS/R03 South Service Center, Philadelphia, PA.

Service Type/Location: Coating of Polypropylene Plastic Bleeding Tubes, Department of Agriculture (USDA), Animal Plant Health Inspection Service's (APHIS) National Veterinary Stockpile (NVS), (Offsite: 12600 Third St., Grandview, MO), 1541 E. Bannister Road, Kansas City, MO.

NPA: JobOne, Independence, MO.

Contracting Activity: Department of Agriculture, Animal and Plant Health Inspection Service, Minneapolis, MN.

Barry S. Lineback,

Director, Business Operations.

[FR Doc. 2013–04087 Filed 2–21–13; 8:45 am]

BILLING CODE 6353–01–P

DEPARTMENT OF EDUCATION

[Docket No. ED–2013–ICCD–0014]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Application for Native American Career and Technical Education Program (NACTEP)

AGENCY: Office of Adult and Vocational Education (OVAE), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 3501 *et seq.*), ED is proposing a reinstatement of a previously approved information collection.

DATES: Interested persons are invited to submit comments on or before March 25, 2013.

ADDRESSES: Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting Docket ID number ED–2013–ICCD–0014 or via postal mail, commercial delivery, or hand delivery. Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted. Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Room 2E117, Washington, DC 20202–4537.

FOR FURTHER INFORMATION CONTACT: Electronically mail *ICDocketMgr@ed.gov*. Please do not send comments here.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Application for Native American Career and Technical Education Program (NACTEP).

OMB Control Number: 1830–0542.

Type of Review: Reinstatement of a previously approved information collection.

Respondents/Affected Public: State, Local and Tribal Governments.

Total Estimated Number of Annual Responses: 80.

Total Estimated Number of Annual Burden Hours: 9,600.

Abstract: This discretionary grant falls under the Streamlined Clearance Process for Discretionary Grant Information Collection, 1894–0001. The Native American Career and Technical Education Program (NACTEP) is authorized under Section 116 of the Carl D. Perkins Career and Technical Education Improvement Act of 2006. The purpose of NACTEP is to provide grants to improve career and technical education programs that are consistent with the purposes of the Act and that benefit American Indians and Alaska Natives.

Dated: February 14, 2013.

Tomakie Washington,

Acting Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.

[FR Doc. 2013–04051 Filed 2–21–13; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No. ED–2013–ICCD–0013]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Application for Grants Under Disability and Rehabilitation Research (1894–0001)

AGENCY: Office of Special Education and Rehabilitation Services (OSERS), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 3501 *et seq.*), ED is proposing an extension of an existing information collection.

DATES: Interested persons are invited to submit comments on or before March 25, 2013.

ADDRESSES: Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting Docket ID number ED–2013–ICCD–0013 or via postal mail, commercial delivery, or hand delivery. Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted. Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Room 2E117, Washington, DC 20202–4537.

FOR FURTHER INFORMATION CONTACT: Electronically mail *ICDocketMgr@ed.gov*. Please do not send comments here.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Application for Grants under Disability and Rehabilitation Research (1894–0001).

OMB Control Number: 1820–0027.

Type of Review: Extension without change of an existing collection of information.

Respondents/Affected Public: State, Local and Tribal Governments.

Total Estimated Number of Annual Responses: 655.

Total Estimated Number of Annual Burden Hours: 131,000.

Abstract: This application package invites grants for research and related activities in Rehabilitation of Individuals with disabilities. This is in response to Public Law 93–112, Secs. 14(a) and 762, Rehabilitation Act of 1973, as amended. This grant application package contains program profiles, standard forms, program regulations, **Federal Register** information, FAQs, and transmitting instructions. Applications are primarily institutions of higher education, but may also include States; public or private agencies, including for-profit agencies; public or private organizations, including for-profit organizations and hospitals; and Indian tribes and tribal organizations. NIDRR's Research Fellowship is for qualified individuals only.

Dated: February 14, 2013.

Tomakie Washington,

Acting Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.

[FR Doc. 2013–04050 Filed 2–21–13; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Privacy Act of 1974; System of Records—School Participation Division Complaints Tracking System

AGENCY: Federal Student Aid, Department of Education.

ACTION: Notice of a new system of records.

SUMMARY: In accordance with the Privacy Act of 1974, as amended (Privacy Act), 5 U.S.C. 552a, the Chief Operating Officer for Federal Student Aid (FSA) of the Department of Education (Department) publishes this notice proposing to add a new system of records entitled "School Participation Division Complaints Tracking System (SPD–CTS)" (18–11–19).

DATES: Submit your comments on this proposed new system of records on or before March 25, 2013.

The Department has filed a report describing the new system of records covered by this notice with the Chair of the Senate Committee on Homeland Security and Governmental Affairs, the Chair of the House Committee on Oversight and Government Reform, and the Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB) on February 19, 2013. This new system of records will become effective on the later date of: (1) Expiration of the 40-day period for OMB review on April 1, 2013, unless OMB waives 10 days of the 40-day review period for compelling reasons shown by the Department; or (2) March 25, 2013, unless the system of records needs to be changed as a result of public comment or OMB review.

ADDRESSES: Address all comments about the School Participation Division—Complaints Tracking System to: Performance Improvement and Procedures Services Group Director, FSA, U.S. Department of Education, Union Center Plaza (UCP), 830 First Street NE., Washington, DC 20202–5435. Telephone: 202–377–4232. If you prefer to send comments through the Internet, use the following address: *comments@ed.gov*.

You must include the term "SPD–CTS" in the subject line of your electronic message.

During and after the comment period, you may inspect all public comments about this notice at the U.S. Department of Education in room 72E1, UCP, 7th Floor, 830 First Street NE., Washington, DC 20202–5435 between the hours of 8:00 a.m. and 4:30 p.m., Eastern time, Monday through Friday of each week except Federal holidays.

Assistance to Individuals With Disabilities in Reviewing the Rulemaking Record

On request, we will provide an appropriate accommodation or auxiliary aid to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for this notice. If you want to schedule an appointment for this type of accommodation or auxiliary aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT.**

FOR FURTHER INFORMATION CONTACT: Performance Improvement and Procedures Services Group Director, FSA, U.S. Department of Education, UCP, 830 First Street NE., Washington, DC 20202–5435. Telephone: 202–377–4232. If you use a telecommunications device for the deaf (TDD), or text telephone (TTY), you may call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

Introduction

In accordance with Executive Order 13607 of April 27, 2012, the Department's Federal Student Aid office has created a complaint system to strengthen enforcement and compliance mechanisms. The SPD–CTS will register and track complaints and responses for students receiving Federal military, veteran's educational, or Federal title IV, Higher Education Act of 1965, as amended (HEA) program benefits. Information may be shared with other Federal agencies, such as the Department of Veterans Affairs, the Department of Defense, the Department of Justice, and the Consumer Financial Protection Board (CFPB), for the purposes indicated in the routine uses published below and provided that such disclosure is permissible under the Family Educational Rights and Privacy Act (FERPA). Complaints are received through various resources (including, but not limited to, the public, school officials, external oversight partners, students, referrals from Federal, State, or local agencies, and other FSA offices), regarding issues such as administrative capability, school closure, disbursements, foreign schools, misrepresentation, and loan issues or student eligibility issues. Complaints are typically received via telephone or written correspondence by either FSA or the Office of Inspector General; however, complaints are registered without regard to the manner in which they are submitted. The preferred method for the receipt of title IV complaints and allegations is via email using the general SPD mailbox at *Caseteams@ed.gov*.

Upon receipt, the complaint or allegation is sent to the appropriate SPD team member for review, follow-up, and resolution. The complaints and allegations are reviewed to establish facts and circumstances regarding the alleged impropriety relating to the administration of the title IV, HEA programs. If the complaint or allegation is found to have merit, SPD takes the appropriate compliance action.

The purposes of the SPD–CTS are to capture complaint and allegation information from any source, to track complaints and allegations accurately by maintaining an audit trail of actions taken by the SPD, to provide geographically dispersed team members with meaningful and up-to-date information at decision points for SPD activities, to routinely resolve complaints within a timely manner, to report annually to Congress, to provide oversight and to ensure program integrity, thus safeguarding taxpayers' interests, to identify title IV, HEA program issues that may lead to law enforcement investigations, litigation, or other proceedings for use in such proceedings, to refer instances of possible fraud and abuse in Federal, State, or local programs to appropriate persons, entities, or authorities, where they may be covered by other Privacy Act system of records notices, and to create a centralized complaint system for students receiving educational benefits to register complaints that can be tracked and responded to by appropriate Federal, State, or local persons, entities, or authorities, where they also may be covered by other Privacy Act system of records notices.

The SPD–CTS includes records on individuals who have received title IV, HEA program assistance and are unsatisfied with their institutions of higher education. These records not only contain complaints and allegations against institutions of higher education, but they also contain, individually identifying information about title IV, HEA recipients, including, but not limited to their: names, street addresses, email addresses, and phone numbers. The information in the SPD–CTS may be shared with other law enforcement agencies for the purposes indicated in the routine uses published below and provided that such disclosure is consistent with FERPA.

Anyone in the SPD can add cases; those records will be held in accordance with federal record retention policies. In order to view the contents of the SPD–CTS on the Web site, a password is required to access SPD–CTS on the Web site.

The Privacy Act of 1974 (5 U.S.C. 552a(e)(4) and (11)) requires the Department to publish this notice of a new system of records in the **Federal Register**. The Department's regulations implementing the Privacy Act are contained in 34 CFR part 5b.

The Privacy Act applies to any record about an individual that contains individually identifying information and that is retrieved by a unique identifier associated with each individual, such as a name or Social Security number (SSN). The information about each individual is called a "record," and the system, whether manual or computer-based, is called a "system of records."

The Privacy Act requires each agency to publish a system of records notice in the **Federal Register** and to prepare reports to the Administrator of the Office of Information and Regulatory Affairs, OMB whenever the agency publishes a new system of records or significantly alters an established system of records. Each agency is also required to send copies of the report to the Chair of the Senate Committee on Homeland Security and Governmental Affairs and the Chair of the House of Representatives Committee on Oversight and Government Reform. These reports are included to permit an evaluation of the probable effect of the proposal on the privacy rights of individuals.

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (e.g., braille, large print, audiotape, or compact disc) on request to the contact person listed under this section.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *www.gpo.gov/fdsys*. At this site you can view this document, as well as all other documents of the Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov*. Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Dated: February 19, 2013.

James W. Runcie,

Chief Operating Officer, Federal Student Aid.

For the reasons discussed in the introduction, the Chief Operating Officer, Federal Student Aid, U.S. Department of Education (Department) publishes a new system of records to read as follows:

SYSTEM NUMBER:

18–11–19

SYSTEM NAME:

"School Participation Division—Complaints Tracking System (SPD–CTS)".

SECURITY CLASSIFICATION:

None.

SYSTEM LOCATION:

The information in the SPD–CTS is on an Intranet Web site called PCNet and is maintained by a School Participation Division (SPD) staff member in the Department's Dallas Regional Office located at 1999 Bryan Street, Suite 1410, Dallas, Texas 75201–6817. The Web site itself is located at the Virtual Data Center, maintained by Dell Perot Systems, 2300 W. Plano Parkway, Plano, Texas 75075–8427.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

This system contains records of individuals who file a complaint or allegation against an institution of higher education (IHE) related to the administration of title IV, Higher Education Act of 1965, as amended (HEA) programs.

CATEGORIES OF RECORDS IN THE SYSTEM:

Records in the SPD–CTS include, but are not limited to, data about individuals who have filed a complaint or allegation about an IHE. The records contain individually identifying information about these individuals, including, but not limited to their: names, addresses, email addresses, and telephone numbers.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

This system of records is authorized under Executive Order 13607 of April 27, 2012 and title IV of the HEA, 20 U.S.C. 1070 *et seq.*

PURPOSES:

The information contained in this system is maintained for the following purposes: (1) To capture complaint and allegation information from any source; (2) to track complaints and allegations accurately by maintaining an audit trail of actions taken by the SPD; (3) to provide geographically dispersed staff with meaningful and up-to-date information at decision points for SPD activities; (4) to routinely resolve complaints within a timely manner; (5) to report annually to Congress; (6) to provide oversight and to ensure program integrity, thus safeguarding taxpayers' interests; (7) to identify title IV, HEA program issues that may lead to law enforcement investigations, litigation, or other proceedings and for use in such proceedings; (8) to refer instances of possible fraud and abuse in Federal, State, or local programs to appropriate persons, entities, or authorities, where they may be covered by other Privacy Act system of records notices; and, (9) to create a centralized complaint system for students receiving educational benefits to register complaints that can be tracked and responded to by appropriate Federal, State, or local persons, entities, or authorities, where they also may be covered by other Privacy Act system of records notices.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

The Department may disclose information contained in a record in this system of records under the routine uses listed in this system of records without the consent of the individual if the disclosure is compatible with the purposes for which the record was collected. The Department may make these disclosures on a case-by-case basis, or if the Department has complied with the computer matching requirements of the Privacy Act of 1974, as amended (Privacy Act), under a computer matching agreement. To the extent any routine use disclosure published below involves the disclosure of personally identifiable information from education records protected by the Family Educational Rights and Privacy Act (FERPA), such disclosure only will be made to the extent that it is permissible under FERPA.

(1) *Program Purposes.* The Department may disclose records from the SPD–CTS system of records for the following program purposes:

(a) To verify the identity of the complainant involved or the accuracy of any complaint record in this system of records, or to assist with the determination of program eligibility and benefits, the Department may disclose records to IHEs; third-party servicers; or Federal, State, or local agencies.

(b) To support the investigation of possible fraud and abuse and to detect and prevent fraud and abuse in Federal, State, or local programs, disclosures may be made to IHEs; third-party servicers; or Federal, State, or local agencies.

(c) To support the creation of a centralized complaint system for students receiving educational benefits and to permit those complaints to be responded to by appropriate persons, entities, or authorities, disclosures may be made to appropriate Federal, State, or local persons, entities, or authorities.

(2) *Congressional Member Disclosure.* The Department may disclose the records of an individual to a member of Congress or the member's staff when necessary to respond to an inquiry from the member made at the written request of that individual. The member's right to the information is no greater than the right of the individual who requested it.

(3) *Disclosure for Use by Other Law Enforcement Agencies.* The Department may disclose information to any Federal, State, local, or foreign agency or other public authority responsible for enforcing, investigating, or prosecuting violations of administrative, civil, or criminal law or regulation if that information is relevant to any enforcement, regulatory, investigative, or prosecutorial responsibility within the receiving entity's jurisdiction.

(4) *Enforcement Disclosure.* In the event that information in this system of records indicates, either on its face or in connection with other information, a violation or potential violation of any applicable statute, regulation, or order of a competent authority, the Department may disclose the relevant records to the appropriate agency, whether foreign, Federal, State, Tribal, or local, charged with the responsibility of investigating or prosecuting that violation or charged with enforcing or

implementing the statute, Executive Order, rule, regulation, or order issued pursuant thereto.

(5) *Litigation or Alternative Dispute Resolution (ADR) Disclosure.*

(a) *Introduction.* In the event that one of the following parties listed below is involved in litigation or ADR, or has an interest in litigation or ADR, the Department may disclose certain records to the parties described in paragraphs (b), (c) and (d) of this routine use under the conditions specified in those paragraphs:

(i) The Department, or any of its components;

(ii) Any Department employee in his or her official capacity;

(iii) Any Department employee in his or her individual capacity if the Department of Justice (DOJ) has been requested to or has agreed to provide or arrange for representation of the employee;

(iv) Any Department employee in his or her individual capacity where the Department has agreed to represent the employee; or

(v) The United States where the Department determines that the litigation is likely to affect the Department or any of its components.

(b) *Disclosure to the DOJ.* If the Department determines that disclosure of certain records to the DOJ is relevant and necessary to litigation or ADR, the Department may disclose those records as a routine use to the DOJ.

(c) *Adjudicative Disclosure.* If the Department determines that it is relevant and necessary to litigation or ADR to disclose certain records from this system of records to an adjudicative body before which the Department is authorized to appear or to an individual or an entity designated by the Department or otherwise empowered to resolve or mediate disputes, the Department may disclose those records as a routine use to the adjudicative body, individual, or entity.

(d) *Disclosure to Parties, Counsel, Representatives, or Witnesses.* If the Department determines that disclosure of certain records to a party, counsel, representative, or witness is relevant and necessary to the litigation or ADR, the Department may disclose those records as a routine use to the party, counsel, representative, or witness.

(6) *Employment, Benefit, and Contracting Disclosure.*

(a) *For Decisions by the Department.* The Department may disclose information from this system of records to a Federal, State, or local agency or to another public authority or professional organization, if necessary, to obtain information relevant to a Department decision concerning the hiring or retention of an employee or other personnel action; the issuance of a security clearance; the letting of a contract; or the issuance of a license, grant, or other benefit.

(b) *For Decisions by Other Public Agencies and Professional Organizations.* The Department may disclose information from this system of records to a Federal, State, local, or foreign agency or other public authority or professional organization, in connection with the hiring or retention of an employee or other personnel action; the issuance of a security clearance; the reporting of an investigation of an employee; the letting of a contract; or the issuance of a license, grant, or other benefit, to the extent that the record is relevant to the receiving entity's decision on the matter.

(7) *Employee Grievance, Complaint, or Conduct Disclosure.* If a record is relevant and necessary to a grievance, complaint, or disciplinary proceeding involving a present or former employee of the Department, the Department may disclose a record from this system of records in the course of investigation, fact-finding, or adjudication to any party to the grievance, complaint, or action; to the party's counsel or representative; to a witness; or to a designated fact-finder, mediator, or other person designated to resolve issues or decide the matter. The disclosure may only be made during the course of investigation, fact-finding, or adjudication.

(8) *Labor Organization Disclosure.* The Department may disclose a record from this system of records to an arbitrator to resolve disputes under a negotiated grievance procedure or to officials of a labor organization recognized under 5 U.S.C. chapter 71 when relevant and necessary to their duties of exclusive representation.

(9) *Freedom of Information Act (FOIA) and Privacy Act Advice Disclosure.* The Department may disclose records from this system of records to the DOJ or Office of Management and Budget (OMB) if the Department concludes that disclosure is desirable or necessary in determining whether particular records are required to be disclosed under the FOIA or the Privacy Act.

(10) *Disclosure to the DOJ.* The Department may disclose records from this system of records to the DOJ to the extent necessary for obtaining DOJ advice on any matter relevant to an audit, inspection, or other inquiry related to the programs covered by this system.

(11) *Contract Disclosure.* If the Department contracts with an entity for the purposes of performing any function that requires disclosure of records in this system to employees of the contractor, the Department may disclose the records to those employees. Before entering into such a contract, the Department must require the contractor to maintain Privacy Act safeguards as required under 5 U.S.C. 552a(m) with respect to the records in the system.

(12) *Research Disclosure.* The Department may disclose records from this system of records to a researcher if the Department determines that the individual or organization to which the disclosure would be made is qualified to carry out specific research related to functions or purposes of this system of records. The official may disclose records from this system of records to that researcher solely for the purpose of carrying out that research related to the functions or purposes of this system of records. The researcher must be required to maintain Privacy Act safeguards with respect to the disclosed records.

(13) *Disclosure to OMB for Credit Reform Act (CRA) Support.* The Department may disclose records from this system of records to OMB as necessary to fulfill CRA requirements.

(14) *Disclosure in the Course of Responding to a Breach of Data.* The Department may disclose records from this system of records to appropriate agencies, entities, and persons when: (a) The Department suspects or has confirmed that the security or confidentiality of information in this system has been compromised; (b) the Department has determined that as a result of the suspected or confirmed compromise, there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by the Department or by another agency or entity) that rely upon the compromised information; and (c) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist the Department's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

Disclosures pursuant to 5 U.S.C. 552a(b)(12): the Department may disclose information regarding a valid, overdue claim of the Department to a consumer reporting agency. Such information is limited to (1) The name, address, taxpayer identification number,

and other information necessary to establish the identity of the individual responsible for the claim; (2) the amount, status, and history of the claim; and (3) the program under which the claim arose. The Department may disclose the information specified in this paragraph under 5 U.S.C. 552a(b)(12) and the procedures contained in 31 U.S.C. 3711(e). A consumer reporting agency to which these disclosures may be made is defined at 15 U.S.C. 1681a(f) and 31 U.S.C. 3701(a)(3).

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

The Department electronically stores the complaints and allegations on an Intranet Web site. The Web site is located at the Virtual Data Center in Plano, Texas.

RETRIEVABILITY:

Records in the SPD–CTS system are retrieved by searching any of the following data elements: complainant's name, institution's name, reviewer's name or Office of Postsecondary Education identification (OPEID) number.

SAFEGUARDS:

In addition to undergoing security clearances, contract and Department employees are required to complete security awareness training on an annual basis. Annual security awareness training is required to ensure that contract and Department users are appropriately trained in safeguarding Privacy Act data in accordance with OMB Circular No. A–130, Appendix III.

The computer system employed by the Department offers a high degree of resistance to tampering and circumvention. This security system limits data access to Department and contract staff on a "need-to-know" basis and controls individual users' ability to access and alter records within the system. All users of this system of records are given a password. The Department's FSA Information Security and Privacy Policy requires the enforcement of a complex password policy. This password is only given to SPD staff who are assigned to investigate and resolve the complaint(s).

RETENTION AND DISPOSAL:

The records created by this system are currently unscheduled. ED will apply to the National Archives and Records Administration (NARA) for disposition authority that covers these records. Until disposition authority is received from NARA, no records will be destroyed.

SYSTEM MANAGER AND ADDRESS:

Dale Shaw, FSA, U.S. Department of Education, 1999 Bryan Street Suite 1410, Dallas, Texas 75201–6817.

NOTIFICATION PROCEDURE:

If you wish to determine whether a record exists regarding you in the system of records, provide the system manager with your name, address, email address, and phone number. Requests must meet the requirements in 34 CFR 5b.5, including proof of identity.

RECORD ACCESS PROCEDURES:

If you wish to gain access to a record in this system, provide the system manager with your name, address, email address, and phone number. Requests by an individual for access to a record must meet the requirements in the regulations at 34 CFR 5b.5, including proof of identity.

CONTESTING RECORD PROCEDURE:

If you wish to change the content of your personal record within the system of records, provide the system manager with your name, address, email address, and phone number. Identify the specific items to be changed, and provide a written justification for the change. Requests to amend a record must meet the requirements in 34 CFR 5b.7.

RECORD SOURCE CATEGORIES:

This system includes records on individuals who may have received title IV, HEA program assistance. These records include information provided by various sources (including, but not limited to, the public, school officials, external oversight partners, students, referrals from Federal, State, or local agencies, and other FSA offices). The Department's Office of Inspector General (OIG) may also refer complaints and allegations received via the OIG Hotline that do not appear to require an OIG audit, a formal OIG investigation, or action by any other federal agency.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 2013–04126 Filed 2–21–13; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

President's Council of Advisors on Science and Technology (PCAST)

AGENCY: Office of Science, Department of Energy.

ACTION: Notice of partially-closed meeting.

SUMMARY: This notice sets forth the schedule and summary agenda for a partially closed meeting of the President's Council of Advisors on Science and Technology (PCAST), and describes the functions of the Council. Notice of this meeting is required under the Federal Advisory Committee Act (FACA), 5 U.S.C., App. 2.

DATES: Friday, March 15, 2013; 9:00 a.m.–12:30 p.m.

ADDRESSES: National Academy of Sciences (in the Lecture Room), 2101 Constitution Avenue NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Information regarding the meeting agenda, time, location, and how to register for the meeting is available on the PCAST Web site at: *http://whitehouse.gov/ostp/pcast.* A live video webcast and an archive of the webcast after the event are expected to be available at *http://whitehouse.gov/ostp/pcast.* The archived video will be available within one week of the meeting. Questions about the meeting should be directed to Dr. Amber Hartman Scholz, PCAST Acting Executive Director, at *ascholz@ostp.eop.gov,* (202) 456–4444. Please note that public seating for this meeting is limited and is available on a first-come, first-served basis.

SUPPLEMENTARY INFORMATION: The President's Council of Advisors on Science and Technology (PCAST) is an advisory group of the nation's leading scientists and engineers, appointed by the President to augment the science and technology advice available to him from inside the White House and from cabinet departments and other Federal agencies. See the Executive Order at *http://www.whitehouse.gov/ostp/pcast.* PCAST is consulted about and provides analyses and recommendations concerning a wide range of issues where understandings from the domains of science, technology, and innovation may bear on the policy choices before the President. PCAST is co-chaired by Dr. John P. Holdren, Assistant to the President for Science and Technology, and, Director, Office of Science and Technology Policy, Executive Office of the President, The White House; and Dr. Eric S. Lander, President, Broad Institute of the Massachusetts Institute of Technology and Harvard.

Type of Meeting: Open and Closed.

Proposed Schedule and Agenda: The President's Council of Advisors on Science and Technology (PCAST) is scheduled to meet in open session on March 15, 2013 from 9:00 a.m. to 12:30 p.m.

Open Portion of Meeting: During this open meeting, PCAST is tentatively scheduled to hear from speakers who will provide information on the National Math and Science Initiative, graduate education, and an update on the PCAST energy and climate change letter report. Additional information and the agenda, including any changes that arise, will be posted at the PCAST Web site at: *http://whitehouse.gov/ostp/pcast.*

Closed Portion of the Meeting: PCAST may hold a closed meeting of approximately one hour with the President on March 15, 2013, which must take place in the White House for the President's scheduling convenience and to maintain Secret Service protection. This meeting will be closed to the public because such portion of the meeting is likely to disclose matters that are to be kept secret in the interest of national defense or foreign policy under 5 U.S.C. 552b(c)(1).

Public Comments: It is the policy of the PCAST to accept written public comments of any length, and to accommodate oral public comments whenever possible. The PCAST expects that public statements presented at its meetings will not be repetitive of previously submitted oral or written statements.

The public comment period for this meeting will take place on March 15, 2013, at a time specified in the meeting agenda posted on the PCAST Web site at *http://whitehouse.gov/ostp/pcast.* This public comment period is designed only for substantive commentary on PCAST's work, not for business marketing purposes.

Oral Comments: To be considered for the public speaker list at the meeting, interested parties should register to speak at: *http://whitehouse.gov/ostp/pcast,* no later than 12:00 p.m. (EST) on March 8, 2013. Phone or email reservations will not be accepted. To accommodate as many speakers as possible, the time for public comments will be limited to two (2) minutes per person, with a total public comment period of 30 minutes. If more speakers register than there is space available on the agenda, PCAST will randomly select speakers from among those who applied. Those not selected to present oral comments may always file written comments with the committee. Speakers are requested to bring at least 25 copies of their oral comments for distribution to the PCAST members.

Written Comments: Although written comments are accepted continuously, written comments should be submitted to PCAST no later than 12:00 p.m. (EST) on March 8, 2013, so that the comments may be made available to the PCAST members prior to this meeting for their consideration. Information regarding how to submit comments and documents to PCAST is available at *http://whitehouse.gov/ostp/pcast* in the section entitled "Connect with PCAST."

Please note that because PCAST operates under the provisions of FACA, all public comments and/or presentations will be treated as public documents and will be made available for public inspection, including being posted on the PCAST Web site.

Meeting Accommodations: Individuals requiring special accommodation to access this public meeting should contact Dr. Amber Hartman Scholz at least ten business days prior to the meeting so that appropriate arrangements can be made.

Issued in Washington, DC, on February 15, 2013.

LaTanya R. Butler,

Deputy Committee Management Officer.

[FR Doc. 2013–04108 Filed 2–21–13; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP13–64–000]

Gulf Crossing Pipeline Company LLC; Notice of Application

On February 1, 2013, Gulf Crossing Pipeline Company (Gulf Crossing) filed with the Federal Energy Regulatory Commission (Commission) an application under section 7 of the Natural Gas Act and Commission regulations for authorization to construct and operate a new 16.5 mile, 16-inch diameter pipeline lateral and appurtenant auxiliary facilities. The pipeline would extend from Gulf Crossing's Sherman Compressor Station, near Sherman, Texas to Panda Sherman Power, LLC's new 758 megawatt gas-fired power plant in Grayson County, Texas, as more fully described in the Application.

Questions regarding this application may be directed to J. Kyle Stephens, Vice President of Regulatory Affairs, Boardwalk Pipeline Partners, LP, 9 Greenway Plaza, Houston, Texas, 77046; by fax 713–479–1846 or email to *kyle.stephens@bwpmlp.com.*

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below, file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit seven copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

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 seven

copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. This filing is accessible on-line at *http://www.ferc.gov.using* the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5:00 p.m. Eastern Time on March 8, 2013.

Dated: February 15, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–04081 Filed 2–21–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13739–002]

Lock+ Hydro Friends Fund XLII, LLC; Notice of Application Ready for Environmental Analysis and Soliciting Comments, Recommendations, Terms and Conditions, and Prescriptions

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Major Original License.

b. *Project No.:* 13739–002.

c. *Date filed:* September 17, 2012.

d. *Applicant:* Lock+ Hydro Friends Fund XLII, LLC.

e. *Name of Project:* Braddock Locks and Dam Hydroelectric Project.

f. *Location:* At the existing U.S. Army Corps of Engineers' Braddock Locks and Dam on the Monongahela River, in Allegheny County, Pennsylvania. The project would occupy about 0.19 acre of federal lands.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791 (a)—825(r).

h. *Applicant Contact:* Mr. Mark R. Stover, Lock+™ Hydro Friends Fund XLII, LLC, c/o Hydro Green Energy, LLC, 900 Oakmont Lane, Suite 310, Westmont, IL 60559; (877) 556–6566 ext. 711; email—*mark@hgenergy.com*.

i. *FERC Contact:* John Mudre at (202) 502–8902; or email at *john.mudre@ferc.gov*.

j. *Deadline for filing comments, recommendations, terms and conditions, and prescriptions:* 60 days from the issuance date of this notice; reply comments are due 105 days from the issuance date of this notice.

All documents may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp*. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp*. You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The Commission's Rules of Practice require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. This application has been accepted and is now ready for environmental analysis.

l. The proposed project would utilize the existing U.S. Army Corps of Engineers' Braddock Locks and Dam and the Braddock Pool, and would consist of the following new facilities: (1) A new powerhouse with five turbine-generators having a total installed capacity of 3,750 kilowatts; (2) a new approximately 2,585-foot-long, 23-kilovolt electric distribution line; (3) a switchyard and control room; and (4) appurtenant facilities. The average annual generation is estimated to be 25,020 megawatt-hours.

The proposed project would deploy hydropower turbines within a patented "Large Frame Module" (LFM) that would be deployed on the south (river left) side of the dam, opposite the location of the existing navigational locks and at the upstream face of the existing left closure weir. The proposed modular, low environmental impact powerhouse would be approximately 60.4 feet long, 16.6 feet wide, and 40 feet high, and constructed of structural-grade steel. The powerhouse will bear on a concrete foundation on rock that is anchored to the existing left closure weir. A trash rack with 6-inch openings would be placed at the powerhouse intake to increase safety and protect the turbines from large debris.

m. A copy of the application is available for review at the Commission in the Public Reference Room or may 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. A copy is also available for inspection and reproduction at the address in item h above.

All filings must (1) bear in all capital letters the title "COMMENTS", "REPLY COMMENTS", "RECOMMENDATIONS," "TERMS AND CONDITIONS," or "PRESCRIPTIONS;" (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person submitting the filing; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, recommendations, terms and conditions or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Agencies may obtain copies of the application directly from the applicant. Each filing must be accompanied by proof of service on all persons listed on the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b), and 385.2010.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

n. Public notice of the filing of the initial development application, which has already been given, established the due date for filing competing applications or notices of intent. Under the Commission's regulations, any competing development application must be filed in response to and in compliance with public notice of the initial development application. No competing applications or notices of intent may be filed in response to this notice.

o. *A license applicant must file no later than 60 days following the date of issuance of this notice:* (1) A copy of the water quality certification; (2) a copy of

the request for certification, including proof of the date on which the certifying agency received the request; or (3) evidence of waiver of water quality certification.

Dated: February 15, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–04080 Filed 2–21–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–2602–004.
Applicants: NewPage Energy Services, LLC.
Description: NewPage Energy Services, LLC Market-Based Rate Tariff to be effective 2/12/2013.
Filed Date: 2/11/13.
Accession Number: 20130211–5141.
Comments Due: 5 p.m. e.t. 3/4/13.

Docket Numbers: ER10–2603–002.
Applicants: Rumford Paper Company.
Description: Rumford Paper Company Market-Based Rate Tariff to be effective 2/12/2013.
Filed Date: 2/11/13.
Accession Number: 20130211–5150.
Comments Due: 5 p.m. e.t. 3/4/13.

Docket Numbers: ER10–2604–002.
Applicants: Luke Paper Company.
Description: Luke Paper Company Market-Based Rate Tariff to be effective 2/12/2013.
Filed Date: 2/11/13.
Accession Number: 20130211–5136.
Comments Due: 5 p.m. e.t. 3/4/13.

Docket Numbers: ER10–2606–004.
Applicants: Consolidated Water Power Company.
Description: Consolidated Water Power Company Market-Based Rate Tariff to be effective 2/12/2013.
Filed Date: 2/11/13.
Accession Number: 20130211–5129.
Comments Due: 5 p.m. e.t. 3/4/13.

Docket Numbers: ER10–2609–004.
Applicants: Escanaba Paper Company.
Description: Escanaba Paper Company Market-Based Rate Tariff to be effective 2/12/2013.
Filed Date: 2/11/13.
Accession Number: 20130211–5131.
Comments Due: 5 p.m. e.t. 3/4/13.

Docket Numbers: ER13–410–001.
Applicants: Entergy Gulf States Louisiana, L.L.C.
Description: Compliance Filing to be effective 6/22/2012.
Filed Date: 2/11/13.
Accession Number: 20130211–5191.
Comments Due: 5 p.m. e.t. 3/4/13.

Docket Numbers: ER13–922–000.
Applicants: Northern States Power Company, a Wisconsin corporation.
Description: 2013–02–12 NSPW Medford Intercon Agrmt-NOC–317 to be effective 12/31/2012.
Filed Date: 2/12/13.
Accession Number: 20130212–5063.
Comments Due: 5 p.m. e.t. 3/5/13.

Docket Numbers: ER13–923–000.
Applicants: Arizona Public Service Company.
Description: Southwest Valley 500kV Project between SRP and APS to be effective 4/15/2013.
Filed Date: 2/12/13.
Accession Number: 20130212–5081.
Comments Due: 5 p.m. e.t. 3/5/13.

Docket Numbers: ER13–924–000.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: 02–12–2013 SA 2510 Rochester Minn La Crosse T–T IA to be effective 2/13/2013.
Filed Date: 2/12/13.
Accession Number: 20130212–5117.
Comments Due: 5 p.m. e.t. 3/5/13.

Docket Numbers: ER13–925–000.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: 02–12–2013 SA 2511 NSP–MN Minn La Crosse T–T IA to be effective 2/13/2013.
Filed Date: 2/12/13.
Accession Number: 20130212–5121.
Comments Due: 5 p.m. e.t. 3/5/13.

Docket Numbers: ER13–926–000.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: 02–12–2013 SA 2512 NSP–WI Wisc La Crosse Owners T–T IA to be effective 2/13/2013.
Filed Date: 2/12/13.
Accession Number: 20130212–5123.
Comments Due: 5 p.m. e.t. 3/5/13.

Docket Numbers: ER13–927–000.
Applicants: AES Beaver Valley, LLC.
Description: AES Beaver Valley, LLC submits Notice of Termination of Transmission Agreement.
Filed Date: 2/12/13.
Accession Number: 20130212–5134.
Comments Due: 5 p.m. e.t. 3/5/13.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: February 12, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–04075 Filed 2–21–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER13–449–001.
Applicants: California Independent System Operator Corporation.
Description: 2013–02–13 Circular Scheduling Compliance to be effective 2/1/2013.
Filed Date: 2/13/13.
Accession Number: 20130213–5090.
Comments Due: 5 p.m. e.t. 3/6/13.

Docket Numbers: ER13–790–001.
Applicants: Nevada Power Company.
Description: Rates Schedule No. 111 Second Amended & Restated PPA ORNI 42 to be effective 1/24/2013.
Filed Date: 2/12/13.
Accession Number: 20130212–5170.
Comments Due: 5 p.m. e.t. 3/5/13.

Docket Numbers: ER13–928–000.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: 2013–02–12 SSR as a Resource Filing to be effective 3/20/2013.
Filed Date: 2/12/13.
Accession Number: 20130212–5167.
Comments Due: 5 p.m. e.t. 3/5/13.

Docket Numbers: ER13–929–000.
Applicants: Nevada Power Company.
Description: Rate Schedule Nos. 76 & 77 Concurrence in SCE—Eldorado to be effective 1/1/2013.
Filed Date: 2/12/13.
Accession Number: 20130212–5171.
Comments Due: 5 p.m. e.t. 3/5/13.

Docket Numbers: ER13–930–000.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: 02–12–2013 SA1560 4th Amended G298 GIA to be effective 2/13/2013.

Filed Date: 2/12/13.

Accession Number: 20130212–5174.

Comments Due: 5 p.m. e.t. 3/5/13.

Docket Numbers: ER13–931–000.

Applicants: Avista Corporation.

Description: Cancel Unsigned Service Agreement T–1084 to be effective 12/31/9998.

Filed Date: 2/13/13.

Accession Number: 20130213–5001.

Comments Due: 5 p.m. e.t. 3/6/13.

Docket Numbers: ER13–932–000.

Applicants: Southern California Edison Company.

Description: Southern California Edison Company submits Notice of Cancellation for the Firm Transmission Service Agreement with the State of California Department of Water Resources.

Filed Date: 2/13/13.

Accession Number: 20130213–5061.

Comments Due: 5 p.m. e.t. 3/6/13.

Docket Numbers: ER13–933–000.

Applicants: American Electric Power Service Corporation.

Description: Petition by American Electric Power Service Corporation, on behalf of certain affiliates, for Limited Waiver of certain PJM Interconnection, L.L.C. Open Access Transmission Tariff provisions of Attachment DD.

Filed Date: 2/12/13.

Accession Number: 20130212–5243.

Comments Due: 5 p.m. e.t. 3/5/13.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: February 13, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–04077 Filed 2–21–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER12–2292–002.

Applicants: Southwest Power Pool, Inc.

Description: Southwest Power Pool, Inc. submits Petition for Waiver of its Open Access Transmission Tariff Provisions implementing certain curtailment procedures.

Filed Date: 2/13/13.

Accession Number: 20130213–5183.

Comments Due: 5 p.m. e.t. 3/1/13.

Docket Numbers: ER13–934–000.

Applicants: Southwest Power Pool, Inc.

Description: 2520 Blue Canyon Windpower V LLC GIA to be effective 1/14/2013.

Filed Date: 2/13/13.

Accession Number: 20130213–5131.

Comments Due: 5 p.m. e.t. 3/6/13.

Docket Numbers: ER13–935–000.

Applicants: ISO New England Inc.

Description: ISO New England Inc. submits Capital Budget and Capital Budget Quarterly Filing for Fourth Quarter of 2012.

Filed Date: 2/13/13.

Accession Number: 20130213–5182.

Comments Due: 5 p.m. e.t. 3/6/13.

Docket Numbers: ER13–936–000.

Applicants: Powerex Corp.

Description: Expiration of Limited Waiver Tariff Revision to be effective 1/9/2013.

Filed Date: 2/14/13.

Accession Number: 20130214–5041.

Comments Due: 5 p.m. e.t. 3/7/13.

Docket Numbers: ER13–937–000.

Applicants: Southwest Power Pool, Inc.

Description: Southwest Power Pool, Inc. submits Notice of Cancellation of Large Generator Interconnection Service Agreement (1st revised No. 1255).

Filed Date: 2/14/13.

Accession Number: 20130214–5071.

Comments Due: 5 p.m. e.t. 3/7/13.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: February 14, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–04074 Filed 2–21–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP13–557–000.

Applicants: Texas Eastern Transmission, LP.

Description: Duke Energy Carolinas 4–1–2013 Neg Rate to be effective 4/1/2013.

Filed Date: 2/12/13.

Accession Number: 20130212–5021.

Comments Due: 5 p.m. e.t. 2/25/13.

Docket Numbers: RP13–558–000.

Applicants: Texas Eastern Transmission, LP.

Description: Duke Energy Carolinas 4–1–2014 Neg Rate to be effective 4/1/2014.

Filed Date: 2/12/13.

Accession Number: 20130212–5022.

Comments Due: 5 p.m. e.t. 2/25/13.

Docket Numbers: RP13–559–000.

Applicants: Texas Eastern Transmission, LP.

Description: Duke Energy Carolinas 4–1–2015 Neg Rate to be effective 4/1/2015.

Filed Date: 2/12/13.

Accession Number: 20130212–5023.

Comments Due: 5 p.m. e.t. 2/25/13.

Docket Numbers: RP13–560–000.

Applicants: Texas Eastern Transmission, LP.

Description: Duke Energy Carolinas 4–1–2016 Neg Rate to be effective 4/1/2016.

Filed Date: 2/12/13.

Accession Number: 20130212–5024.

Comments Due: 5 p.m. e.t. 2/25/13.

Docket Numbers: RP13–561–000.

Applicants: Texas Eastern Transmission, LP.

Description: Duke Energy Carolinas 4–1–2017 Neg Rate to be effective 4/1/2017.

Filed Date: 2/12/13.

Accession Number: 20130212–5025.

Comments Due: 5 p.m. e.t. 2/25/13.

Docket Numbers: RP13–562–000.

Applicants: Northern Natural Gas Company.

Description: Northern Natural Gas Company submits Notice of Penalty and DDVC Revenue Crediting Report.

Filed Date: 2/12/13.

Accession Number: 20130212–5072.

Comments Due: 5 p.m. e.t. 2/25/13.

Docket Numbers: RP13–563–000.

Applicants: Dominion South Pipeline Company, LP.

Description: DSP—Tariff Cancellation to be effective 3/13/2013.

Filed Date: 2/12/13.

Accession Number: 20130212–5125.

Comments Due: 5 p.m. e.t. 2/25/13.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

Filings in Existing Proceedings

Docket Numbers: RP11–1631–002.

Applicants: Energy West Development, Inc.

Description: Compliance to 147 to be effective 12/1/2012.

Filed Date: 2/12/13.

Accession Number: 20130212–5073.

Comments Due: 5 p.m. e.t. 2/25/13.

Docket Numbers: RP13–116–002.

Applicants: MIGC LLC.

Description: 2nd Revised NAESB v2.0 Compliance Filing to be effective 12/1/2012.

Filed Date: 2/13/13.

Accession Number: 20130213–5000.

Comments Due: 5 p.m. e.t. 2/25/13.

Any person desiring to protest in any the above proceedings must file in accordance with Rule 211 of the Commission's Regulations (18 CFR 385.211) on or before 5:00 p.m. Eastern time on the specified comment date.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, and service can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: February 13, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–04076 Filed 2–21–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ID–5705–001]

Taylor, G. Tom; Notice of Filing

Take notice that on February 14, 2013, G. Tom Taylor filed an application to hold interlocking positions pursuant to section 305(b) of the Federal Power Act, 16 U.S.C. 825d(b), Part 45 of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure, 18 CFR part 45, and the Commission's Order No. 664, 112 FERC ¶ 61,298 (2005).

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 email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5:00 p.m. Eastern Time on March 7, 2013.

Dated: February 15, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–04082 Filed 2–21–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RM98–1–000]

Records Governing Off-the-Record Communications

Public Notice

This constitutes notice, in accordance with 18 CFR 385.2201(b), of the receipt of prohibited and exempt off-the-record communications.

Order No. 607 (64 FR 51222, September 22, 1999) requires Commission decisional employees, who make or receive a prohibited or exempt off-the-record communication relevant to the merits of a contested proceeding, to deliver to the Secretary of the Commission, a copy of the communication, if written, or a summary of the substance of any oral communication.

Prohibited communications are included in a public, non-decisional file associated with, but not a part of, the decisional record of the proceeding. Unless the Commission determines that the prohibited communication and any responses thereto should become a part of the decisional record, the prohibited off-the-record communication will not be considered by the Commission in reaching its decision. Parties to a proceeding may seek the opportunity to respond to any facts or contentions made in a prohibited off-the-record communication, and may request that the Commission place the prohibited communication and responses thereto in the decisional record. The Commission will grant such a request only when it determines that fairness so requires. Any person identified below as having made a prohibited off-the-record communication shall serve the document on all parties listed on the official service list for the applicable proceeding in accordance with Rule 2010, 18 CFR 385.2010.

Exempt off-the-record communications are included in the decisional record of the proceeding, unless the communication was with a cooperating agency as described by 40 CFR 1501.6, made under 18 CFR 385.2201(e) (1) (v).

The following is a list of off-the-record communications recently

received by the Secretary of the Commission. The communications listed are grouped chronologically, in ascending order. These filings are available for review at the Commission in the Public Reference Room or may 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, please contact FERC, Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866)208–3676, or for TTY, contact (202)502–8659.

Docket No.	Filed date	Presenter or requester
Prohibited:		
1. P–12690–000.	02–13–13	Robert Wargo.
2. RP12–479–000.	02–14–13	Bob White.[1]

[1] Phone record.

Dated: February 15, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–04079 Filed 2–21–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Western Area Power Administration

Washoe Project-Rate Order No. WAPA–160

AGENCY: Western Area Power Administration, DOE.

ACTION: Notice of Proposed Extension of Non-Firm Power Formula Rate.

SUMMARY: This action is a proposal to extend the existing Washoe Project, Stampede Powerplant (Stampede) non-firm power formula rate, Schedule SNF–7, through September 30, 2017. The existing formula rate will expire July 31, 2013.

DATES: By July 31, 2013, Western Area Power Administration (Western) will publish in the **Federal Register** the final Notice of Extension and Rate Order.

ADDRESSES: All documents that Western used to develop the proposed Stampede non-firm power formula rate extension are available for inspection and copying at the Sierra Nevada Customer Service Region, located at 114 Parkshore Drive, Folsom, CA 95630–4710.

FOR FURTHER INFORMATION CONTACT: Ms. Regina Rieger, Rates Manager, Sierra Nevada Customer Service Region, Western Area Power Administration, 114 Parkshore Drive, Folsom, CA 95630–4710, (916) 353–4629, email: *rieger@wapa.gov*.

SUPPLEMENTARY INFORMATION: By Delegation Order No. 00–037.00, effective December 6, 2001, the Secretary of Energy delegated: (1) The authority to develop power and transmission rates to Western's Administrator; (2) the authority to confirm, approve, and place such rates into effect on an interim basis to the Deputy Secretary of Energy; and (3) the authority to confirm, approve, and place into effect on a final basis, to remand or to disapprove such rates to the Federal Energy Regulatory Commission (FERC).

FERC confirmed and approved the existing formula rate, contained in Rate Order No. WAPA–136,[1] on a final basis for 5 years through July 31, 2013.[2] In accordance with 10 CFR 903.23(a), Western proposes to extend the existing Stampede non-firm power formula rate without an adjustment. The formula rate is applied annually after determining Stampede's reimbursable expenses and revenue collected in accordance with the Stampede Energy Exchange Services contract. Since the project has no Federally-owned transmission, the contractor accepts delivery of Stampede generation to serve project use obligations and pays Western for energy received in excess of project use loads. Pursuant to Rate Order No. WAPA–136, any remaining reimbursable expenses are transferred to the Central Valley Project (CVP) for incorporation into the CVP power revenue requirement. The existing formula rate methodology collects annual revenue sufficient to recover annual expenses, including interest, capital requirements, and timely deficit recovery, thus ensuring repayment of the project within the cost recovery criteria set forth in DOE Order RA 6120.2.

The formula rate provides sufficient revenue to recover all appropriate costs and the affiliated contract remains in effect through December 31, 2024. Western proposes to extend the current rate schedule through September 30, 2017, and will consider further extension as determined necessary. Consistent with 10 CFR 903.23(a) for proposals to extend but not otherwise change existing rates, Western will not hold a consultation and comment period.

Thirty days after this notice is published, Western will take further action on the proposed formula rate extension consistent with 10 CFR part 903.

Dated: February 12, 2013.

Anita J. Decker,

Acting Administrator.

[FR Doc. 2013–04115 Filed 2–21–13; 8:45 am]

BILLING CODE 6450–01–P

[1] 73 FR 42,565 (July 22, 2008).

[2] *See U.S. Dept. of Energy, Western Area Power Admin.*, Docket No. EF08–5161–000, 127 FERC ¶ 62,043 (2009).

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OECA–2005–0062; FRL 9007–7]

Proposed Information Collection Request; Comment Request; Procedures for Implementing the National Environmental Policy Act and Assessing the Environmental Effects Abroad of EPA Actions (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency is planning to submit an information collection request (ICR), "40 CFR Part 6; Procedures for Implementing the National Environmental Policy Act and Assessing the Environmental Effects Abroad of EPA Actions" (EPA ICR No. 2243.06, OMB Control No. 2020–0033) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). Before doing so, EPA is soliciting public comments on specific aspects of the proposed information collection as described below. This is a proposed extension of the ICR, which is currently approved through August 31, 2013. An Agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: Comments must be submitted on or before Tuesday, April 23, 2013.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–OECA–2005–0062 online using *www.regulations.gov* (our preferred method) or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

FOR FURTHER INFORMATION CONTACT: Jessica Trice, Office of Federal Activities, Mail Code 2252A, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (202) 564–6646; fax number: (202) 564–0072; email address: *trice.jessica@epa.gov*.

SUPPLEMENTARY INFORMATION: Supporting documents which explain in detail the information that the EPA will be collecting are available in the public docket for this ICR. The docket can be viewed online at www.regulations.gov or in person at the EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit *http://www.epa.gov/dockets*.

Pursuant to section 3506(c)(2)(A) of the PRA, EPA is soliciting comments and information to enable it to: (i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (ii) evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (iii) enhance the quality, utility, and clarity of the information to be collected; and (iv) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses. EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval. At that time, EPA will issue another **Federal Register** notice to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB.

Abstract: The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321–4347 establishes a national policy for the environment. The Council on Environmental Quality (CEQ) oversees the NEPA implementation. CEQ's Regulations at 40 CFR parts 1500 through 1508 set the standard for NEPA compliance. They also require agencies to establish their own NEPA implementing procedures. EPA's procedures for implementing NEPA are found in 40 CFR Part 6. Through this part, EPA adopted the CEQ Regulations and supplemented those regulations for actions by EPA that are subject to NEPA requirements. EPA actions subject to NEPA include the award of wastewater treatment construction grants under Title II of the Clean Water Act, EPA's issuance of new source National Pollutant Discharge Elimination System (NPDES) permits under section 402 of the Clean Water Act, certain research and development projects, development and issuance of regulations, EPA actions involving renovations or new construction of facilities, and certain grants awarded for projects authorized by Congress through the Agency's annual Appropriations Act. EPA is collecting information from certain applicants as part of the process of complying with either NEPA or Executive Order 12114 ("Environmental Effects Abroad of Major Federal Actions"). EPA's NEPA regulations apply to the actions of EPA that are subject to NEPA in order to ensure that environmental information is available to the Agency's decision-makers and the public before decisions are made and before actions are taken. When EPA conducts an environmental assessment pursuant to its Executive Order 12114 procedures, the Agency generally follows its NEPA procedures. Compliance with the procedures is the responsibility of EPA's Responsible Officials, and for applicant proposed actions applicants may be required to provide environmental information to EPA as part of the environmental review process. For this Information Collection Request (ICR), applicant-proposed projects subject to either NEPA or Executive Order 12114 (and that are not addressed in other EPA programs' ICRs) are addressed through the NEPA process.

Form Numbers: None.

Respondents/affected entities: Entities potentially affected by this action are certain grant or permit applicants who must submit environmental information documentation to EPA for their projects to comply with NEPA or Executive Order 12114, including Wastewater Treatment Construction Grants Program facilities, State and Tribal Assistance Grant recipients and new source National Pollutant Discharge Elimination System permittees.

Respondent's obligation to respond: Voluntary.

Estimated number of respondents: 312.

Frequency of response: On occasion

Total estimated burden: 38,472 hours

Total estimated cost: $3,503,245, includes $7,638 annualized capital or operation & maintenance costs.

Changes in Estimates: The above estimates are based on information and data available through the current ICR supporting documentation. However, it is anticipated that there will be slight decrease in hours in the total estimated respondent burden compared with the ICR currently approved by OMB. This slight decrease is due to changes in the number of respondents and their associated EPA actions eligible for categorical exclusions which results in a reduction in total hours and burden.

Dated: February 15, 2013.

Cliff Rader,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 2013–04149 Filed 2–21–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–9007–8]

Environmental Impacts Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information (202) 564–7146 or *http://www.epa.gov/compliance/nepa/*.

Weekly receipt of Environmental Impact Statements

Filed 02/11/2013 Through 02/15/2013

Pursuant to 40 CFR 1506.9.

Notice

Section 309(a) of the Clean Air Act requires that EPA make public its comments on EISs issued by other Federal agencies. EPA's comment letters on EISs are available at: *http://www.epa.gov/compliance/nepa/eisdata.html*.

EIS No. 20130034, Final EIS, BLM, WY, Lander Field Office Planning Area Project, Proposed Resource Management Plan, Review Period Ends: 03/25/2013, Contact: Kristen Yannone 307–332–8400.

EIS No. 20130035, Draft Supplement, FHWA, WA, SR–167 Puyallup to SR 509, SR 167 Puyallup River Bridge Replacement, Comment Period Ends: 04/08/2013, Contact: Dean Moberg 360–534–9344.

EIS No. 20130036, Final EIS, NNSA, NV, Site-Wide EIS—Continued Operation of the Department of Energy/National Nuclear Security Administration, Nevada National Security Site and Off-Site Location in Nevada, Review Period Ends: 03/25/2013, Contact: Linda Cohn 702–295–0077.

EIS No. 20130037, Draft EIS, FHWA, VA, Tier 1—Interstate 66 Corridor,

from US Route 15 in Prince William County to Interstate 495 in Fairfax County, Comment Period Ends: 04/08/2013, Contact: John Simkins 202–366–5866.

EIS No. 20130038, Draft EIS, USACE, FL, Everglades Agricultural Area A–1 Shallow Flow Equalization Basin, Comment Period Ends: 04/08/2013, Contact: Alisa Zarbo 561–472–3506.

EIS No. 20130039, Final Supplement, USACE, KS, John Redmond Dam and Reservoir, Storage Reallocation, Review Period Ends: 03/26/2013, Contact: Patricia Newell 918–669–4937.

EIS No. 20130040, Draft EIS, USFS, CA, Whisky Ridge Ecological Restoration Project, Comment Period Ends: 04/08/2013, Contact: Aimee Smith 559–877–2218.

EIS No. 20130041, Draft EIS, USFS, AZ, Salt River Allotments Vegetative Management Project, Comment Period Ends: 04/08/2013, Contact: Debbie Cress 928–467–3220.

EIS No. 20130042, Draft Supplement, USFS, CA, Eldorado National Forest Travel Management, Comment Period Ends: 04/08/2013, Contact: Diana Erickson 530–621–5214.

Amended Notices

EIS No. 20120394, Draft EIS, USFS, OR, Tollgate Fuels Reduction Project, Umatilla National Forest, Walla Walla Ranger District, Comment Period Ends: 03/15/2013, Contact: Kempton Cooper 509–522–6009.

Revision to FR Notice Published 12/31/2012; Extending Comment Period to 03/15/2013.

EIS No. 20130033, Draft Supplement, USFS, CA, Southern California National Forests Land Management Plan Amendment, Comment Period Ends: 05/16/2013, Contact: Robert Hawkins 916–849–8037.

Revision to FR Notice Published 2/15/2013; Change Comment Period from 05/17/2013 to 5/16/2013.

Dated: February 19, 2013.

Cliff Rader,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 2013–04147 Filed 2–21–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9784–3]

Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990–2011

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of document availability and request for comments.

SUMMARY: The Draft Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990–2011 is available for public review. Annual U.S. emissions for the period of time from 1990 through 2011 are summarized and presented by source category and sector. The inventory contains estimates of carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), hydrofluorocarbons (HFC), perfluorocarbons (PFC), and sulfur hexafluoride (SF_6) emissions. The inventory also includes estimates of carbon fluxes in U.S. agricultural and forest lands. The technical approach used in this report to estimate emissions and sinks for greenhouse gases is consistent with the methodologies recommended by the Intergovernmental Panel on Climate Change (IPCC), and reported in a format consistent with the United Nations Framework Convention on Climate Change (UNFCCC) reporting guidelines. The Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990–2011 is the latest in a series of annual U.S. submissions to the Secretariat of the UNFCCC.

DATES: To ensure your comments are considered for the final version of the document, please submit your comments within 30 days of the appearance of this notice. However, comments received after that date will still be welcomed and be considered for the next edition of this report.

ADDRESSES: Comments should be submitted to Mr. Leif Hockstad at: Environmental Protection Agency, Climate Change Division (6207J), 1200 Pennsylvania Ave., NW., Washington, DC 20460, Fax: (202) 343–2359. You are welcome and encouraged to send an email with your comments to *hockstad.leif@epa.gov*.

FOR FURTHER INFORMATION CONTACT: Mr. Leif Hockstad, Environmental Protection Agency, Office of Air and Radiation, Office of Atmospheric Programs, Climate Change Division, (202) 343–9432, *hockstad.leif@epa.gov*.

SUPPLEMENTARY INFORMATION: For this year's public review, EPA is calling attention to two specific areas where interested stakeholders could provide feedback to improve the quality of the emission estimates. First, EPA is seeking comments on approaches for using facility-level data reported under EPA's Greenhouse Gas Reporting Program (GHGRP), particularly data from reporters that began reporting in 2011. For selected source categories, EPA could use data elements reported under the GHGRP, such as facility-level data that can be aggregated at the national level, to derive country-specific emission factors for use in estimating industrial process emissions. Categories with GHGRP-related updates under consideration include nitric acid, petrochemical production, phosphoric acid, titanium dioxide, lime production, and several fluorinated gas categories. Interested stakeholders should review detailed methodological approaches in Chapter 4 (Industrial Processes) of the report. Depending on stakeholder feedback, EPA may include revised estimates in the final published inventory report that use these emission factors derived from the specified GHGRP data elements.

The second area is the natural gas sector, which in recent years has experienced significant growth and changes in industry practices. EPA recently solicited and received new information and data related to emissions estimates for the oil and gas industry through a variety of mechanisms, including the formal public notice and comment process of the oil and gas New Source Performance Standards (NSPS) to control VOCs, a stakeholder workshop on the natural gas sector emissions estimates, and data submitted under the GHGRP. In developing the draft inventory report for this public comment period, EPA carefully evaluated relevant information, and has made updates to two key sources: liquids unloading, and completions with hydraulic fracturing and refracturing. EPA also made additional changes to the report to allow for more transparency. EPA seeks feedback on these updates, and on incorporation of GHGRP data, and requests recommendations for improving the overall quality of the inventory report to be finalized in April 2013, as well as subsequent Inventory reports.

The draft report can be obtained by visiting the U.S. EPA's Climate Change Site at: *http://www.epa.gov/climatechange/ghgemissions/usinventoryreport.html.*

Dated: February 14, 2013.

Gina McCarthy,

Assistant Administrator, Office of Air and Radiation.

[FR Doc. 2013–04142 Filed 2–21–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2013–0075; FRL–9378–8]

FIFRA Scientific Advisory Panel; Notice of Public Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: There will be a 4-day meeting of the Federal Insecticide, Fungicide, and Rodenticide Act Scientific Advisory Panel (FIFRA SAP) to consider and review the Endocrine Disruptor Screening Program (EDSP) Tier 1 Screening Assays and Battery Performance.

DATES: The meeting will be held on May 21–24, 2013, from approximately 9 a.m. to 5 p.m.

Comments. The Agency encourages that written comments be submitted by May 7, 2013 and requests for oral comments be submitted by May 14, 2013. However, written comments and requests to make oral comments may be submitted until the date of the meeting, but anyone submitting written comments after May 7, 2013 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 March 8, 2013.

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–2013–0075, by one of the following methods:

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

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

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.

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: Fred Jenkins Jr., DFO, Office of Science Coordination and Policy (7201M), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 564–3327; fax number: (202) 564–8382; email address: *jenkins.fred@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) and FIFRA. 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.

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–2013–0075 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 May 7, 2013, 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 May 7, 2013 should contact the DFO listed under **FOR FURTHER INFORMATION CONTACT.** Anyone submitting written comments at the meeting should bring 25 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 May 14, 2013, 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). Oral comments before FIFRA SAP are limited to approximately 5 minutes unless prior arrangements have been made. In addition, each speaker should bring 25 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: Regulatory toxicology/risk assessment, ecotoxicology (fish and amphibian toxicology), comparative endocrinology, reproductive physiology, developmental biology/toxicology, thyroid physiology, *in vitro* models, toxicological pathology, amphibian histopathology, morphometrics, quantitative ecology/biostatistics, and systems biology. 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 March 8, 2013. 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 the 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 ad hoc scientists.

FIFRA SAP members are subject to the provisions of 5 CFR part 2634, Executive Branch Financial Disclosure, as supplemented by the 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. The 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://www.epa.gov/scipoly/sap* or may be obtained from the OPP Docket or 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 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

Under the Federal Food, Drug, and Cosmetic Act (FFDCA), section 408(p) and the Safe Drinking Water Act (SDWA), section 1457, the EPA is required to screen all pesticide chemicals (active and inert ingredients) and those drinking water contaminants to which a "substantial population" is exposed for the potential to interact with the endocrine system. As recommended by a Federal Advisory Committee, (Endocrine Disruptor Screening and Testing Advisory Committee, EDSTAC), the EPA Endocrine Disruptor Screening Program (EDSP) established a two tiered screening and testing program to address the potential of chemicals to perturb the estrogen, androgen or thyroid (E,A or T) systems and elicit adverse human and ecological health outcomes. In 1999, following the EDSTAC recommendations, a joint subcommittee of the Agency's Science Advisory Board (SAB) and FIFRA SAP recommended to the Agency, after review of the initial set of Tier 1 data, to subject that data to external scientific peer review for consideration to further optimize the Tier 1 screening battery.

Tier 1 screening was recommended to include a diverse yet complementary suite of *in vitro* and *in vivo* assays covering multiple hormonal modes of action (MoA) across various taxa. To maximize sensitivity and reliability (i.e., minimizing false negatives) for determining the potential of a chemical to interact with E, A, or T, the suite of assays was to be conducted as a battery.

If the results of the Tier 1 battery indicated the potential for a chemical to interact with the endocrine system as determined through a weight of evidence (WoE) analysis, various Tier 2 tests were to be considered for determining dose-response relationships and any potential adverse effects for risk assessment. The EDSP is mandated under FFDCA to use "validated" assays to screen for endocrine disrupting chemicals. Validation principles established by the Organization for Economic Co-Operation and Development (OECD) and Interagency Coordinating Committee on the Validation of Alternative Methods (ICCVAM) were followed to develop, standardize, and validate many of the initially proposed Tier 1 *in vitro* and *in vivo* screening assays as well as more novel screening assays that emerged after the EDSTAC final report in 1998. Subsequent to the validation process, an independent peer review of individual Tier 1 screening assays was conducted. Based on results of the validation process, comments from peer review, and recommendations from EDSTAC, the EDSP proposed a battery of screening assays that was founded on the strengths of one or more assays complimenting the limitations of other assays in the battery. Moreover, it was expected that the result(s) of each assay would not be considered in isolation but be inclusive of the results of all assays in the battery to support a WoE analysis. The FIFRA SAP reviewed the proposed Tier 1 screening battery and recommended a battery of 11 assays to EPA which the Panel indicated "* * * as an appropriate starting point to detect endocrine disrupting chemicals based on the current state of the science." In addition, however, the SAP also expected the Agency to continue "* * * to develop, refine, and review the battery." Notably, this latter statement concurs with a recommendation from the initial joint SAB/SAP who indicated EPA should review the initial data "* * * with an eye towards revising the process and eliminating those methods that don't work."

This FIFRA SAP review will be focused on a subset of the initial Tier 1 screening data received by the Agency in response to test orders issued for the first list of chemicals in 2009. The SAP review will involve the performance of the 11 Tier 1 screening assays and performance of the assays as a battery that was designed to detect the potential of a test chemical to interact with the E, A or T hormonal pathways. The SAP will be asked to comment on factors that may impact interpretation of the assay/battery results (e.g., variability) as well as suggestions for increasing the efficiency of the Tier 1 screening approach. To illustrate assay/battery performances, case examples of Tier 1 data from the initial list of chemicals will be used. It should be noted that there will be a separate SAP meeting scheduled in the summer of 2013 to discuss the decision logic in a WoE approach to identify candidate chemicals for Tier 2 testing using EDSP Tier 1 screening results, other scientifically relevant information (OSRI), and health and ecological effects data from 40 CFR part 158 studies.

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 approximately early May 2013. 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 Docket or at *http://www.regulations.gov*.

List of Subjects

Environmental protection, Pesticides and pests, and Endocrine disruptors.

Dated: February 13, 2013.

Steven M. Knott,

Acting, Director, Office of Science Coordination and Policy.

[FR Doc. 2013–03977 Filed 2–21–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2010–0014; FRL–9378–7]

Notice of Receipt of Requests To Voluntarily Cancel Certain Pesticide Registrations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In accordance with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), EPA is issuing a notice of receipt of requests by registrants to voluntarily cancel certain pesticide registrations. EPA intends to grant these requests at the close of the comment period for this announcement unless the Agency receives substantive comments within the comment period that would merit its further review of the requests, or unless the registrants withdraw its requests. If these requests are granted, any sale, distribution, or use of products listed in this notice will be permitted after the registration has been cancelled only if such sale, distribution, or use is consistent with the terms as described in the final order.

DATES: Comments must be received on or before August 21, 2013.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2010–0014, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.

Submit written withdrawal request by mail to: Pesticide Re-Evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001. ATTN: John W. Pates, Jr.

- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.htm*.

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

FOR FURTHER INFORMATION CONTACT: John W. Pates, Jr., Pesticide Re-Evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (703) 308–8195; email address: *pates.john@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including

environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides.

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–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.

II. What action is the agency taking?

This notice announces receipt by the Agency of requests from registrants to cancel 25 pesticide products registered under FIFRA section 3 or 24(c). These registrations are listed in sequence by registration number (or company number and 24(c) number) in Table 1 of this unit.

Unless the Agency determines that there are substantive comments that warrant further review of the requests or the registrants withdraw their requests, EPA intends to issue an order in the **Federal Register** canceling all of the affected registrations.

TABLE 1—REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION

Registration No.	Product name	Chemical name
000241–00391	Pendulum 3.3 Herbicide	Pendimethalin.
000241–00403	Pendimethalin Manufacturing Concentrate Herbicide	Pendimethalin.
000264–00807	Calypso 70WG Insecticide	Thiacloprid.
000655–00802	Prentox Larva-Lur Contains Propoxur	Propoxur.
009688–00198	Chemsico Herbicide Concentrate DP	Prometon, Diquat dibromide.
009688–00218	Chemsico Herbicide RTU DP	Prometon, Diquat dibromide.
053883–00135	Esfenvalerate AG	Esfenvalerate.
061483–00011	P1/P13 Creosote Oil	Creosote oil (Note: Derived from any source).
061483–00012	P2 Creosote Coal Tar Solution	Coal Tar Creosote (Note: Derived from any source).
074062–00002	Winpeace™ SF–1	10,10′-Oxybisphenoxarsine.
CA–060004	Gramoxone Inteon	Paraquat dichloride.
CA–870038	Griffin Direx 4L Herbicide	Diuron.
CO–110002	Rozol Prairie Dog Bait	Chlorophacinone.
ID–980007	Agri-Mek 0.15 EC Miticide/Insecticide	Abamectin.
IL–050001	Callisto	Mesotrione.
LA–090006	Confirm 2F	Tebufenozide.
OR–030037	Rubigan E.C.	Fenarimol.
OR–040013	Agri-Mek 0.15 EC Miticide/Insecticide	Abamectin.
OR–060006	Prowl H2O Herbicide	Pendimethalin.
OR–060007	Prowl H2O Herbicide	Pendimethalin.
TX–060017	Gramoxone Inteon	Paraquat dichloride.
VA–060002	Gramoxone Inteon	Paraquat dichloride.
WA–030007	Palisade EC	Trinexapac-ethyl.
WA–070010	Pear Wrap Treated with Ethoxyquin	Ethoxyquin.
WA–080006.	Provide 10SG	Gibberellin A4 mixt. with Gibberellin A7.

Table 2 of this unit includes the names and addresses of record for all registrants of the products in Table 1 of this unit, in sequence by EPA company number. This number corresponds to the first part of the EPA registration numbers of the products listed in this unit.

TABLE 2—REGISTRANTS REQUESTING VOLUNTARY CANCELLATION

EPA company No.	Company name and address
241 (OR–060006, OR–060007)	BASF Corporation, 26 Davis Dr., P.O. Box 13528, Research Triangle Park, NC 27709–3528.

TABLE 2—REGISTRANTS REQUESTING VOLUNTARY CANCELLATION—Continued

EPA company No.	Company name and address
264	Bayer CropScience LP, 2 T.W. Alexander Dr., P.O. Box 12014, Research Triangle Park, NC 27709.
655	Prentiss LLC, Agent: Pyxis Regulatory Consulting, Inc., 4110 136th St. NW., Gig Harbor, WA 98332.
9688	Chemsico, P.O. Box 142642, St. Louis, MO 63114–0642.
53883	Control Solutions, Inc., 5903 Genoa-Red Bluff Rd., Pasadena, TX 77057–1041.
61483	KMG-Bernuth, Inc., 9555 W. Sam Houston Pkwy., Suite 600, Houston, TX 77099.
74062	Winpeace International. LTD., 3414 Bishop St., Cincinnati, OH 45220–1831.
CA060004; ID980007; IL050001; OR040013; TX060017; VA060002.	Syngenta Crop Protection, LLC, 410 Swin Rd., P.O. Box 18300, Greensboro, NC 27419–8300.
CA870038	Easter Lily Research Foundation, P.O. Box 907, Brookings, OR 97415.
CO110002	Liphatech, Inc., 3600 W. Elm St., Milwaukee, WI 53209.
LA–090006	Dow AgroSciences LLC, 9330 Zionsville Rd., 308/2E, Indianapolis, IN 46268–1054.
OR–030037	Gowan Company, P.O. Box 5569, Yuma, AZ 85366–8844.
WA–070010	Wrap Pack Inc., Agent: Technology Sciences Group, Inc., 1150 18th St. NW., Suite 100, Washington, D.C. 20036.
WA–080006	Valent BioSciences Corporation, Environmental Science Division, 870 Technology Way, Libertyville, IL 60048–6316.

III. What is the Agency's authority for taking this action?

Section 6(f)(1) of FIFRA provides that a registrant of a pesticide product may at any time request that any of its pesticide registrations be canceled. FIFRA further provides that, before acting on the request, EPA must publish a notice of receipt of any such request in the **Federal Register**.

Section 6(f)(1)(B) of FIFRA requires that before acting on a request for voluntary cancellation, EPA must provide a 30-day public comment period on the request for voluntary cancellation or use termination. In addition, FIFRA section 6(f)(1)(C) requires that EPA provide a 180-day comment period on a request for voluntary cancellation or termination of any minor agricultural use before granting the request, unless:

1. The registrants request a waiver of the comment period, or
2. The EPA Administrator determines that continued use of the pesticide would pose an unreasonable adverse effect on the environment.

The registrants in Table 2 of Unit II. have not requested that EPA waive the 180-day comment period. Accordingly, EPA will provide a 180-day comment period on the proposed requests.

IV. Procedures for Withdrawal of Request

Registrants who choose to withdraw a request for cancellation should submit such withdrawal in writing to the person listed under **FOR FURTHER INFORMATION CONTACT**. If the products have been subject to a previous cancellation action, the effective date of cancellation and all other provisions of any earlier cancellation action are controlling.

V. Provisions for Disposition of Existing Stocks

Existing stocks are those stocks of registered pesticide products that are currently in the United States and that were packaged, labeled, and released for shipment prior to the effective date of the cancellation action. Because the Agency has identified no significant potential risk concerns associated with these pesticide products, upon cancellation of the products identified in Table 1 of Unit II., EPA anticipates allowing registrants to sell and distribute existing stocks of these products for 1 year after publication of the Cancellation Order in the **Federal Register**. Thereafter, registrants will be prohibited from selling or distributing the pesticides identified in Table 1 of Unit II., except for export consistent with FIFRA section 17 or for proper disposal. Persons other than registrants will generally be allowed to sell, distribute, or use existing stocks until such stocks are exhausted, provided that such sale, distribution, or use is consistent with the terms of the previously approved labeling on, or that accompanied, the canceled products.

List of Subjects

Environmental protection, Pesticides and pests.

Dated: February 13, 2013.

Richard P. Keigwin, Jr.,

Director, Pesticide Re-Evaluation Division, Office of Pesticide Programs.

[FR Doc. 2013–04031 Filed 2–21–13; 8:45 am]

BILLING CODE 6560–50–P

EXPORT-IMPORT BANK

[Public Notice 2013–0113]

Application for Final Commitment for a Long-Term Loan or Financial Guarantee in Excess of $100 Million: AP087791XX

AGENCY: Export-Import Bank of the United States.

ACTION: Notice.

SUMMARY: This Notice is to inform the public, in accordance with Section 3(c)(10) of the Charter of the Export-Import Bank of the United States ("Ex-Im Bank"), that Ex-Im Bank has received an application for final commitment for a long-term loan or financial guarantee in excess of $100 million (as calculated in accordance with Section 3(c)(10) of the Charter). Comments received within the comment period specified below will be presented to the Ex-Im Bank Board of Directors prior to final action on this Transaction.

Reference: AP087791XX.

Purpose and Use:

Brief description of the purpose of the transaction:

To support the export of U.S. manufactured commercial aircraft to Mexico.

Brief non-proprietary description of the anticipated use of the items being exported:

To provide short- and medium-haul airline service in Mexico and between Mexico and other countries in North, Central and South America.

To the extent that Ex-Im Bank is reasonably aware, the item(s) being exported may be used to produce exports or provide services in competition with the exportation of goods or provision of services by a United States industry.

Parties:

Principal Supplier: The Boeing Company.

Obligor: Aerovias de Mexico, S.A. de C.V.

Guarantor(s): Grupo Aeromexico, S.A.B. de C.V.

Description of Items Being Exported: Boeing 737 aircraft.

Information on Decision: Information on the final decision for this transaction will be available in the "Summary Minutes of Meetings of Board of Directors" on *http://exim.gov/newsandevents/boardmeetings/board/.*

Confidential Information: Please note that this notice does not include confidential or proprietary business information; information which, if disclosed, would violate the Trade Secrets Act; or information which would jeopardize jobs in the United States by supplying information that competitors could use to compete with companies in the United States.

DATES: Comments must be received on or before March 19, 2013 to be assured of consideration before final consideration of the transaction by the Board of Directors of Ex-Im Bank.

ADDRESSES: Comments may be submitted through Regulations.gov at *www.regulations.gov.* To submit a comment, enter EIB–2013–0013 under the heading "Enter Keyword or ID" and select Search. Follow the instructions provided at the Submit a Comment screen. Please include your name, company name (if any) and EIB–2013–0013 on any attached document.

Sharon A. Whitt,

Records Clearance Officer.

[FR Doc. 2013–04026 Filed 2–21–13; 8:45 am]

BILLING CODE 6690–01–P

EXPORT-IMPORT BANK

Economic Impact Policy

This notice is to inform the public that the Export-Import Bank of the United States has received an application for a $115 million direct loan to support the export of approximately $100 million worth of vehicle assembly equipment to India. The U.S. exports will enable the Indian company to produce approximately 330,000 vehicles per year. Available information indicates that the majority of this new vehicle production will be sold in India with the remainder sold in Mexico, the Middle East, Africa, and ASEAN regions. Interested parties may submit comments on this transaction by email to *economic.impact@exim.gov* or by mail to 811 Vermont Avenue NW., Room 442, Washington, DC 20571, within 14 days of the date this notice appears in the **Federal Register**, inclusive of the date of this notification.

Angela Mariana Freyre,

Senior Vice President and General Counsel.

[FR Doc. 2013–04078 Filed 2–21–13; 8:45 am]

BILLING CODE 6690–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than March 11, 2013.

A. Federal Reserve Bank of Minneapolis (Jacqueline G. King, Community Affairs Officer) 90 Hennepin Avenue, Minneapolis, Minnesota 55480–0291:

1. *Andrew W. Schmidt and Edward K. Massee,* both of Appleton, Minnesota, as members of the Schmidt Family Group and the Massee Family Group; to acquire voting shares of MPS Investment Company, and thereby indirectly acquire voting shares of Farmers and Merchants State Bank, both in Appleton, Minnesota.

Board of Governors of the Federal Reserve System, February 19, 2013.

Robert deV. Frierson,

Secretary of the Board.

[FR Doc. 2013–04085 Filed 2–21–13; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0159; Docket 2012–0076; Sequence 17]

Federal Acquisition Regulation; Information Collection; Central Contractor Registration

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for public comments regarding an extension to an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act, the Regulatory Secretariat will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a previously approved information collection requirement concerning the Central Contractor Registration database. A notice was published in the **Federal Register** at 77 FR 24713, on April 25, 2012. One respondent submitted comments.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the Federal Acquisition Regulation (FAR), and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

DATES: Submit comments on or before April 23, 2013.

ADDRESSES: Submit comments identified by Information Collection 9000–0159, Central Contractor Registration, by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by inputting "Information Collection 9000–0159, Central Contractor Registration" under the heading "Enter Keyword or ID" and selecting "Search". Select the link "Submit a Comment" that corresponds with "Information

Collection 9000–0159, Central Contractor Registration". Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "Information Collection 9000–0159, Central Contractor Registration" on your attached document.

- *Fax:* 202–501–4067.
- *Mail:* General Services Administration, Regulatory Secretariat (MVCB), 1275 First Street NE., Washington, DC 20417. ATTN: Hada Flowers/IC 9000–0159, Central Contractor Registration.

Instructions: Please submit comments only and cite Information Collection 9000–0159, Central Contractor Registration, in all correspondence related to this collection. All comments received will be posted without change to *http://www.regulations.gov*, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Mr. Curtis E. Glover, Sr., Procurement Analyst, Office of Governmentwide Policy, GSA, (202)501–1448, or via email at *curtis.glover@gsa.gov*.

SUPPLEMENTARY INFORMATION:

I. Purpose

Federal Acquisition Regulation (FAR) Subpart 4.11 prescribes policies and procedures for requiring contractor registration in the Central Contractor Registration (CCR) database. The CCR is the primary vendor database for the U.S. Federal Government. CCR collects, validates, stores, and disseminates data in support of agency acquisition missions.

Both current and potential Federal Government vendors are required to register in CCR in order to be awarded contracts by the Federal Government. Vendors are required to complete a one-time registration to provide basic information relevant to procurement and financial transactions. Vendors must update or renew their registration at least once per year to maintain an active status.

CCR validates the vendor information and electronically share the secure and encrypted data with Federal agency finance offices to facilitate paperless payments through electronic funds transfer. Additionally, CCR shares the data with Federal Government procurement and electronic business systems.

II. Analysis of Public Comments

One respondent submitted public comments on the extension of the previously approved information collection. The analysis of the public comments is summarized as follows:

Comment: The respondent commented that the extension of the information collection would violate the fundamental purposes of the Paperwork Reduction Act because of the burden it puts on the entity submitting the information and the agency collecting the information.

Response: In accordance with the Paperwork Required Act (PRA), agencies can request an OMB approval of an existing information collection. The PRA requires that agencies use the **Federal Register** notice and comment process, to extend the OMB's approval, at least every three years. This extension, to a previously approved information collection, pertains to FAR Subpart 4.11—Central Contractor Registration. The purpose of this part is to prescribe the policies and procedures for requiring contractor registration in the Central Contractor Registration (CCR) database, a part of the business partner Network (BPN) to—

(a) Increase visibility of vendor sources (including their geographical locations) for specific supplies and services; and

(b) Establish a common source of vendor data for the Government.

The Government must ensure that contractors are registered in the CCR database prior to award of a contract or agreement, except in certain cases. Clause 52.204–7, Central Contractor Registration, is mandatory except in certain cases. Not granting this extension would consequently eliminate the Government's ability to gather information about its vendor base which is used in the procurement process, and to facilitate electronic payment to vendors.

Comment: The respondent commented that the Agencies did not accurately estimate the public burden an extension of the information collection requirement would create. The respondent indicated that CCR requires extensive information about the registrant, for example executive compensation, and the time required is estimated time per response is 50 to 100 times greater than the estimate of .4526 hours per response.

Response: The Federal Procurement Data System shows 193,397 unique vendors received awards in Fiscal Year (FY) 2011. For FY 2011, it is estimated that 168,646 current Government vendors received new awards, and 24,751 new vendors were awarded contracts. These vendors are required to input information in CCR in order to receive awards. In consideration of the public comment, it is estimated that for current CCR vendors, an average of 1 hour is needed to update the information in the system. For new CCR registrants, it is estimated that 3 hours will be required for each respondent to fill out the documentation in the system. An overall average of 1.2559 hours is required to review and update the documentation for current registrants and to review, prepare, and complete the registration for new registrants. This is an increase from the estimated average of .4526 hours per response. There are other OMB information collection requirements that account for the data collected in CCR. For example, OMB Control Number 9000–0177 accounts for the reporting of executive compensation. A notice was published in the **Federal Register** at 77 FR 22766, on April 17, 2012.

Comment: The respondent commented that the collective burden of compliance with the information collection requirement greatly exceeds the Agencies estimate and outweighs any potential utility of the extension.

Response: The Paperwork Reduction Act (PRA) was designed to improve the quality and use of Federal information to strengthen decision-making, accountability, and openness in government and society. Central to this process is the solicitation of comments from the public. This process incorporates an enumerated specification of targeted information and provides interested parties a meaningful opportunity for comment on the relevant compliance cost. This process has led to decreases in the overall collective burden of compliance for the information collection requirement in regards to the public. Based on OMB estimates, in FY 2010, the public spent 8.8 billion hours responding to information collections. This was a decrease of one billion hours, or ten percent from the previous fiscal year. In effect, the collective burden of compliance for the public is going down as the Government publishes rules that make the process less complex, more transparent, and reduces the cost of federal regulations to both the Contractor community and Government.

Comment: The respondent commented that the Government's response to the Paperwork Reduction Act waiver for Far Case 2007–006 is instructive on the total burden for respondents.

Response: Serious consideration is given, during the open comment period, to all comments received and adjustments are made to the paperwork burden estimate based on reasonable considerations provided by the public. This is evidenced, as the respondent notes, in FAR Case 2007–006 where an

adjustment was made from the total preparation hours from three to 60. This change was made considering particularly the hours that would be required for review within the company, prior to release to the Government.

The burden is prepared taking into consideration the necessary criteria in OMB guidance for estimating the paperwork burden put on the entity submitting the information. For example, consideration is given to an entity reviewing instructions; using technology to collect, process, and disclose information; adjusting existing practices to comply with requirements; searching data sources; completing and reviewing the response; and transmitting or disclosing information. The estimated burden hours for a collection are based on an average between the hours that a simple disclosure by a very small business might require and the much higher numbers that might be required for a very complex disclosure by a major corporation. Also, the estimated burden hours should only include projected hours for those actions which a company would not undertake in the normal course of business. Careful consideration went into assessing the estimated burden hours for this collection, and an upward adjustment is being to the estimated burden hours.

III. Annual Reporting Burden

Respondents: 193,397.

Responses per Respondent: 1.

Annual Responses: 193,397.

Hours per Response: 1.2559.

Total Burden Hours: 242,887.

Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (MVCB), 1275 First Street NE., Washington, DC 20417, telephone (202) 501–4755. Please cite OMB Control Number 9000–0159, Central Contractor Registration, in all correspondence.

Dated: February 15, 2013.

William Clark,

Acting Director, Federal Acquisition Policy Division, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

[FR Doc. 2013–04110 Filed 2–21–13; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0068; Docket 2012–0076; Sequence 55]

Federal Acquisition Regulation; Submission for OMB Review; Economic Price Adjustment

AGENCY: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for an extension to an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act, the Regulatory Secretariat will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a previously approved information collection requirement concerning economic price adjustment. A notice was published in the **Federal Register** at 77 FR 69442, on November 19, 2012. One respondent submitted comments.

DATES: Submit comments on or before March 25, 2013.

ADDRESSES: Submit comments identified by Information Collection 9000–0068, Economic Price Adjustment by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by searching the OMB control number. Select the link "Submit a Comment" that corresponds with "Information Collection 9000–0068, Economic Price Adjustment". Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "Information Collection 9000–0068, Economic Price Adjustment" on your attached document.
- *Fax:* 202–501–4067.
- *Mail:* General Services Administration, Regulatory Secretariat (MVCB), 1275 First Street NE., Washington, DC 20417. ATTN: Hada Flowers/IC 9000–0068, Economic Price Adjustment.

Instructions: Please submit comments only and cite Information Collection 9000–0068, Economic Price Adjustment, in all correspondence related to this collection. All comments received will be posted without change to *http://www.regulations.gov*, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Mr. Michael O. Jackson, Procurement Analyst, Office of Governmentwide Acquisition Policy, GSA (202) 208–4949 or email *michaelo.jackson@gsa.gov.*

SUPPLEMENTARY INFORMATION:

A. Purpose

FAR 16.203, Fixed-price contracts with economic price adjustment, and associated clauses at 52.216–2, 52.216–3, and 52.216–4 provide for upward and downward revision of the stated contract price upon occurrence of specified contingencies. In order for the contracting officer to be aware of price changes, the firm must provide pertinent information to the Government. The information is used to determine the proper amount of price adjustments required under the contract.

B. Discussion and Analysis

One respondent submitted public comments on the extension of the previously approved information collection. The analysis of the public comments is summarized as follows:

Comment: The respondent commented that the extension of the information collection would violate the fundamental purposes of the Paperwork Reduction Act because of the burden it puts on the entity submitting the information and the agency collecting the information. The respondent opposes granting the extension of the information collection requirement.

Response: In accordance with the Paperwork Reduction Act (PRA), agencies can request an OMB approval of an existing information collection. The PRA requires that agencies use the **Federal Register** notice and comment process, to extend the OMB's approval, at least every three years. This extension, to a previously approved information collection, pertains to FAR 16.203, Fixed-price contracts with economic price adjustment, and associated clauses at 52.216–2, 52.216–3, and 52.216–4 which provide for upward and downward revision of the stated contract price upon occurrence of specified contingencies. In order for the contracting officer to be aware of price changes, the firm must provide pertinent information to the Government. The information is used to determine the proper amount of price adjustments required under the contract. Not granting this extension would consequently eliminate FAR clauses that provide a benefit to the public and the agency collecting the information.

Comment: The respondent commented that the agency did not

accurately estimate the public burden challenging that the agency's methodology for calculating it is insufficient and inadequate and does not reflect the total burden. The respondent indicated that .25 hours or 15 minutes per response for the level of effort involved under the relevant clauses is unrealistically low. For this reason, the respondent provided that the agency should reassess the estimated total burden hours and revise the estimate upwards to be more accurate, as was done in FAR Case 2007–006. The same respondent also provided that the burden of compliance with the information collection requirement greatly exceeds the agency's estimate and outweighs any potential utility of the extension.

Response: Serious consideration is given, during the open comment period, to all comments received and adjustments are made to the paperwork burden estimate based on reasonable considerations provided by the public. This is evidenced, as the respondent notes, in FAR Case 2007–006 where an adjustment was made from the total preparation hours from three to 60. This change was made considering particularly the hours that would be required for review within the company, prior to release to the Government.

The burden is prepared taking into consideration the necessary criteria in OMB guidance for estimating the paperwork burden put on the entity submitting the information. For example, consideration is given to an entity reviewing instructions; using technology to collect, process, and disclose information; adjusting existing practices to comply with requirements; searching data sources; completing and reviewing the response; and transmitting or disclosing information. The estimated burden hours for a collection are based on an average between the hours that a simple disclosure by a very small business might require and the much higher numbers that might be required for a very complex disclosure by a major corporation. Also, the estimated burden hours should only include projected hours for those actions which a company would not undertake in the normal course of business. Careful consideration went into assessing the burden for this collection, and although the respondent did not provide a specific recommendation for an increase of time per response, an adjustment is made to the estimated total burden. At any point, members of the public may submit comments for further consideration, and are encouraged to provide data to support their request for an adjustment.

C. Annual Reporting Burden

The estimated annual reporting burden is being adjusted upward since published in the **Federal Register** at 74 FR 64085, on December 7, 2009. The upward adjustment is based on a revised number of respondents obtained from the Federal Procurement Data System—Next Generation (FPDS–NG) data for fixed-price contracts with economic price adjustments, and consideration of the public comment.

Respondents: 11,945.
Responses per Respondent: 1.
Annual Responses: 11,945.
Hours per Response: 1.5.
Total Burden Hours: 17,918.
Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (MVCB), 1275 First Street NE., Washington, DC 20417, telephone (202) 501–4755. Please cite OMB Control No. 9000–0068, Economic Price Adjustment, in all correspondence.

Dated: February 19, 2013.

William Clark,

Acting Director, Federal Acquisition Policy Division, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

[FR Doc. 2013–04111 Filed 2–21–13; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Meeting of the National Advisory Council for Healthcare Research and Quality

AGENCY: Agency for Healthcare Research and Quality (AHRQ), HHS.

ACTION: Notice of public meeting.

SUMMARY: In accordance with section 10(a) of the Federal Advisory Committee Act, 5 U.S.C. App. 2, this notice announces a meeting of the National Advisory Council for Healthcare Research and Quality.

DATES: The meeting will be held on Friday, April 12, 2013, from 8:30 a.m. to 3:30 p.m.

ADDRESSES: The meeting will be held at the Eisenberg Conference Center, Agency for Healthcare Research and Quality, 540 Gaither Road, Rockville, Maryland 20850.

FOR FURTHER INFORMATION CONTACT: Jaime Zimmerman, Designated Management Official, at the Agency for Healthcare Research and Quality, 540 Gaither Road, Rockville, Maryland, 20850, (301) 427–1456. For press-related information, please contact Alison Hunt at (301) 427–1244.

If sign language interpretation or other reasonable accommodation for a disability is needed, please contact the Food and Drug Administration (FDA) Office of Equal Employment Opportunity and Diversity Management on (301) 827–4840, no later than Friday, March 22, 2013. The agenda, roster, and minutes are available from Ms. Bonnie Campbell, Committee Management Officer, Agency for Healthcare Research and Quality, 540 Gaither Road, Rockville, Maryland, 20850. Ms. Campbell's phone number is (301) 427–1554.

SUPPLEMENTARY INFORMATION:

I. Purpose

The National Advisory Council for Healthcare Research and Quality is authorized by Section 941 of the Public Health Service Act, 42 U.S.C. 299c. In accordance with its statutory mandate, the Council is to advise the Secretary of the Department of Health and Human Services and the Director, Agency for Healthcare Research and Quality (AHRQ), on matters related to AHRQ's conduct of its mission including providing guidance on (A) Priorities for health care research, (B) the field of health care research including training needs and information dissemination on health care quality and (C) the role of the Agency in light of private sector activity and opportunities for public private partnerships.

The Council is composed of members of the public, appointed by the Secretary, and Federal ex-officio members specified in the authorizing legislation.

II. Agenda

On Friday, April 12, 2013, there will be a subcommittee meeting for the National Healthcare Quality and Disparities Report scheduled to begin at 7:30 a.m. The subcommittee meeting is open the public. The Council meeting will convene at 8:30 a.m., with the call to order by the Council Chair and approval of previous Council summary notes. The meeting will begin with the AHRQ Director presenting an on update on current research, programs, and initiatives. Following the morning session, the Council will hold an Executive Session between the hours of 12:00 p.m. and 1:30 p.m. to discuss strategic issues related to the Agency for

Healthcare Research and Quality. This Executive Session will be closed to the public in accordance with 5 U.S.C. App. 2, section 10(d) and 5 U.S.C. 552b(c)(9)(B). This portion of the meeting is likely to disclose information the premature disclosure of which would be likely to significantly frustrate implementation of a proposed agency action to the public. The final agenda will be available on the AHRQ Web site at *www.AHRQ.gov* no later than Friday, March 29, 2013.

Dated: February 13, 2012.

Carolyn M. Clancy,

Director.

[FR Doc. 2013–04057 Filed 2–21–13; 8:45 am]

BILLING CODE 4160–90–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–13–0604]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call (404) 639–7570 or send an email to *omb@cdc.gov*. Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC 20503 or by fax to (202) 395–5806. Written comments should be received within 30 days of this notice.

Proposed Project

School Associated Violent Death Surveillance System (0920–0604, Expiration 1/31/2013)—Reinstatement with change—National Center for Injury Prevention and Control (NCIPC), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The Division of Violence Prevention (DVP), National Center for Injury Prevention and Control (NCIPC) proposes to maintain a system for the surveillance of school-associated homicides and suicides; the system relies on existing public records and interviews with law enforcement officials and school officials. The purpose of the system is to (1) estimate the rate of school-associated violent death in the United States and (2) identify common features of school-associated violent deaths. The system will contribute to the understanding of fatal violence associated with schools, guide further research in the area, and help direct ongoing and future prevention programs.

School-associated violent deaths (SAVD) is an ongoing surveillance system that draws cases from the entire United States in attempting to capture all cases of school-associated violent deaths that have occurred. Investigators review public records and published press reports concerning each school-associated violent death. For each identified case, investigators also interview an investigating law enforcement official (defined as a police officer, police chief, or district attorney), and a school official (defined as a school principal, school superintendent, school counselor, school teacher, or school support staff) who are knowledgeable about the case in question. Respondents will only be interviewed once. Researchers request information on both the victim and alleged offender(s)—including demographic data, their academic and criminal records, and their relationship to one another. Data are also collected on the time and location of the death; the circumstances, motive, and method of the fatal injury; and the security and violence prevention activities in the school and community where the death occurred, before and after the fatal injury event.

The revisions to this data collection involve changes to the data collection instruments that will enhance the scope or relevance of the information previously collected, and changes that will reflect recent advancements and developments in research addressing violence in school settings. There has also been an additional measure added which will further strengthen the data security processes.

There are no costs to the respondents other than their time. The total estimated annual burden hours are 70.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
School Officials	School CATI Interview	35	1	1
Police Officials	Law Enforcement CATI Interview	35	1	1

Dated: February 14, 2013.

Ron A. Otten,

Director, Office of Scientific Integrity (OSI), Office of the Associate Director for Science (OADS), Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2013–04048 Filed 2–21–13; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–10418, CMS–10028]

Agency Information Collection Activities: OMB Review; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services, is publishing the following summary of proposed collections 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 function; (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.

1. *Type of Information Collection Request:* Revision of currently approved collection; *Title of Information Collection:* Annual MLR and Rebate Calculation Report and MLR Rebate Notices; *Use:* Under Section 2718 of the Affordable Care Act and implementing regulation at 45 CFR Part 158, a health insurance issuer (issuer) offering group or individual health insurance coverage must submit a report to the Secretary concerning the amount the issuer spends each year on claims, quality improvement expenses, non-claims costs, federal and state taxes and licensing and regulatory fees, and the amount of earned premium. An issuer must provide an annual rebate if the amount it spends on certain costs compared to its premium revenue (excluding federal and states taxes and licensing and regulatory fees) does not meet a certain ratio, referred to as the medical loss ratio (MLR). An interim final rule (IFR) implementing the MLR was published on December 1, 2010 (75 FR 74865) and modified by technical corrections on December 30, 2010 (75 FR 82277), which added Part 158 to Title 45 of the Code of Federal Regulations. The IFR was effective January 1, 2011. A final rule regarding selected provisions of the IFR was published on December 7, 2011 (76 FR 76574, CMS–9998–FC) and an interim final rule regarding an issue not included in issuers' reporting obligations (disbursement of rebates by non-federal governmental plans) was also published December 7, 2011 (76 FR 76596, CMS–9998–IFC2) Both rules published on December 7, 2011 were effective January 1, 2012. Each issuer is required to submit annually MLR data, including information about any rebates it must provide, on a form prescribed by CMS, for each state in which the issuer conducts business. Each issuer is also required to provide a rebate notice to each policyholder that is owed a rebate and each subscriber of policyholders that are owed a rebate for any given MLR reporting year. Additionally, each issuer is required to maintain for a period of seven years all documents, records and other evidence that support the data included in each issuer's annual report to the Secretary.

The 60-day **Federal Register** notice published on December 4, 2012, (77 FR 71801) pertained to the 2012 MLR Annual Reporting Form and Instructions, and the comment period closed on February 4, 2013. We received a total of 4 public comments on 25 specific issues regarding the notice of the revised Medical Loss Ratio (MLR) PRA package. Most of the comments addressed clarifying the instructions or correcting typographical errors, the removal of calculated cells and the issuer's ability to copy and paste data onto the form, and the inclusion of a credibility indicator for small issuers so that small issuers would not need to fill out the complete MLR reporting form. We have taken into consideration all of the proposed suggestions and have made changes to the 2012 MLR Annual Reporting Form and Instructions.

Form Number: CMS–10418 (OCN: 0938–1164); *Frequency:* Annual submission for each respondent; *Affected Public:* Private Sector, Business or other for-profits and not-for-profit institutions; *Number of Respondents:* 502; *Number of Responses:* 3,085; *Total Annual Hours:* 311,302. (For policy questions regarding this collection, contact Carol Jimenez at (301) 492–4457. For all other issues, call (410) 786–1326.)

2. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* State Health Insurance Assistance Program (SHIP) Client Contact Form, Public and Media Activity Report Form, and Resource Report Form. *Use:* Section 4360(f) of the Omnibus Budget Reconciliation Act (OBRA) 1990 requires the Secretary to provide a series of reports to the U.S. Congress on the performance of the program and its impact on beneficiaries and to obtain important informational feedback from beneficiaries. Further, in response to requirements of the Balanced Budget Act of 1997, CMS launched a comprehensive five-year campaign, the National Medicare Education Program (NMEP), to raise awareness among beneficiaries about their Medicare health plan options and help them assess the advantages and disadvantages each choice holds for them. The Medicare Modernization Act (MMA) of 2003 required State Health Insurance Assistance Programs (SHIPs) to be actively engaged in the implementation of the Medicare Prescription Drug Program (Part D). MIPPA legislation and Affordable Care Act legislation required SHIPs to provide enrollment assistance for the Limited Income Subsidy (LIS) and Medicare Savings Program (MSP). The goal is to ensure that beneficiaries are making an informed choice, regardless of whether they stay in Original Medicare or choose new options. CMS is responsible to Congress for demonstrating improvement over time in the level of awareness and understanding beneficiaries have about health plan options. The SHIPs are an integral component of this initiative. The information collected is used to fulfill the reporting requirements described in Section 4360(f) of OBRA 1990. CMS will utilize this data. The data will be accumulated and analyzed to measure SHIP performance in order to determine whether and to what extent the SHIPs have met the goals of improved CMS customer service to beneficiaries and better understanding by beneficiaries of their health insurance options. Further, the information will be used in the administration of the grants, to measure performance and appropriate use of the funds by the state grantees, to identify gaps in services and technical support needed by SHIPs, and to identify and share best practices. The overall burden of hours and expected number of respondents increase is based on projected future service growth and projected future increases in staffing to accommodate the increased demand to utilize the SHIP network to raise awareness about new CMS policies, outreach initiatives, or both. However, the instruments themselves have not changed. *Form Number:* CMS–10028 (OCN: 0938–0850); *Frequency:* Occasionally; *Affected Public:* State, Local, or Tribal Governments; *Number of Respondents:* 17,838; *Total Annual Responses:* 2,346,465. *Total Annual Hours:* 195,642. (For policy questions regarding this collection contact Gregory Price at 410–786–4041. For all other issues call 410–786–1326.)

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS' Web Site address at *http://www.cms.hhs.gov/PaperworkReductionActof1995*, or Email your request, including your address, and phone number as well the OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov*, or call the Reports Clearance Office on (410) 786–1326.

To be assured consideration, comments and recommendations for the proposed information collections must be received by the OMB desk officer at the address below, no later than 5 p.m. on March 25, 2013.

OMB, Office of Information and Regulatory Affairs, Attention: CMS Desk Officer, Fax Number: (202) 395–6974, Email: *OIRA_submission@omb.eop.gov*.

Dated: February 15, 2013.

Martique Jones,

Deputy Director, Regulations Development Group, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2013–04015 Filed 2–21–13; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–R–282]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare & Medicaid Services (CMS) is publishing the following summary of proposed collections 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.

1. *Type of Information Collection Request:* Extension. *Title of Information Collection:* Medicare Advantage Appeals and Grievance Data Disclosure Requirements (42 CFR 422.111). *Use:* Section 1852(c)(2)(C) of the Social Security Act and 42 CFR 422.111(c)(3) require that Medicare Advantage (MA) organizations and demonstrations disclose information pertaining to the number of disputes, and their disposition in the aggregate, with the categories of grievances and appeals to any individual eligible to elect an MA organization who requests this information. MA organizations and demonstrations remain under a requirement to collect and provide this information to individuals eligible to elect an MA organization, we continue to need the same format and form for reporting. *Form Number:* CMS–R–282 (OCN 0938–0778). *Frequency:* Annually and semi-annually. *Affected Public:* Private Sector (business or other for-profit and not-for-profit institutions). *Number of Respondents:* 51,370. *Total Annual Responses:* 52,260. *Total Annual Hours:* 5,414. (For policy questions regarding this collection contact Stephanie Simons at 206–615–2420. For all other issues call 410–786–1326.)

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS' Web Site address at *http://www.cms.hhs.gov/PaperworkReductionActof1995*, or Email your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov*, or call the Reports Clearance Office at 410–786–1326.

In commenting on the proposed information collections please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in one of the following ways by April 23, 2013:

1. *Electronically.* You may submit your comments electronically to *http://www.regulations.gov*. Follow the instructions for "Comment or Submission" or "More Search Options" to find the information collection document(s) accepting comments.

2. *By regular mail.* You may mail written comments to the following address:

CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Document Identifier/OMB Control Number _____, Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

Dated: February 19, 2013.

Martique Jones,

Deputy Director, Regulations Development Group, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2013–04120 Filed 2–21–13; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–10430, CMS–10164 and CMS–838]

Agency Information Collection Activities: OMB Review; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services, is publishing the following summary of proposed collections 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 function; (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.

1. *Type of Information Collection Request:* Reinstatement of a previously approved collection; *Title:* Information Collection Requirements for Compliance with Individual and Group Market Reforms under Title XXVII of the Public Health Service Act; *Use:* The provisions of title XXVII of the Public Health Service Act (PHS Act) are designed to make it easier for people to get access to health care coverage and to reduce the limitations that can be put on the coverage. Sections 2723 and 2761 of the PHS Act direct CMS to enforce a provision (or provisions) of title XXVII of the PHS Act with respect to health insurance issuers when a state has notified CMS that it has not enacted legislation to enforce or that it is not otherwise enforcing a provision (or provisions) of the individual and group market reforms with respect to health insurance issuers, or when CMS has determined that a state is not substantially enforcing one or more of those provisions. This collection also pertains to notices issued by individual and group health insurance issuers and self-funded non-Federal governmental plans. This collection includes the issuance of certificates of creditable coverage; notification of preexisting condition exclusions; notification of special enrollment rights; and review of issuers' filings of individual and group market products or similar Federal review in cases in which a state is not enforcing a title XXVII individual or group market provision. This information collection is a reinstatement of a previously approved collection (which expired on September 30, 2012 (OMB#: 0938–0702 and OMB#: 0938–0703)) with minimal changes to reflect

laws passed since the previous collection document was approved. While the OMB control number for this proposed collection will remain the same as the previously approved collection, this proposed collection will be given a new CMS Form Number. *Form Number:* CMS–10430 (OCN: 0938–0702); *Frequency:* Annually; Occasionally; *Affected Public:* Private Sector; Business or other for-profits and Not-for-profit institutions, and State, Local, or Tribal Governments; *Number of Respondents:* 8,716; *Total Annual Responses:* 39,831,442; *Total Annual Hours:* 3,760,422 hours. (For policy questions regarding this collection contact Lisa Campbell at 301–492–4114. For all other issues call 410–786–1326.)

2. *Type of Information Collection Request:* Reinstatement with a change of a previously approved collection; *Title:* Medicare Electronic Data Interchange (EDI) Registration and Electronic Data Interchange (EDI) Enrollment Form; *Use:* The purpose of this collection is to obtain information that will be subsequently used during transaction exchange for identification of Medicare providers/suppliers and authorization of requested Electronic Data Interface (EDI) functions. The EDI Enrollment and the Medicare Registration Forms are completed by Medicare providers, suppliers, or both suppliers and submitted to Medicare contractors. Authorization is needed for providers and suppliers to send and receive HIPAA standard transactions directly (or through a designated 3rd party) to and from Medicare contractors. Medicare contractors would use the information for initial set-up and maintenance of the access privileges. The use of the standard form provides an efficient uniform means by which Medicare captures information necessary to drive Medicare EDI security and EDI access privileges. All EDI providers will complete and sign the EDI Enrollment Form along with the Medicare EDI Registration Form. They will also reconfirm their access privileges annually.

The information collected will be uploaded into Medicare contractor computer systems. Medicare contractors will store this information in a database accessed at the time of provider connection to the Medicare Data Contractor Network (MDCN). When authentication is successful and connectivity is established, transactions may be exchanged. The information will be stored in a computer data base and used to authenticate the user on day-to-day electronic commerce, support the submitter and password administration function, and validate access relationships between providers/suppliers and their designated EDI submitter/receiver on a per transaction basis. *Form Number:* CMS–10164 (OCN: 0938–0983); *Frequency:* Once; *Affected Public:* Private Sector—Business or other for-profits, Not for-profit institutions; *Number of Respondents:* 240,000; *Total Annual Responses:* 240,000; *Total Annual Hours:* 80,000. (For policy questions regarding this collection contact Claudette Sikora at 410–786–5618. For all other issues call 410–786–1326.)

3. *Type of Information Collection Request:* Reinstatement without change of a previously approved collection. *Title of Information Collection:* Medicare Credit Balance Reporting Requirements and Supporting Regulations in 42 CFR 405.371, 405.378 and 413.20; *Use:* Section 1815(a) of the Social Security Act authorizes the Secretary to request information from providers which is necessary to properly administer the Medicare program. Quarterly credit balance reporting is needed to monitor and control the identification and timely collection of improper payments. The information obtained from Medicare credit balance reports will be used by the contractors to identify and recover outstanding Medicare credit balances and by Federal enforcement agencies to protect Federal funds. The information will also be used to identify the causes of credit balances and to take corrective action. *Form Number:* CMS–838 (OCN: 0938–0600); *Frequency:* Yearly; *Affected Public:* Private sector—Business or other for-profits; *Number of Respondents:* 45,838; *Total Annual Responses:* 183,352; *Total Annual Hours:* 550,056. (For policy questions regarding this collection contact Milton Jacobson at 410–786–7553. For all other issues call 410–786–1326.)

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS' Web Site address at *http://www.cms.hhs.gov/PaperworkReductionAct1995*, or Email your request, including your address, and phone number as well the OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov*, or call the Reports Clearance Office on (410) 786–1326.

To be assured consideration, comments and recommendations for the proposed information collections must be received by the OMB desk officer at the address below, no later than 5 p.m. on March 25, 2013.

OMB, Office of Information and Regulatory Affairs, Attention: CMS Desk Officer, Fax Number: (202) 395–6974, Email: *OIRA_submission@omb.eop.gov*.

Dated: February 19, 2013.

Martique Jones,

Deputy Director, Regulations Development Group, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2013–04135 Filed 2–21–13; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–3279–N]

Announcement of the Re-Approval of the Commission on Office Laboratory Accreditation (COLA) as an Accreditation Organization Under the Clinical Laboratory Improvement Amendments of 1988

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Notice.

SUMMARY: This notice announces the application of the Commission on Office Laboratory Accreditation (COLA) for approval as an accreditation organization for clinical laboratories under the Clinical Laboratory Improvement Amendments of 1988 (CLIA) program. We have determined that COLA meets or exceeds the applicable CLIA requirements. In this notice, we announce the approval and grant COLA deeming authority for a period of 6 years.

DATES: *Effective Date:* This notice is effective from February 22, 2013 to February 22, 2019.

FOR FURTHER INFORMATION CONTACT: Raelene Perfetto, (410) 786–6876.

SUPPLEMENTARY INFORMATION:

I. Background and Legislative Authority

On October 31, 1988, the Congress enacted the Clinical Laboratory Improvement Amendments of 1988 (CLIA) (Pub. L. 100–578). CLIA amended section 353 of the Public Health Service Act. We issued a final rule implementing the accreditation provisions of CLIA on July 31, 1992 (57 FR 33992). Under those provisions, CMS may grant deeming authority to an accreditation organization if its requirements for laboratories accredited under its program are equal to or more stringent than the applicable CLIA program requirements in 42 CFR part 493 (Laboratory Requirements). Subpart

E of part 493 (Accreditation by a Private, Nonprofit Accreditation Organization or Exemption Under an Approved State Laboratory Program) specifies the requirements an accreditation organization must meet to be approved by CMS as an accreditation organization under CLIA.

II. Notice of Approval of Commission on Office Laboratory Accreditation (COLA) as an Accreditation Organization

In this notice, we approve COLA as an organization that may accredit laboratories for purposes of establishing their compliance with CLIA requirements for the following specialty and subspecialty areas under CLIA:

- Microbiology, including Bacteriology, Mycobacteriology, Mycology, Parasitology, Virology.
- Diagnostic Immunology, including Syphilis Serology, General Immunology.
- Chemistry, including Routine Chemistry, Urinalysis, Endocrinology, Toxicology.
- Hematology.
- Immunohematology, including ABO Group & Rh Group, Antibody Detection, Antibody Identification, Compatibility Testing.

We have examined the initial COLA application and all subsequent submissions to determine its accreditation program's equivalency with the requirements for approval of an accreditation organization under subpart E of part 493. We have determined that COLA meets or exceeds the applicable CLIA requirements. We have also determined that COLA will ensure that its accredited laboratories will meet or exceed the applicable requirements in subparts H, I, J, K, M, Q, and the applicable sections of R. Therefore, we grant COLA approval as an accreditation organization under subpart E of part 493, for the period stated in the **DATES** section of this notice for the submitted specialty and subspecialty areas under CLIA. As a result of this determination, any laboratory that is accredited by COLA during the time period stated in the **DATES** section of this notice will be deemed to meet the CLIA requirements for the listed subspecialties and specialties, and therefore, will generally not be subject to routine inspections by a state survey agency to determine its compliance with CLIA requirements. The accredited laboratory, however, is subject to validation and complaint investigation surveys performed by CMS, or its agent(s).

III. Evaluation of the COLA Request for Approval as an Accreditation Organization Under CLIA

The following describes the process used to determine that the COLA accreditation program meets the necessary requirements to be approved by CMS and that, as such, CMS may approve COLA as an accreditation program with deeming authority under the CLIA program. COLA formally applied to CMS for approval as an accreditation organization under CLIA for the following specialties and subspecialties:

- Microbiology, including Bacteriology, Mycobacteriology, Mycology, Parasitology, Virology.
- Diagnostic Immunology, including Syphilis Serology, General Immunology.
- Chemistry, including Routine Chemistry, Urinalysis, Endocrinology, Toxicology.
- Hematology.
- Immunohematology, including ABO Group & Rh Group, Antibody Detection, Antibody Identification, Compatibility Testing.

In reviewing these materials, we reached the following determinations for each applicable part of the CLIA regulations:

A. Subpart E—Accreditation by a Private, Nonprofit Accreditation Organization or Exemption Under an Approved State Laboratory Program

The COLA submitted its mechanism for monitoring compliance with all requirements equivalent to condition-level requirements, a list of all its current laboratories and the expiration date of their accreditation, and a detailed comparison of the individual accreditation requirements with the comparable condition-level requirements. The COLA policies and procedures for oversight of laboratories performing laboratory testing for the submitted CLIA specialties and subspecialties are equivalent to those of CLIA in the matters of inspection, monitoring proficiency testing (PT) performance, investigating complaints, and making PT information available. The COLA submitted requirements for monitoring and inspecting laboratories in the areas of accreditation organization, data management, the inspection process, procedures for removal or withdrawal of accreditation, notification requirements, and accreditation organization resources. The requirements of the accreditation programs submitted for approval are equal to or more stringent than the requirements of the CLIA regulations.

Our evaluation identified the COLA requirements pertaining to waived testing that are more stringent than CLIA requirements. The COLA requires the laboratory director to review quality control results for waived tests monthly and also requires that competency be assessed and documented for personnel performing waived testing. The CLIA requirements at § 493.15(e) require eligible laboratories to follow the manufacturer's instructions for performing tests and obtain a certificate of waiver as outlined in part 493, subpart B.

B. Subpart H—Participation in Proficiency Testing for Laboratories Performing Nonwaived Testing

The COLA's requirements are equal to the CLIA requirements at § 493.801 through § 493.865. Like CLIA, all of the COLA's accredited laboratories are required to participate in an HHS-approved PT program for tests listed in subpart I. The COLA also encourages its accredited laboratories to participate in PT for tests that are waived under CLIA.

C. Subpart J—Facility Administration for Nonwaived Testing

The COLA's requirements are equal to the CLIA requirements at § 493.1100 through § 493.1105.

D. Subpart K—Quality System for Nonwaived Testing

The COLA requirements are equal to or more stringent than the CLIA requirements at § 493.1200 through § 493.1299. For instance, when a laboratory establishes performance specifications for a test not approved by the Food and Drug Administration (FDA) or a test that has been approved by the FDA but modified, the COLA requires its accredited laboratories to submit all data obtained for review and approval by the COLA prior to adding the test to the laboratory's menu.

E. Subpart M—Personnel for Nonwaived Testing

We have determined that the COLA requirements are equal to the CLIA requirements at § 493.1403 through § 493.1495 for laboratories that perform moderate and high complexity testing.

F. Subpart Q—Inspections

We have determined that the COLA requirements are equal to the CLIA requirements at § 493.1771 through § 493.1780. The COLA will continue to conduct biennial onsite inspections. An unannounced inspection would be performed when a complaint, lodged against a laboratory accredited by the COLA, indicates that problems may exist within the laboratory that may

have a serious or immediate impact on patient care.

G. Subpart R—Enforcement Procedures

The COLA meets the requirements of subpart R to the extent that it applies to accreditation organizations. The COLA policy sets forth the actions the organization takes when laboratories it accredits do not comply with its requirements and standards for accreditation. When appropriate, the COLA will deny, suspend, or revoke accreditation in a laboratory accredited by the COLA and report that action to us within 30 days. The COLA also provides an appeals process for laboratories that have had accreditation denied, suspended, or revoked.

We have determined that the COLA's laboratory enforcement and appeal policies are equal to or more stringent than the requirements of part 493 subpart R as they apply to accreditation organizations.

IV. Federal Validation Inspections and Continuing Oversight

The federal validation inspections of laboratories accredited by the COLA may be conducted on a representative sample basis or in response to substantial allegations of noncompliance (that is, complaint inspections). The outcome of those validation inspections, performed by CMS or our agents, or the state survey agencies, will be our principal means for verifying that the laboratories accredited by the COLA remain in compliance with CLIA requirements. This federal monitoring is an ongoing process.

V. Removal of Approval as an Accrediting Organization

Our regulations provide that we may rescind the approval of an accreditation organization, such as that of the COLA, for cause, before the end of the effective date of approval. If we determine that the COLA has failed to adopt, maintain and enforce requirements that are equal to, or more stringent than, the CLIA requirements, or that systemic problems exist in its monitoring, inspection or enforcement processes, we may impose a probationary period, not to exceed 1 year, in which the COLA would be allowed to address any identified issues. Should the COLA be unable to address the identified issues within that timeframe, CMS may, in accordance with the applicable regulations, revoke COLA's deeming authority under CLIA.

Should circumstances result in our withdrawal of the COLA's approval, we will publish a notice in the **Federal Register** explaining the basis for removing its approval.

VI. Collection of Information Requirements

This notice does not impose any information collection and record keeping requirements subject to the Paperwork Reduction Act (PRA). Consequently, it does not need to be reviewed by the Office of Management and Budget (OMB) under the authority of the PRA. The requirements associated with the accreditation process for clinical laboratories under the CLIA program, codified in 42 CFR part 493 subpart E, are currently approved by OMB under OMB approval number 0938–0686.

VII. Executive Order 12866 Statement

In accordance with the provisions of Executive Order 12866, this notice was not reviewed by the Office of Management and Budget.

Authority: Section 353 of the Public Health Service Act (42 U.S.C. 263a).

Dated: February 8, 2013.

Marilyn Tavenner,

Acting Administrator, Centers for Medicare & Medicaid Services.

[FR Doc. 2013–03927 Filed 2–21–13; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–3280–PN]

Medicare and Medicaid Programs; Application From the Center for Improvement in Healthcare Quality (CIHQ) for CMS-Approval of Its Hospital Accreditation Program

AGENCY: Centers for Medicare & Medicaid Services, HHS.

ACTION: Proposed notice.

SUMMARY: This proposed notice with comment period acknowledges the receipt of an application from the Center for Improvement in Healthcare Quality (CIHQ) for recognition as a national accrediting organization for hospitals that wish to participate in the Medicare or Medicaid programs.

DATES: To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. on March 25, 2013.

ADDRESSES: In commenting, refer to file code (CMS–3280–PN). Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

You may submit comments in one of four ways (choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on specific issues in this regulation to *http://www.regulations.gov.* Follow the "Submit a comment" instructions.

2. *By regular mail.* You may mail written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–3280–PN, P.O. Box 8016, Baltimore, MD 21244–8010.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–3280–PN, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.

4. *By hand or courier.* Alternatively, you may deliver (by hand or courier) your written ONLY to the following addresses.

a. For delivery in Washington, DC—Centers for Medicare & Medicaid Services, Department of Health and Human Services, Room 445–G, Hubert H Humphrey Building, 200 Independence Avenue SW., Washington, DC 20201.

(Because access to the interior of the Hubert H. Humphrey Building is not readily available to persons without Federal Government identification, commenters are encouraged to leave their comments in the CMS drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of filing by stamping in and retaining an extra copy of the comments being filed.)

b. For delivery in Baltimore, MD—Centers for Medicare & Medicaid Services, Department of Health and Human Services, 7500 Security Boulevard, Baltimore, MD 21244–1850.

If you intend to deliver your comments to the Baltimore address, call telephone number (410) 786–9994 in advance to schedule your arrival with one of our staff members.

Comments erroneously mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and received after the comment period.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Cindy Melanson, (410) 786–0310. Patricia Chmielewski, (410) 786–6899. Monda Shaver, (410) 786–3410.

SUPPLEMENTARY INFORMATION:

Inspection of Public Comments: All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following Web site as soon as possible after they have been received: *http://www.regulations.gov*. Follow the search instructions on that Web site to view public comments.

Comments received timely will also be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, at the headquarters of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, phone 1–800–743–3951.

I. Background

Under the Medicare program, eligible beneficiaries may receive covered services in a hospital provided certain requirements are met. Section 1861(e) of the Social Security Act (the Act), establishes criteria for facilities seeking designation as a hospital. Regulations concerning provider agreements are located at 42 CFR part 489 and those pertaining to activities relating to the survey and certification of facilities are located at 42 CFR part 488. The regulations at 42 CFR part 482, specify the conditions that a hospital must meet to participate in the Medicare programs, the scope of covered services, and the conditions for Medicare payment for hospitals.

Generally, to enter into an agreement, a hospital must first be certified by a State survey agency as complying with the conditions or requirements set forth in part 482 of our regulations. Thereafter, the hospital is subject to regular surveys by a State survey agency to determine whether it continues to meet these requirements.

Section 1865(a)(1) of the Act provides that, if a provider entity demonstrates through accreditation by an approved national accrediting organization that all applicable Medicare conditions are met or exceeded, we will deem those provider entities as having met the requirements. Accreditation by an accrediting organization is voluntary and is not required for Medicare participation.

If an accrediting organization is recognized by the Secretary as having standards for accreditation that meet or exceed Medicare requirements, any provider entity accredited by the national accrediting body's approved program would be deemed to meet the Medicare conditions. A national accrediting organization applying for approval of its accreditation program under part 488, subpart A, must provide us with reasonable assurance that the accrediting organization requires the accredited provider entities to meet requirements that are at least as stringent as the Medicare conditions. Our regulations concerning the approval of accrediting organizations are set forth at § 488.4 and § 488.8(d)(3). The regulations at § 488.8(d)(3) require an accrediting organization to reapply for continued approval of its accreditation program every 6 years or sooner as determined by CMS.

II. Approval of Deeming Organizations

Section 1865(a)(2) of the Act and our regulations at § 488.8(a) require that our findings concerning review and approval of a national accrediting organization's requirements, consider among other factors, the applying accrediting organization's requirements for accreditation; survey procedures; resources for conducting required surveys; capacity to furnish information for use in enforcement activities; monitoring procedures for provider entities found not in compliance with the conditions or requirements; and ability to provide CMS with the necessary data for validation.

Section 1865(a)(3)(A) of the Act further requires that we publish, within 60 days of receipt of an organization's complete application, a notice that identifies the national accrediting body making the request, describes the nature of the request, and provides at least a 30-day public comment period. We have 210 days from the receipt of a completed application to publish a notice of approval or denial of the application.

The purpose of this proposed notice is to inform the public of CIHQ's request for approval of its hospital accreditation program. This notice also solicits public comment on whether CIHQ's requirements meet or exceed Medicare's conditions of participation for hospitals.

III. Evaluation of Deeming Authority Request

CIHQ submitted all the necessary materials to enable us to make a determination concerning its request for approval of its hospital accreditation program. This application was determined to be complete on January 4, 2013. Under section 1865(a)(2) of the Act and our regulations at § 488.8 (Federal review of accrediting organizations), our review and evaluation of CIHQ will be conducted in accordance with, but not necessarily limited to, the following factors:

- The equivalency of CIHQ's standards for a hospital as compared with CMS' hospital conditions of participation.
- CIHQ's survey process to determine the following:

++ CIHQ's composition of the survey team, surveyor qualifications, and the ability of the organization to provide continuing surveyor training.

++ CIHQ's processes compared to those of State agencies, including survey frequency, and the ability to investigate and respond appropriately to complaints against accredited facilities.

++ CIHQ's processes and procedures for monitoring a hospital that is out of compliance with CIHQ's program requirements. These monitoring procedures are used only when CIHQ identifies noncompliance. If noncompliance is identified through validation reviews or complaint surveys, the State survey agency monitors corrections as specified at § 488.7(d).

++ CIHQ's capacity to report deficiencies to the surveyed facilities and respond to the facility's plan of correction in a timely manner.

++ CIHQ's capacity to provide CMS with electronic data and reports necessary for effective validation and assessment of the organization's survey process.

++ The adequacy of CIHQ's staff and other resources, and its financial viability.

++ CIHQ's capacity to adequately fund required surveys.

++ CIHQ's policies with respect to whether surveys are announced or unannounced.

++ CIHQ's agreement to provide CMS with a copy of the most current accreditation survey together with any other information related to the survey as CMS may require (including corrective action plans).

IV. Collection of Information Requirements

This document does not impose information collection and recordkeeping requirements. Consequently, it need not be reviewed by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995.

V. Response to Public Comments

Because of the large number of public comments we normally receive on

Federal Register documents, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this preamble, and, when we proceed with a subsequent document, we will respond to the comments in the preamble to that document.

Upon completion of our evaluation, including evaluation of comments received as a result of this notice, we will publish a final notice in the **Federal Register** announcing the result of our evaluation.

(Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program; No. 93.773 Medicare—Hospital Insurance Program; and No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: February 14, 2013.

Marilyn Tavenner,

Acting Administrator, Centers for Medicare & Medicaid Services.

[FR Doc. 2013–04093 Filed 2–21–13; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–7027–N]

Medicare, Medicaid, and Children's Health Insurance Programs; Meeting of the Advisory Panel on Outreach and Education (APOE), March 27, 2013

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Notice of meeting.

SUMMARY: This notice announces a meeting of the Advisory Panel on Outreach and Education (APOE) (the Panel) in accordance with the Federal Advisory Committee Act. The Panel advises and makes recommendations to the Secretary of Health and Human Services and the Administrator of the Centers for Medicare & Medicaid Services on opportunities to enhance the effectiveness of consumer education strategies concerning Medicare, Medicaid, and the Children's Health Insurance Program (CHIP). This meeting is open to the public.

DATES: *Meeting Date:* Wednesday, March 27, 2013, 8:30 a.m. to 4:00 p.m. Eastern Daylight Time (EDT).

Deadline for Meeting Registration, Presentations and Comments: Wednesday, March 13, 2013, 5:00 p.m., EDT.

Deadline for Requesting Special Accommodations: Wednesday, March 13, 2013, 5:00 p.m., EDT.

ADDRESSES: *Meeting Location:* The Embassy Row Hotel, 2015 Massachusetts Avenue NW., Washington, DC 20036.

Presentations and Written Comments: Jennifer Kordonski, Designated Federal Official (DFO), Division of Forum and Conference Development, Office of Communications, Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Mailstop S1–13–05, Baltimore, MD 21244–1850 or contact Ms. Kordonski via email at *Jennifer.Kordonski@cms.hhs.gov*.

Registration: The meeting is open to the public, but attendance is limited to the space available. Persons wishing to attend this meeting must register at the Web site *http://events.SignUp4.com/APOEMAR2013MTG* or by contacting the DFO at the address listed in the **ADDRESSES** section of this notice or by telephone at number listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice, by the date listed in the **DATES** section of this notice. Individuals requiring sign language interpretation or other special accommodations should contact the DFO at the address listed in the **ADDRESSES** section of this notice by the date listed in the **DATES** section of this notice.

FOR FURTHER INFORMATION CONTACT: Jennifer Kordonski, (410) 786–1840. Additional information about the APOE is available on the Internet at *http://www.cms.gov/FACA/04_APOE.asp*. Press inquiries are handled through the CMS Press Office at (202) 690–6145.

SUPPLEMENTARY INFORMATION: In accordance with section 10(a) of the Federal Advisory Committee Act (FACA), this notice announces a meeting of the Advisory Panel on Outreach and Education (APOE) (the Panel). Section 9(a)(2) of the Federal Advisory Committee Act authorizes the Secretary of Health and Human Services (the Secretary) to establish an advisory panel if the Secretary determines that the panel is "in the public interest in connection with the performance of duties imposed * * * by law." Such duties are imposed by section 1804 of the Social Security Act (the Act), requiring the Secretary to provide informational materials to Medicare beneficiaries about the Medicare program, and section 1851(d) of the Act, requiring the Secretary to provide for "activities * * * to broadly disseminate information to [M]edicare beneficiaries * * * on the coverage options provided under [Medicare Advantage] in order to promote an active, informed selection among such options."

The Panel is also authorized by section 1114(f) of the Act (42 U.S.C. 1314(f)) and section 222 of the Public Health Service Act (42 U.S.C. 217a). The Secretary signed the charter establishing this Panel on January 21, 1999 (64 FR 7899, February 17, 1999) and approved the renewal of the charter on January 21, 2011 (76 FR 11782, March 3, 2011).

Pursuant to the amended charter, the Panel advises and makes recommendations to the Secretary of Health and Human Services and the Administrator of the Centers for Medicare & Medicaid Services (CMS) concerning optimal strategies for the following:

- Developing and implementing education and outreach programs for individuals enrolled in, or eligible for, Medicare, Medicaid, and the Children's Health Insurance Program (CHIP).
- Enhancing the federal government's effectiveness in informing Medicare, Medicaid, and CHIP consumers, providers and stakeholders pursuant to education and outreach programs of issues regarding these and other health coverage programs, including the appropriate use of public-private partnerships to leverage the resources of the private sector in educating beneficiaries, providers and stakeholders.
- Expanding outreach to vulnerable and underserved communities, including racial and ethnic minorities, in the context of Medicare, Medicaid, and CHIP education programs.
- Assembling and sharing an information base of "best practices" for helping consumers evaluate health plan options.
- Building and leveraging existing community infrastructures for information, counseling, and assistance.
- Drawing the program link between outreach and education, promoting consumer understanding of health care coverage choices and facilitating consumer selection/enrollment, which in turn support the overarching goal of improved access to quality care, including prevention services, envisioned under health care reform.

The current members of the Panel are: Samantha Artiga, Principal Policy Analyst, Kaiser Family Foundation; Joseph Baker, President, Medicare Rights Center; Philip Bergquist, Manager, Health Center Operations, CHIPRA Outreach & Enrollment Project and Director, Michigan Primary Care Association; Marjorie Cadogan, Executive Deputy Commissioner, Department of Social Services; Jonathan Danphine, Senior Vice President, AARP;

Barbara Ferrer, Executive Director, Boston Public Health Commission; Shelby Gonzales, Senior Health Outreach Associate, Center on Budget & Policy Priorities; Jan Henning, Benefits Counseling & Special Projects Coordinator, North Central Texas Council of Governments' Area Agency on Aging; Warren Jones, Executive Director, Mississippi Institute for Improvement of Geographic Minority Health; Cathy Kaufmann, Administrator, Oregon Health Authority; Sandy Markwood, Chief Executive Officer, National Association of Area Agencies on Aging; Miriam Mobley-Smith, Dean, Chicago State University, College of Pharmacy; Ana Natale-Pereira, Associate Professor of Medicine, University of Medicine & Dentistry of New Jersey; Megan Padden, Vice President, Sentara Health Plans; David W. Roberts, Vice-President, Healthcare Information and Management System Society; Julie Bodēn Schmidt, Associate Vice President, National Association of Community Health Centers; Alan Spielman, President & Chief Executive Officer, URAC; Winston Wong, Medical Director, Community Benefit Director, Kaiser Permanente and Darlene Yee-Melichar, Professor & Coordinator, San Francisco State University.

The agenda for the March 27, 2013 meeting will include the following:

- Welcome and Listening Session with CMS Leadership
- Recap of the Previous (December 18, 2012) Meeting
- Affordable Care Act Initiatives
- An Opportunity for Public Comment
- Meeting Summary, Review of Recommendations, and Next Steps

Individuals or organizations that wish to make a 5-minute oral presentation on an agenda topic should submit a written copy of the oral presentation to the DFO at the address listed in the **ADDRESSES** section of this notice by the date listed in the **DATES** section of this notice. The number of oral presentations may be limited by the time available. Individuals not wishing to make a presentation may submit written comments to the DFO at the address listed in the **ADDRESSES** section of this notice by the date listed in the **DATES** section of this notice.

Authority: Sec. 222 of the Public Health Service Act (42 U.S.C. 217a) and sec. 10(a) of Pub. L. 92–463 (5 U.S.C. App. 2, sec. 10(a) and 41 CFR 102–3).

(Catalog of Federal Domestic Assistance Program No. 93.733, Medicare—Hospital Insurance Program; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: February 13, 2013.

Marilyn Tavenner,

Acting Administrator, Centers for Medicare & Medicaid Services.

[FR Doc. 2013–03928 Filed 2–21–13; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Comment Request

Title: Project LAUNCH Cross-Site Evaluation.

OMB No.: 0970–0373.

Description: The Administration for Children and Families (ACF), U.S. Department of Health and Human Services, is collecting data as part of a cross-site evaluation of a Substance Abuse and Mental Health Services Administration(SAMHSA) initiative called Project LAUNCH (Linking Actions for Unmet Needs in Children's Health). Project LAUNCH promotes the healthy development and wellness of children ages birth to eight years. A total of 35 Project LAUNCH grantees are funded to improve coordination among child-serving systems, build infrastructure, and improve methods for providing services. Grantees implement a range of public health strategies to support young child wellness in a designated locality.

Grants were awarded in four cohorts. Three of these cohorts will end on a rolling basis over the next three years and one cohort of grantees was recently awarded and will end in five years. Annual estimates of burden take into account rolling graduation of cohorts and represent an average of burden over three years.

Data for the cross-site evaluation of Project LAUNCH will be collected through: (1) Interviews conducted either via telephone or during site-visits to Project LAUNCH grantees, (2) semi-annual reports that will be submitted electronically on a web-based data reporting system, and (3) outcome data tables included in grantee specific end-of-year evaluation reports.

During either telephone interviews or the site visits, researchers will conduct interviews with Project LAUNCH service providers and collaborators in states/tribes and local communities of focus. Interviewers will ask program administrators questions about all Project LAUNCH activities, including: Infrastructure development; collaboration and coordination among partner agencies, organizations, and service providers; and development, implementation, and refinement of service strategies.

As part of the proposed data collection, Project LAUNCH staff will be asked to submit semi-annual electronic reports on state/tribal and local systems development and on services that children and families receive. The electronic data reports also will collect data about other Project LAUNCH-funded service enhancements, such as trainings, Project LAUNCH systems change activities, and changes in provider settings and practice. Information provided in these reports will be aggregated on a quarterly basis, and reported semi-annually.

As a final part of the proposed data collection, the cross-site evaluation will utilize outcome data provided by grantee evaluators as part of their end-of-year evaluation reports to the SAMHSA. Information provided in these reports is aggregated.

Respondents: State/Tribal Child Wellness Coordinator, Local Child Wellness Coordinator, Chair of the State/Tribal Child Wellness Council (during site visit only), Chair of the Community Child Wellness Council, and Local Service Providers/ Stakeholders.

ANNUAL BURDEN ESTIMATES

Instrument	Total number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours	Annual burden hours
Child Wellness Coordinator Interview Guide	19	1	1.5	87	29
Chair of Local Child Wellness Council Interview Guide	19	1	1	57	19
Local Stakeholder Interview Guide	114	1	.75	258	86
State Child Wellness Coordinator Interview Guide	19	1	1.25	72	24
Chair of State Child Wellness Council Interview Guide	11	1	1.25	14	14
Electronic Data Reporting: Systems Measures	19	2	4	456	152

ANNUAL BURDEN ESTIMATES—Continued

Instrument	Total number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours	Annual burden hours
Electronic Data Reporting: Services Measures	19	2	8	912	304
Outcomes Data Tables in End of Year Reports	27	1	8	648	216

Estimated Total Annual Burden Hours: 844.

In compliance with the requirements of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above. Copies of the proposed collection of information can be obtained and comments may be forwarded by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: OPRE Reports Clearance Officer. Email address: *OPREinfocollection@acf.hhs.gov*. All requests should be identified by the title of the information collection.

The Department specifically requests comments 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) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Steven M. Hanmer,

Reports Clearance Officer.

[FR Doc. 2013–03787 Filed 2–21–13; 8:45 am]

BILLING CODE 4184–22–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2013–D–0114]

Distinguishing Medical Device Recalls From Product Enhancements; Reporting Requirements; Draft Guidance for Industry and Food and Drug Administration Staff; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of the draft guidance entitled "Distinguishing Medical Device Recalls From Product Enhancements; Reporting Requirements." This draft guidance intends to clarify for industry when a potential change to a device is a medical device recall, distinguish those instances from product enhancements, and identify the reporting requirements for both recalls and product enhancements. This draft guidance is not final nor is it in effect at this time.

DATES: Although you can comment on any guidance at any time (see 21 CFR 10.115(g)(5)), to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance, submit either electronic or written comments on the draft guidance by May 23, 2013.

ADDRESSES: Submit written requests for single copies of the draft guidance document entitled "Distinguishing Medical Device Recalls From Product Enhancements; Reporting Requirements" to the Division of Small Manufacturers, International, and Consumer Assistance, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 4613, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your request, or fax your request to 301–847–8149. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance.

Submit electronic comments on the draft guidance to *http://www.regulations.gov*. Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852. Identify comments with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Ron Brown, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 2654, Silver Spring, MD 20993–0002, 301–796–6163.

I. Background

Defects or performance failures of marketed medical devices can pose serious risks to public health. Recalls serve both to correct the defect in current and future devices and to notify users of potential risks and steps to minimize the impact of device failure or function. The recall process establishes a mechanism for firms that produce and market medical devices to take timely action to correct violative devices or remove them from the marketplace when correction or removal is necessary to protect the public health.

When a firm's recall process is operating effectively, the firm identifies a device defect or failure, determines a recall is appropriate, and triggers the initiation of the recall process. However, firms may have trouble identifying whether a change to a device meets the definition of a recall, the appropriate scope of a recall, and when FDA should be notified of a recall. These issues can result in delays in notifying the public about unsafe medical devices.

FDA also recognizes that continuous improvement activities, as part of an effective quality system, often have a favorable impact on medical device safety and are part of ongoing efforts to design and manufacture devices that meet the needs of the user and patient. When new iterations of a device involve improvements to device design, it does not necessarily mean that the existing device needs to be recalled. Such changes may be appropriately characterized instead as product enhancements.

In addition to determining whether a proposed change to a marketed device meets the definition of a device recall or

a product enhancement, a firm must make a separate assessment on whether it is required to report the change to FDA.

The guidance is organized in a question-and-answer format, providing responses to questions that FDA believes are helpful in properly identifying medical device recalls and applying the reporting requirements.

II. Significance of Guidance

The draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the agency's current thinking on the difference between a recall and an enhancement to an existing premarket approval application (PMA) or 510(k). It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statute and regulations.

III. Electronic Access

Persons interested in obtaining a copy of the draft guidance may do so by using the Internet. A search capability for all CDRH guidance documents is available at *http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/default.htm*. Guidance documents are also available at *http://www.regulations.gov*. To receive "Distinguishing Medical Device Recalls From Product Enhancements; Reporting Requirements," you may either send an email request to *dsmica@fda.hhs.gov* to receive an electronic copy of the document or send a fax request to 301–847–8149 to receive a hard copy. Please use the document number 1819 to identify the guidance you are requesting.

IV. Paperwork Reduction Act of 1995

The draft guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in 21 CFR part 7, subpart C have been approved under OMB control number 0910–0249; the collections of information in 21 CFR part 801 and 21 CFR 809.10 have been approved under OMB control number 0910–0485; the collections of information in 21 CFR part 803 have been approved under OMB control number 0910–0437; and the collections of information in 21 CFR part 810 have been approved under OMB control number 0910–0432.

V. Comments

Interested persons may submit either electronic comments regarding this document to *http://www.regulations.gov* or written comments to the Division of Dockets Management (see **ADDRESSES**). It is only necessary to send one set of comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday, and will be posted to the docket at *http://www.regulations.gov*.

Dated: February 15, 2013.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2013–04060 Filed 2–21–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2012–E–0196]

Determination of Regulatory Review Period for Purposes of Patent Extension; SAPIEN TRANSCATHETER HEART VALVE

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) has determined the regulatory review period for SAPIEN TRANSCATHETER HEART VALVE and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of an application to the Director of Patents and Trademarks, Department of Commerce, for the extension of a patent which claims that medical device.

ADDRESSES: Submit electronic comments to *http://www.regulations.gov*. Submit written petitions along with three copies and written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Beverly Friedman, Office of Regulatory Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6284, Silver Spring, MD 20993–0002, 301–796–3602.

SUPPLEMENTARY INFORMATION: The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100–670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: A testing phase and an approval phase. For medical devices, the testing phase begins with a clinical investigation of the device and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the device and continues until permission to market the device is granted. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Director of Patents and Trademarks may award (half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a medical device will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(3)(B).

FDA recently approved for marketing the medical device, SAPIEN TRANSCATHETER HEART VALVE. SAPIEN TRANSCATHETER HEART VALVE is indicated for transfemoral delivery in patients with severe symptomatic native aortic valve stenosis who have been determined by a cardiac surgeon to be inoperable for open aortic valve replacement and in whom existing comorbidities would not preclude the expected benefit from correction of the aortic stenosis. Subsequent to this approval, the Patent and Trademark Office received a patent term restoration application for SAPIEN TRANSCATHETER HEART VALVE (U.S. Patent No. 5,411,552) from Edwards Lifesciences AG and the Patent and Trademark Office requested FDA's assistance in determining this patent's eligibility for patent term restoration. In a letter dated July 10, 2012, FDA advised the Patent and Trademark Office that this medical device had undergone a regulatory review period and that the approval of SAPIEN TRANSCATHETER HEART VALVE represented the first permitted commercial marketing or use of the product. Thereafter, the Patent and Trademark Office requested that the

FDA determine the product's regulatory review period.

FDA has determined that the applicable regulatory review period for SAPIEN TRANSCATHETER HEART VALVE is 2,473 days. Of this time, 2,106 days occurred during the testing phase of the regulatory review period, while 367 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 520(g) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 360j(g)) involving this device became effective:* January 26, 2005. The applicant claims that the investigational device exemption (IDE) required under section 520(g) of the FD&C Act for human tests to begin became effective on March 24, 2003. However, FDA records indicate that the IDE was determined substantially complete for clinical studies to have begun on January 26, 2005, which represents the IDE effective date.

2. *The date an application was initially submitted with respect to the device under section 515 of the FD&C Act (21 U.S.C. 360e):* November 1, 2010. The applicant claims October 29, 2010, as the date the premarket approval application (PMA) for SAPIEN Transcatheter Heart Valve (PMA P100041) was initially submitted. However, FDA records indicate that PMA P100041 was submitted on November 1, 2010.

3. *The date the application was approved:* November 2, 2011. FDA has verified the applicant's claim that PMA P100041 was approved on November 2, 2011.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the U.S. Patent and Trademark Office applies several statutory limitations in its calculations of the actual period for patent extension. In its application for patent extension, this applicant seeks 1,757 days of patent term extension.

Anyone with knowledge that any of the dates as published are incorrect may submit to the Division of Dockets Management (see **ADDRESSES**) either electronic or written comments and ask for a redetermination by April 23, 2013. Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by August 21, 2013. To meet its burden, the petition must contain sufficient facts to merit an FDA investigation. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) electronic or written comments and written petitions. It is only necessary to send one set of comments. However, if you submit a written petition, you must submit three copies of the petition. Identify comments with the docket number found in brackets in the heading of this document. Comments and petitions that have not been made publicly available on *http://www.regulations.gov* may be viewed in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: February 15, 2013.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2013–04016 Filed 2–21–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2013–N–0001]

Request for Nominations for Voting and/or Nonvoting Consumer Representatives on Public Advisory Committees or Panels and Request for Notification From Consumer Organizations Interested in Participating in the Selection Process for Nominations for Voting and/or Nonvoting Consumer Representatives on Public Advisory Committees or Panels

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is requesting that any consumer organizations interested in participating in the selection of voting and/or nonvoting consumer representatives to serve on its advisory committees or panels notify FDA in writing. FDA is also requesting nominations for voting and/or nonvoting consumer representatives to serve on advisory committees and/or panels for which vacancies currently exist or are expected to occur in the near future. Nominees recommended to serve as a voting or nonvoting consumer representative may either be self-nominated or may be nominated by a consumer organization. Nominations will be accepted for current vacancies and for those that will or may occur through December 2013.

DATES: Any consumer organization interested in participating in the selection of an appropriate voting or nonvoting member to represent consumer interests on an FDA advisory committee or panel may send a letter or email stating that interest to FDA by March 25, 2013, for vacancies listed in this notice. Concurrently, nomination materials for prospective candidates should be sent to FDA by March 25, 2013.

ADDRESSES: All statements of interest from consumer organizations interested in participating in the selection process and consumer representative nominations should be sent electronically to *CV@OC.FDA.GOV*, by mail to Advisory Committee Oversight and Management Staff, 10903 New Hampshire Ave., Bldg. 32, rm. 5129, Silver Spring, MD 20993–0002, or by fax to 301–847–8640. Information about becoming a member of an FDA advisory committee can be obtained by visiting FDA's Web site at *http://www.fda.gov/AdvisoryCommittees/default.htm*.

FOR FURTHER INFORMATION CONTACT: Dornette Spell-LeSane, Advisory Committee Oversight and Management Staff, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, rm. 5129, Silver Spring, MD 20993–0002, 301–796–8224, *dornette.spelllesane@fda.hhs.gov*.

For questions relating to specific advisory committees or panels, contact the appropriate person listed in table 1 in the **SUPPLEMENTARY INFORMATION** section of this document.

SUPPLEMENTARY INFORMATION:

For questions relating to specific advisory committees or panels, contact the appropriate person listed in table 1 of this document.

TABLE 1—ADVISORY COMMITTEE CONTACTS

Contact person	Committee/panel
Diane Goyette, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 31, Rm. 2408, Silver Spring, MD 20993–0002, 301–796–9014, FAX: 301–847–8533, *Diane.Goyette@fda.hhs.gov*.	Anti-Infective Drugs.

TABLE 1—ADVISORY COMMITTEE CONTACTS—Continued

Contact person	Committee/panel
Kristina Toliver, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 31, Rm. 2408, Silver Spring, MD 20993–0002, 301–796–0063, FAX: 301–847–8533, *Kristina.Tolliver@fda.hhs.gov*.	Cardiovascular and Renal Drugs.
Diem-Kieu Ngo, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 31, Rm. 2408, Silver Spring, MD 20993–0002, 301–796–9001 X9021, FAX: 301–847–8533. *Diem.Ngo@fda.hhs.gov*.	Endocrinologic and Metabolic Drugs.
Glendolynn Johnson, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 31, Rm. 2434, Silver Spring, MD 20993–0002, 301–796–9001, FAX: 301–847–8533, *Glendolynn.Johnson@fda.hhs.gov*.	Nonprescription Drugs and Peripheral and Central Nervous System Drugs.
Cindy Hong, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 31, Rm. 2528, Silver Spring, MD 20993–0002, 301–796–0889, FAX: 301–847–8533, *Cindy.Hong@fda.hhs.gov*.	Pulmonary Allergy Drugs.
Karen Strambler, Center for Food Safety and Applied Nutrition, Food and Drug Administration, 5100 Paint Branch Pkwy., Rm. 1C016, College Park, MD 20740, 240–402–2589. FAX: 301–436–2657. *FoodAdvisoryCommittee@fda.hhs.gov*.	Food Advisory Committee.
Donald Jehn, Center for Biologics Evaluation and Research, 1401 Rockville Pike (HFM–71), Rockville, MD 20852, 301–827–1293, FAX: 301–827–0294, *Donald.Jehn@fda.hhs.gov*.	Vaccines and Related Biological Products.
Jamie Waterhouse, Center for Devices and Radiological Devices, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 1611, Silver Spring, MD 20993–0002, 301–796–3063, FAX: 301–847–8116, *Jamie.Waterhouse@fda.hhs.gov*.	Circulatory System Devices and Ear, Nose and Throat Devices Panel.
Shanika Craig, Center for Devices and Radiological Devices, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 1613, Silver Spring, MD 20993–0002, 301–796–6639, FAX: 301–847–8121. *Shanika.Craig@fda.hhs.gov*.	Microbiology Devices Panel.
Sara J. Anderson, Center for Devices and Radiological Health, 10903 New Hampshire Ave., Bldg. 66, Rm. 1544. Silver Spring, MD 20903, 301–796–7047, FAX: 301–847–8121, *Sara.Anderson@fda.hhs.gov*.	Orthopaedic and Rehabilitation Devices Panel.

FDA is requesting nominations for voting and/or nonvoting consumer representatives for the vacancies listed in table 2 of this document:

TABLE 2—COMMITTEE/PANEL VACANCIES

Committee/panel/areas of expertise needed	Current and upcoming vacancies	Approximate date needed
Anti-Infective Drugs	1-Voting	December 1, 2013.
Knowledgeable in the fields of infectious disease, internal medicine, microbiology, pediatrics, epidemiology or statistics, and related specialties		
Cardiovascular and Renal Drugs	1-Voting	July 1, 2013.
Knowledgeable in the fields of cardiology, hypertension, arrhythmia, angina, congestive heart failure, diuresis, and biostatistics.		
Endocrinologic and Metabolic Drugs	1-Voting	July 1, 2013.
Reviews and evaluates data concerning the safety and efficacy of marketed and investigational human drugs products for use in the treatment of endocrine and metabolic disorders.		
Nonprescription Drugs	1-Voting	July 1, 2013.
Knowledgeable in the fields of internal medicine, family practice, clinical toxicology, clinical pharmacology, pharmacy, dentistry, and related specialties.		
Peripheral and Central Nervous System Drugs	1-Voting	Immediately.
Knowledgeable in the fields of neurology, neuropharmacology, neuropathology, otolaryngology, epidemiology or statistics, and related specialties		
Pulmonary Allergy Drugs	1-Voting	June 1, 2013.
Knowledgeable in the fields of pulmonary medicine, allergy, clinical immunology, and epidemiology or statistics		
Food Committee	1-Voting	July 1, 2013.
Knowledgeable in the areas of food technology, pediatric development, nutrition, food microbiology and toxicology		
Vaccines and Related Biological Products	1-Voting	Immediately.
Knowledgeable in the fields of immunology, molecular biology, rDNA, virology, bacteriology, epidemiology or biostatistics, allergy, preventive medicine, infectious diseases, pediatrics, microbiology, and biochemistry		
Circulatory System Devices Panel	1-Nonvoting	July 1, 2013.
Knowledgeable in the safety and effectiveness of marked and investigational devices for use in the circulatory and vascular systems.		
Ear, Nose, and Throat Devices Panel	1-Nonvoting	Immediately.
Knowledgeable in the safety and effectiveness of marketed and investigational ear, nose and throat devices		
Microbiology Devices Panel	1-Nonvoting	Immediately.

TABLE 2—COMMITTEE/PANEL VACANCIES—Continued

Committee/panel/areas of expertise needed	Current and upcoming vacancies	Approximate date needed
Knowledgeable in data concerning the safety and effectiveness of marketed and investigational in vitro devices for use in clinical laboratory medicine including microbiology, virology, and infectious disease and makes appropriate recommendations		
Orthopaedic and Rehabilitation Devices Panel	1-Nonvoting	September 1, 2013.
Knowledgeable in data concerning the safety and effectiveness of marketed and investigational orthopaedic and rehabilitation devices		

I. Functions

A. Anti-Infective Drugs

The committee reviews and evaluates available data concerning the safety and effectiveness of marketed and investigational human drug products for use in the treatment of infections diseases and disorders and makes appropriate recommendations to the Commissioner of Food and Drugs.

B. Cardiovascular and Renal Drugs

The Committee reviews and evaluates available data concerning the safety and effectiveness of marketed and investigational human drug products for use in the treatment of cardiovascular and renal disorders and makes appropriate recommendations to the Commissioner of Food and Drugs.

B. Endocrinologic and Metabolic Drugs

The Committee reviews and evaluates data concerning the safety and effectiveness of marketed and investigational human drug products for use in the treatment of endocrine and metabolic disorders and makes appropriate recommendations to the Commissioner of Food and Drugs.

C. Nonprescription Drugs

The Committee reviews and evaluates available data concerning the safety and effectiveness of over-the-counter (nonprescription) human drug products, or any other FDA-regulated product, for use in the treatment of a broad spectrum of human symptoms and diseases and advises the Commissioner of Food and Drugs either on the issuance of monographs establishing conditions under which these drugs are generally recognized as safe and effective and not misbranded or on the approval of new drug applications for such drugs. The Committee will serve as a forum for the exchange of views regarding the prescription and nonprescription status, including switches from one status to another, of these various drug products and combinations thereof. The Committee may also conduct peer review of Agency sponsored intramural and extramural scientific biomedical programs in support of FDA's mission and regulatory responsibilities.

D. Peripheral and Central Nervous system Drugs

The Committee reviews and evaluates data concerning the safety and effectiveness of marketed and investigational human drug products for use in the treatment of neurologic diseases and makes appropriate recommendations to the Commissioner of Food and Drugs.

E. Pulmonary Allergy Drugs

The Committee reviews and evaluates available data concerning the safety and effectiveness of marketed and investigational human drug products for use in the treatment of pulmonary disease and diseases with allergic and/or immunologic mechanisms and makes appropriate recommendations to the Commissioner of Food and Drugs.

F. Food Advisory Committee

The Committee provides advice to the Commissioner of Food and Drugs and other appropriate officials, on emerging food safety, food science, nutrition, and other food-related health issues that FDA considers of primary importance for its food and cosmetics programs. The Committee may be charged with reviewing and evaluating available data and making recommendations on matters such as those relating to: (1) Broad scientific and technical food or cosmetic related issues, (2) the safety of new foods and food ingredients, (3) labeling of foods and cosmetics, (4) nutrient needs and nutritional adequacy, and (5) safe exposure limits for food contaminants. The Committee may also be asked to provide advice and make recommendations on ways of communicating to the public the potential risks associated with these issues and on approaches that might be considered for addressing the issues.

G. Vaccines and Related Biologic Products

The Committee reviews and evaluates data concerning the safety, effectiveness, and appropriate use of vaccines and related biological products which are intended for use in the prevention, treatment, or diagnosis of human diseases, and, as required, any other products for which FDA has regulatory responsibility. The Committee also considers the quality and relevance of FDA's research program which provides scientific support for the regulation of these products and makes appropriate recommendations to the Commissioner of Food and Drugs.

H. Certain Panels of the Medical Devices Advisory Committee

The Committee reviews and evaluates data on the safety and effectiveness of marketed and investigational devices and makes recommendations for their regulation. With the exception of the Medical Devices Dispute Resolution Panel, each panel, according to its specialty area: advises on the classification or reclassification of devices into one of three regulatory categories; advises on any possible risks to health associated with the use of devices; advises on formulation of product development protocols; reviews premarket approval applications for medical devices; reviews guidelines and guidance documents; recommends exemption of certain devices from the application of portions of the Federal Food, Drug, and Cosmetic Act; advises on the necessity to ban a device; and responds to requests from the Agency to review and make recommendations on specific issues or problems concerning the safety and effectiveness of devices. With the exception of the Medical Devices Dispute Resolution Panel, each panel, according to its specialty area, may also make appropriate recommendations to the Commissioner of Food and Drugs on issues relating to the design of clinical studies regarding

the safety and effectiveness of marketed and investigational devices.

II. Criteria for Members

Persons nominated for membership as consumer representatives on the committees or panels should meet the following criteria: (1) Demonstrate ties to consumer and community-based organizations, (2) be able to analyze technical data, (3) understand research design, (4) discuss benefits and risks, and (5) evaluate the safety and efficacy of products under review. The consumer representative should be able to represent the consumer perspective on issues and actions before the advisory committee; serve as a liaison between the committee and interested consumers, associations, coalitions, and consumer organizations; and facilitate dialogue with the advisory committees on scientific issues that affect consumers.

III. Selection Procedures

Selection of members representing consumer interests is conducted through procedures that include the use of organizations representing the public interest and public advocacy groups. These organizations recommend nominees for the Agency's selection. Representatives from the consumer health branches of Federal, State, and local governments also may participate in the selection process. Any consumer organization interested in participating in the selection of an appropriate voting or nonvoting member to represent consumer interests should send a letter stating that interest to FDA (see **ADDRESSES**) within 30 days of publication of this document.

Within the subsequent 30 days, FDA will compile a list of consumer organizations that will participate in the selection process and will forward to each such organization a ballot listing three to five qualified nominees selected by the Agency based on the nominations received, together with each nominee's current curriculum vitae or resume. Ballots are to be filled out and returned to FDA within 30 days. The nominee receiving the highest number of votes ordinarily will be selected to serve as the member representing consumer interests for that particular advisory committee or panel.

IV. Nomination Procedures

Any interested person or organization may nominate one or more qualified persons to represent consumer interests on the Agency's advisory committees or panels. Self-nominations are also accepted. Potential candidates will be required to provide detailed information concerning such matters as financial holdings, employment, and research grants and/or contracts to permit evaluation of possible sources of conflicts of interest.

All nominations should include: a cover letter; a curriculum vitae or resume that includes the nominee's office address, telephone number, and email address; and a list of consumer or community-based organizations for which the candidate can demonstrate active participation.

Nominations also should specify the advisory committee(s) or panel(s) for which the nominee is recommended. In addition, nominations should include confirmation that the nominee is aware of the nomination and is willing to serve as a member of the advisory committee or panel if selected.

The term of office is up to 4 years. FDA will review all nominations received within the specified timeframes and prepare a ballot containing the names of qualified nominees. Names not selected will remain on a list of eligible nominees and be reviewed periodically by FDA to determine continued interest. Upon selecting qualified nominees for the ballot, FDA will provide those consumer organizations that are participating in the selection process with the opportunity to vote on the listed nominees. Only organizations vote in the selection process. Persons who nominate themselves to serve as voting or nonvoting consumer representatives will not participate in the selection process.

FDA seeks to include the views of women and men, members of all racial and ethnic groups, and individuals with and without disabilities on its advisory committees and therefore, encourages nominations of appropriately qualified candidates from these groups.

This notice is issued under the Federal Advisory Committee Act (5 U.S.C. app. 2) and 21 CFR part 14 relating to advisory committees.

Dated: February 15, 2013.

Jill Hartzler Warner,

Acting Associate Commissioner for Special Medical Programs.

[FR Doc. 2013–04059 Filed 2–21–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Proposed Collection; Comment Request: Federal Interagency Traumatic Brain Injury Research (FITBIR) Informatics System Data Access Request

SUMMARY: In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, for opportunity for public comment on proposed data collection projects, the National Institute of Neurological Disorders and Stroke (NINDS), the National Institutes of Health (NIH), will publish periodic summaries of proposed projects to be submitted to the Office of Management and Budget (OMB) for review and approval.

Written comments and/or suggestions from the public and affected agencies are invited to address one or more of the following points: (1) Whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) The quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project, obtain a copy of the data collection plans and instruments, or to submit written comments, contact Rebecca L. Frederick, Office of Science Policy and Planning, OSPP, NINDS, NIH, 31 Center Drive, Building 31, Room 8A03, Bethesda, MD 20892; call 301–496–9271; or Email: *rebecca.frederick@nih.gov*.

Comment Due Date: Comments regarding this information collection are best assured of having their full effect if received within 60-days of the date of this publication.

Proposed Collection: Federal Interagency Traumatic Brain Injury Research (FITBIR) Informatics System Data Access Request.

Need and Use of Information Collection: The FITBIR Informatics System Data Access Request form is necessary for "Recipient" Principal

Investigators and their organization or corporations with approved assurance from the DHHS Office of Human Research Protections to access data or images from the FITBIR Informatics System for research purposes. The primary use of this information is to document, track, monitor, and evaluate the use of the FITBIR datasets, as well as to notify interested recipients of updates, corrections or other changes to the database.

Frequency of Response: Once per request.

Affected Public: Individuals.

Type of Respondents: Researchers interested in obtaining access to study data and images from the FITBIR Informatics System for research purposes.

The annual reporting burden is as follows:

Estimated Number of Respondents: approximately 40.

Estimated Number of Responses per Respondent: Once per request.

Average Burden Hours per Response: 95/60.

Estimated Total Annual Burden Hours Requested: 63.

There are two scenarios for completing the form. The first is where the Principal Investigator (PI) completes the entire FITBIR Informatics System Data Access Request form, and the second where the PI has the Research Assistant begins filling out the form and PI provides the final reviews and signs it. The estimated annual burden hours to complete the data request form are listed below.

ESTIMATED ANNUAL BURDEN HOURS

Form	Number of respondents	Frequency of response	Average time per response (in hours)	Annual hour burden
FITBIR Informatics System Data Access Request	40	1	95/60	63
Total				63

Dated: February 13, 2013.

Caroline Lewis,

Executive Officer, National Institute of Neurological Disorders and Stroke, National Institutes of Health.

[FR Doc. 2013–04130 Filed 2–21–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Submission for OMB review; Comment Request: Methodological Studies for the Population Assessment of Tobacco and Health (PATH) Study

SUMMARY: Under the provisions of Section 3507(a)(1)(D) of the Paperwork Reduction Act of 1995, the National Institute on Drug Abuse (NIDA), the National Institutes of Health (NIH) has submitted to the Office of Management and Budget (OMB) a request to review and approve the information collection listed below. This proposed information collection was previously published in the **Federal Register** on November 26, 2012, Vol. 77, No. 227, p. 70451 and allowed 60-days for public comment. Two comments were received in support of this request. The purpose of this notice is to allow an additional 30 days for public comment. The National Institutes of Health may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid OMB control number.

Proposed Collection: Title: Cognitive Testing of Instrumentation and Materials for Population Assessment of Tobacco and Health (PATH) Study. *Type of Information Collection Request:* New. *Need and Use of Information Collection:* The PATH study will establish a population-based framework for monitoring and assessing the behavioral and health impacts of regulatory provisions implemented as part of the Family Smoking Prevention and Tobacco Control Act (FSPTCA) by the Food and Drug Administration (FDA). NIDA is requesting generic approval from OMB for methodological studies to improve the PATH study instrumentation and data collection procedures. These methodological studies will support ongoing assessment and refinement of the PATH study's design, and highlight ways to improve study implementation, data collection procedures, and techniques for retention and followup. Data collection methods to be used in these methodological studies include: in-person and telephone surveys; web and smartphone/mobile phone surveys; and focus group and individual in-depth qualitative interviews. Biospecimens may also be collected from adults.

Frequency of Response: Annual [As needed on an on-going and concurrent basis]. *Affected Public:* Individuals. *Type of Respondents:* Youth (ages 12–17) and Adults (ages 18+). *Annual Reporting Burden:* See Table 1. The annualized cost to respondents is estimated at: $371,284. There are no capital, operating or maintenance costs.

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN SUMMARY—METHODOLOGICAL STUDIES FOR THE PATH STUDY

Data collection activity	Type of respondent	Number of respondents	Responses per respondent	Hours per response	Annual hour burden
In-person and telephone surveys	Adults	5,000	1	90/60	7,500
	Youth	3,500	1	90/60	5,250
Web and smartphone/mobile phone surveys.	Adults	5,000	1	90/60	7,500
	Youth	3,500	1	90/60	5,250
Focus groups and individual in-depth qualitative interviews.	Adults	1,000	1	2	2,000
	Youth	1,000	1	2	2,000
Biospecimen collection	Adults	1,000	1	15/60	250

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN SUMMARY—METHODOLOGICAL STUDIES FOR THE PATH STUDY—Continued

Data collection activity	Type of respondent	Number of respondents	Responses per respondent	Hours per response	Annual hour burden
Total		20,000			29,750

Request for Comments: Written comments and/or suggestions from the public and affected agencies are invited on one or more of the following points: (1) Whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and (4) Ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Direct Comments to OMB: Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the: Office of Management and Budget, Office of Regulatory Affairs, *OIRA_submission@omb.eop.gov* or by fax to 202–395–6974, Attention: Desk Officer for NIH. To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact: Kevin P. Conway, Ph.D., Deputy Director, Division of Epidemiology, Services, and Prevention Research, National Institute on Drug Abuse, 6001 Executive Blvd., Room 5185; Rockville, MD 20852, or call non-toll free number 301–443–8755 or email your request, including your address to: *PATHprojectofficer@mail.nih.gov*.

Comments Due Date: Comments regarding this information collection are best assured of having their full effect if received within 30-days of the date of this publication.

Dated: February 19, 2013.

Glenda J. Conroy,

Executive Officer (OM Director), National Institute on Drug Abuse (NIDA).

[FR Doc. 2013–04128 Filed 2–21–13; 8:45 am]

BILLING CODE 4140–01–P

ADVISORY COUNCIL ON HISTORIC PRESERVATION

Draft Program Comment for Extending the Duration of Programmatic Agreements Based on the Department of Energy Prototype Programmatic Agreement for Its Weatherization Assistance Program, State Energy Program, and Energy Efficiency and Conservation Block Grant

AGENCY: Advisory Council on Historic Preservation.

ACTION: Notice of Intent to Issue Program Comments for Extending the Duration of Programmatic Agreements based on the Department of Energy (DOE) Prototype Programmatic Agreement for its Weatherization Assistance Program (WAP), State Energy Program (SEP), and Energy Efficiency and Conservation Block Grant (EECBG).

SUMMARY: The Advisory Council on Historic Preservation (ACHP) is considering issuing a Program Comment for the DOE that would continue its program of tailored compliance with Section 106 of the National Historic Preservation Act for the Office of Weatherization and Intergovernmental Programs Weatherization Related Grant Programs: WAP, SEP, and EECBG. The ACHP seeks public input on the proposed Program Comment.

DATES: Submit comments on or before 5:00 p.m. EST, March 1, 2013.

ADDRESSES: Address all comments concerning this proposed Program Comment to Lee Webb, Office of Federal Agency Programs, Advisory Council on Historic Preservation, 1100 Pennsylvania Avenue, NW., Suite 803, Washington, DC 20004. You may also submit comments via fax at (202) 606–8647 or via electronic mail at *lwebb@achp.gov*.

FOR FURTHER INFORMATION CONTACT: Lee Webb, (202) 606–8583, *lwebb@achp.gov*.

SUPPLEMENTARY INFORMATION: Section 106 of the National Historic Preservation Act requires federal agencies to consider the effects of their undertakings on historic properties and to provide the ACHP a reasonable opportunity to comment with regard to such undertakings. The ACHP has issued the regulations that set forth the process through which Federal agencies comply with these duties. Those regulations are codified under 36 CFR part 800 (Section 106 regulations).

Under Section 800.14(e) of those regulations, agencies can request the ACHP to provide a "Program Comment" on a particular category of undertakings in lieu of conducting individual reviews of each individual undertaking under such category, as set forth in 36 CFR 800.4 through 800.7. An agency can meet its Section 106 responsibilities with regard to the effects of particular aspects of those undertakings by taking into account ACHP's Program Comment and following the steps set forth in that comment.

I. Background

The DOE's Office of Weatherization and Intergovernmental Programs (OWIP) provides financial assistance to state agency applicants for three weatherization related grant programs: WAP, SEP, and EEBG. DOE has determined that activities carried out by these funded programs constitute undertakings with the potential to affect historic properties. Therefore, DOE must comply with Section 106 and its implementing regulations for these undertakings.

The ACHP and DOE began a partnership in August 2009 to explore possible program alternatives to tailor the Section 106 process for these undertakings in anticipation of the dramatic increase in project funding as a result of American Recovery and Reinvestment Act. DOE, in consultation with the ACHP and the National Conference of State Historic Preservation Officers, developed a prototype Programmatic Agreement (PA) to cover three weatherization related grant programs and to create efficiencies in the administration of these OWIP grants: WAP, SEP, and EECBG. The prototype PA identifies a category of routine undertakings with limited potential to affect historic properties and exempts them from further review. The ACHP's Chairman designated the prototype PA on February 8, 2010. Under the terms of the prototype PA, DOE, the SHPO, and the relevant state agency receiving OWIP grants can execute subsequent

agreements without ACHP involvement. Execution of an agreement pursuant to the prototype PA presumes that DOE will conduct its government-to-government consultation responsibilities with federal recognized Indian tribes and its Section 106 consultation requirements with Native Hawaiian organizations. If DOE is notified that a particular undertaking may result in an adverse effect on historic properties of religions and cultural significance to Indian tribes or Native Hawaiian organizations, DOE must invite such Indian tribes or Native Hawaiian organizations to participate in consultation for the affected project.

Since its designation, DOE has used the prototype PA to successfully negotiate and execute 44 programmatic agreements with SHPOs and state agencies receiving DOE OWIP grants. DOE's direct recipients may use the executed state agreement developed under the prototype PA as well. The ACHP provided guidance and technical assistance to DOE Project Officers and SHPOs during the negotiation and subsequent implementation of the agreements, for example, assisting in the determination of appropriate treatments and mitigation for individual projects that resulted in adverse effects.

In the past year, DOE and the ACHP have discussed how to extend and build upon the program established by the prototype PA. As part of this effort, the ACHP, with DOE's participation, hosted a series of listening sessions for SHPOs. The ACHP will also provide an opportunity for SHPOs, tribes, Native Hawaiian organizations, and state agencies an opportunity to comment. The 44 agreements executed under the prototype PA have different expiration dates. Several of the agreements will expire in mid-March 2013. While the prototype PA originally proposed a three year duration clause for these agreements, it is now DOE's and the ACHP's intention that these agreements should extend beyond this three year term.

This Program Comment proposes to extend the duration of the existing 44 agreements executed under the prototype PA until December 31, 2020, and provide the same duration period for any future agreements that may be executed under the prototype PA. Nothing in this Program Comment would alter or modify any other provisions of the prototype PA or the 44 agreements, including the ability of the parties to amend or terminate an executed agreement prior to the expiration date.

II. Expected Benefits

As a result of the partnership with ACHP and the development and the administration of the prototype PA, DOE established internal and external training; recognized best management practices; and utilized DOE guidance and directives to ensure that the DOE weatherization programs were properly implemented in compliance with Section 106. The prototype PA established review efficiencies and protocols which allowed for the grant programs to expedite the weatherization efforts of the homes of many low income individuals across the country, as well as assisted communities in funding energy efficiency, renewable energy, and weatherization projects for public buildings such as schools and courthouses. Due to the success of the prototype PA for DOE's weatherization programs, other departments within DOE have sought ACHP's and OWIP staff's guidance and direction for meeting their historic preservation compliance responsibilities.

The proposed Program Comment would build upon and extend the success of the prototype PA and continue the DOE's program of tailored, efficient compliance with Section 106. Once the public comments resulting from this notice are considered, and edits are incorporated as deemed appropriate, the ACHP will decide whether to issue the Program Comment. The ACHP expects to make that decision in mid-March 2013.

III. Text of the Proposed Program Comment

The following is the text of the proposed Program Comment:

I. Establishment and Authority

This Program Comment was issued by the ACHP on March 2013 pursuant to 36 CFR 800.14(e).

II. Date of Effect

This Program Comment went into effect on March 2013.

III. Use of this Program Comment to Extend the Duration of the Existing Agreements Executed under the DOE Prototype PA and for New Agreements Executed pursuant to the Prototype PA

The DOE may continue, through December 31, 2020, complying with its responsibilities under Section 106 of the National Historic Preservation Act for its Weatherization Assistance Program (WAP), State Energy Program (SEP), and Energy Efficiency and Conservation Block Grant (EECBG) in the relevant States using the 44 agreements currently executed, and those to be executed, under the "Prototype Programmatic Agreement between the United States Department of Energy, the State Energy Office and the State Historic Preservation Office regarding EECBG, SEP and WAP Undertakings," designated by the ACHP on February 8, 2010, regardless of the duration clause of those agreements. However, if any of those agreements gets terminated under its own terms, DOE may no longer use it to comply with its Section 106 responsibilities in the relevant State. This will provide continuity in the Section 106 review for those undertakings covered by the existing and any new agreements executed under the prototype PA. This Program Comment does not alter or modify any provisions of the prototype PA or the 44 executed agreements other than their duration clauses.

IV. Amendment

The ACHP may amend this Program Comment after consulting with DOE, NCSHPO, and other parties as appropriate, and publishing notice in the **Federal Register** to that effect.

V. Sunset Clause

This Program Comment will terminate on December 31, 2020, unless it is amended to extend the period in which it is in effect.

VI. Termination

The ACHP may terminate this Program Comment by publication of a notice in the **Federal Register** thirty (30) days before the termination takes effect.

Authority: 36 CFR 800.14(e).

Dated: February 19, 2013.

John M. Fowler,

Executive Director.

[FR Doc. 2013–04138 Filed 2–21–13; 8:45 am]

BILLING CODE 4310–K6–P

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

Published Privacy Impact Assessments on the Web

AGENCY: Privacy Office, DHS.

ACTION: Notice of Publication of Privacy Impact Assessments.

SUMMARY: The Department of Homeland Security (DHS) Privacy Office is making available thirty-eight Privacy Impact Assessments (PIA) on various programs and systems in the Department. These assessments were approved and published on the Privacy Office's Web

site between June 1, 2012, and November 30, 2012.

DATES: The PIA will be available on the DHS Web site until April 23, 2013, after which they may be obtained by contacting the DHS Privacy Office (contact information below).

FOR FURTHER INFORMATION CONTACT: Jonathan R. Cantor, Acting Chief Privacy Officer, Department of Homeland Security, Washington, DC 20528, or email: *pia@dhs.gov*.

SUPPLEMENTARY INFORMATION: Between June 1, 2012, and November 30, 2012, the DHS Chief Privacy Officer and Acting Chief Privacy Officer approved and published thirty-eight PIAs on the DHS Privacy Office Web site, *www.dhs.gov/privacy*, under the link for "Privacy Impact Assessments." Below is a short summary of those programs, indicating the DHS component responsible for the system and the date on which the PIA was approved. Additional information can be found on the Web site or by contacting the Privacy Office.

System: DHS/S&T/PIA–025 Gaming System Monitoring and Analysis Effort.

Component: Science and Technology Directorate (S&T).

Date of approval: June 1, 2012.

The Gaming System Monitoring and Analysis project is a research effort funded by the Department's S&T Cyber Security Division to design and develop forensic tools for extracting data from gaming systems. S&T conducted a PIA because gaming systems used in this research project may contain personally identifiable information (PII).

System: DHS/CBP/PIA–006(b) Automated Targeting System (ATS).

Component: U.S. Customs and Border Protection (CBP).

Date of approval: June 1, 2012.

As a decision support tool, ATS compares traveler, cargo, and conveyance information against law enforcement, intelligence, and other enforcement data using risk-based targeting scenarios and assessments. This PIA was conducted to notify the public about the changes in modules and expansion of access to datasets used by and stored in ATS.

This PIA was published in conjunction with an updated System of Records Notice, 77 FR 30297 (May 22, 2012).

System: DHS/CBP/PIA–010 Analytical Framework for Intelligence (AFI).

Component: CBP.

Date of approval: June 1, 2012.

AFI enhances DHS's ability to identify, apprehend, and prosecute individuals who pose a potential law enforcement or security risk, and aids in the enforcement of customs and immigration laws, and other laws enforced by DHS at the border. AFI is used for the purposes of: (1) Identifying individuals, associations, or relationships that may pose a potential law enforcement or security risk, targeting cargo that may present a threat, and assisting intelligence product users in the field in preventing the illegal entry of people and goods, or identifying other violations of law; (2) conducting additional research on persons and/or cargo to understand whether there are patterns or trends that could assist in the identification of potential law enforcement or security risks; and (3) sharing finished intelligence products developed in connection with the above purposes with DHS employees who have a need to know in the performance of their official duties and who have appropriate clearances or permissions. Finished intelligence products are tactical, operational, and strategic law enforcement intelligence products that have been reviewed and approved for sharing with finished intelligence product users and authorities outside of DHS, pursuant to routine uses in the published Privacy Act System of Records Notice.

In order to mitigate privacy and security risks associated with the deployment of AFI, CBP has built technical safeguards into AFI and developed a governance process that includes the operational components of CBP, the oversight functions of the CBP Privacy Officer and Office of Chief Counsel, and the Office of Information and Technology. Additionally, the DHS Privacy Office provides oversight for the program.

This PIA was necessary because AFI accesses and stores PII retrieved from DHS, other federal agency, and commercially available databases.

System: DHS/FEMA/PIA–027 Accounting Package (ACCPAC).

Component: Federal Emergency Management Agency (FEMA).

Date of approval: June 8, 2012.

FEMA, Office of the Chief Financial Officer, Debt Establishment Unit, owns and operates the ACCPAC application. ACCPAC is a commercial-off-the-shelf product that assists FEMA Accounts Receivable personnel in tracking, monitoring, and managing debts owed to the Agency. FEMA conducted this PIA because ACCPAC collects, uses, maintains, retrieves, and disseminates PII, including Employer Identification Numbers and Social Security Numbers, to perform its tasks.

System: DHS/FEMA/PIA–027 National Emergency Management Information System—Individual Assistance (NEMIS–IA) Web-based and Client-based Modules.

Component: FEMA.

Date of approval: June 29, 2012.

FEMA, Office of Response and Recovery, Recovery Directorate, and National Processing Service Center Division operate the National Emergency Management Information System (NEMIS) Individual Assistance (IA) system. NEMIS–IA supports FEMA's recovery mission under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. 93–288, as amended, by processing information obtained from disaster recovery assistance applications via the Disaster Assistance Improvement Program/Disaster Assistance Call Center system. NEMIS–IA, which consists of both client-based and web-based modules, also utilizes business rules to detect and prevent "duplication of benefits." FEMA conducted this PIA because NEMIS–IA collects, uses, maintains, retrieves, and disseminates the PII of applicants to FEMA's disaster recovery individual assistance programs.

System: DHS/FEMA/PIA–026 Operational Data Store (ODS) and Enterprise Data Warehouse (EDW) systems.

Component: FEMA.

Date of approval: June 29, 2012.

FEMA and the Office of the Chief Information Officer own and operate the ODS and EDW systems. ODS and EDW replicate source system-provided data from other operational FEMA systems and provide a simplified way of producing Agency reports for internal use as well for external stakeholders. These reports relate to FEMA mission activities, such as FEMA's readiness to deploy, disaster response, internal operations, and oversight. Reports are based on the needs of the particular program requirements or mission-related activity. Each source system has a separate data mart within the ODS to ensure that information is not commingled and that the source system rules for use are followed within the ODS. Data marts allow for the manipulation of data while at the same time ensuring that the exact same data within the source system remains static. FEMA conducted this PIA because ODS and EDW collect, use, maintain, retrieve, and disseminate PII pulled from the source systems.

System: DHS/FEMA/PIA–025 Hazard Mitigation Grant Program (HMGP) System.

Component: FEMA.

Date of approval: June 29, 2012.

FEMA's Federal Insurance and Mitigation Administration (FIMA) operates the HMGP system. The HMGP system is a grant application and management system. FEMA conducted this PIA because the FEMA FIMA HMGP system may collect, use, maintain, retrieve, and disseminate the PII of grantees or sub-grantees as well as the PII of individual property owners associated with the grants or sub-grants.

System: DHS/ALL/PIA–042 Department of Homeland Security (DHS) Closed-Circuit Television (CCTV).

Component: DHS-wide.

Date of approval: July 18, 2012.

DHS and its components deploy a number of CCTV systems throughout the Department. DHS' CCTV systems are used to obtain real-time and recorded visual information in and around federal worksites and facilities to aid in crime prevention and criminal prosecution, enhance officer safety, secure physical access, promote cost savings, and assist in terrorism investigation and terrorism prevention. DHS conducted this PIA because these systems have the ability to capture images of people, license plates, and other visual information within range of the cameras. This PIA replaced existing CCTV PIAs. Those PIAs were retired with the publication of this PIA and are listed in an appendix.

System: DHS/ICE/PIA–010(a) The National Child Victim Identification System (NCVIS).

Component: U.S. Immigration and Customs Enforcement (ICE).

Date of approval: July 18, 2012.

NCVIS is owned by ICE, Homeland Security Investigations (HSI), and is an application that assists federal, state, local, and international law enforcement agencies, INTERPOL, and other supporting organizations, such as the National Center for Missing and Exploited Children (hereafter, authorized partners) in the investigation and prosecution of child exploitation crimes, specifically those involving images of child sexual exploitation. NCVIS maintains a repository of digital images of child exploitation seized and/or submitted to ICE for comparison by law enforcement agencies. These images may capture the faces or other identifying features of the victims and violators involved in these crimes. HSI is expanding the scope of system information that is shared with authorized partners that maintain their own databases of images related to child exploitation crimes for the purposes of identifying the child victims and supporting law enforcement investigations and prosecutions of these crimes. This expanded sharing is intended to allow law enforcement personnel to use these images during investigations to identify and rescue child victims as well as to identify and prosecute the perpetrators of these crimes. HSI is also expanding the range of images shared with law enforcement agencies that have requested a matching report of an image submitted for NCVIS comparison. The PIA for NCVIS was originally published on August 21, 2009. Because HSI is expanding the scope of NCVIS information that is shared with authorized partners, an update to the NCVIS PIA was required.

System: DHS/NPPD/PIA–021(a) Joint Cybersecurity Services Program Defense Industrial Base (DIB)—Enhanced Cybersecurity Services (DECS).

Component: National Protection and Programs Directorate (NPPD).

Date of approval: July 18, 2012.

The Joint Cybersecurity Services Pilot (JCSP) is the Department's voluntary information sharing initiative with the Department of Defense (DOD) and participating commercial companies. NPPD is updating the DHS/NPPD/PIA–021 National Cyber Security Division Joint Cybersecurity Services Pilot PIA published on January 13, 2012, to reflect the establishment of the JCSP as an ongoing permanent program (now known as the Joint Cybersecurity Services Program (JCSP)). The purpose of the program is to enhance the cybersecurity of participating critical infrastructure entities through information sharing partnerships with the critical infrastructure organization or their Commercial Service Provider (CSP). The first phase of the JCSP will focus on the cyber protection of the Defense Industrial Base (DIB) companies that are participating in the DoD's Cyber Security/Information Assurance (CS/IA) Program. This sub-program is known as the DIB Enhanced Cybersecurity Services (DECS). The JCSP may also be used to provide equivalent protection to participating Federal civilian agencies pending deployment of EINSTEIN intrusion prevention capabilities.

System: DHS/CBP/PIA–007(b) Electronic System for Travel Authorization (ESTA).

Component: CBP.

Date of approval: July 18, 2012.

CBP published this update to the PIA for ESTA, last updated July 18, 2011. ESTA is a web-based application and screening system used to determine whether certain aliens are eligible to travel to the United States under the Visa Waiver Program. CBP conducted this updated PIA to evaluate the privacy impact of including the Internet Protocol address associated with a submitted ESTA application for vetting purposes, as well as to evaluate the privacy impact of various updates to the ESTA System of Records Notice, including updates and clarifications to the routine uses and a new routine use permitting the sharing of information in connection with judicial proceedings.

System: DHS/TSA/PIA–037 Automated Wait Time (AWT).

Component: Transportation Security Administration (TSA).

Date of approval: July 22, 2012.

TSA will test and deploy systems automating the collection of information to calculate passenger average wait time in the checkpoint queue. TSA's AWT system utilizes information broadcast from Bluetooth®-enabled devices carried by individuals in the general checkpoint queuing area to calculate wait times and deploy resources, as appropriate, to reduce delays in checkpoint queues. In the interest of transparency to the public, this PIA was conducted pursuant to Section 222 of the Homeland Security Act to assess privacy risk from the AWT system. In order to ensure that AWT systems sustain and do not erode privacy protections, TSA developed and implemented processes that give effect to the Fair Information Practice Principles while generating statistical data used for improving checkpoint operations.

System: DHS/CBP/PIA–012 CBP Portal (E3) to ENFORCE/IDENT.

Component: CBP.

Date of approval: July 25, 2012.

CBP has established E3, the CBP portal to U.S. Immigration and Customs Enforcement's Immigration and Enforcement Operational Records System, Enforcement Integrated Database and US–VISIT's Automated Biometric Identification System (IDENT), to collect and transmit data related to law enforcement activities. E3 collects and transmits biographic, encounter, and biometric data including, but not limited to, fingerprints for identification and verification of individuals encountered at the border for CBP's law enforcement and immigration mission. In addition to the collection of fingerprints, beginning at the end of July 2012, the E3 portal began a six-week pilot program to collect iris scans of individuals apprehended by CBP Border Patrol at the McAllen, Texas, Border Patrol Station. Collection of iris scans provides the capability to capture biometric data from individuals if their fingerprints cannot be obtained, and also to biometrically compare and authenticate an individual's identity. In different

operational environments, iris scans can be captured more quickly than fingerprints, are as or more reliable in providing a unique biometric, do not involve the touching of the subject with respect to those cultures for whom such contact poses a concern, and require less storage capacity and transmission bandwidth than fingerprints. This PIA was conducted because E3 requires the collection of PII.

System: DHS/ICE/PIA–015(e) Enforcement Integrated Database (EID)—EAGLE.

Component: ICE.

Date of approval: July 25, 2012.

ICE has established a new subsystem within EID called EID Arrest Guide for Law Enforcement (EAGLE). EAGLE is a booking application used by ICE law enforcement officers to process the biometric and biographic information of individuals arrested by ICE for criminal violations of law and administrative violations of the Immigration and Nationality Act. Once fully deployed, EAGLE will replace the existing EID booking applications, the Enforcement Apprehension and Booking Module, Mobile IDENT, and WebIDENT, and will perform the identical functions of those applications as described below and in the EID PIA. EAGLE will also forge a new connection to the Department of Defense's (DOD) Automated Biographic Information System (ABIS) and permit the comparison of the fingerprints of foreign nationals arrested by ICE with the DOD's information in ABIS. This PIA update was conducted to provide public notice of the operation of the EAGLE booking system and its interconnection to the DOD ABIS database.

System: DHS/OPS/PIA–008 Homeland Security Information Network R3 User Accounts (HSIN).

Component: Operations Coordination and Planning (OPS).

Date of approval: July 25, 2012.

HSIN is maintained by the Department of Homeland Security. OPS. HSIN is designed to facilitate the secure integration and interoperability of information-sharing resources among federal, state, local, tribal, private-sector commercial, and other non-governmental stakeholders involved in identifying and preventing terrorism as well as in undertaking incident management activities. HSIN is a user-driven, web-based, information-sharing platform that connects all homeland security mission partners within a wide spectrum of homeland security mission areas. OPS conducted this PIA because HSIN collects PII in the form of user account registration information from HSIN users in order to allow them access to the HSIN Release 3 (R3) community.

System: DHS/OPS/PIA–007 Homeland Security Information Network 3.0 Shared Spaces.

Component: OPS.

Date of approval: July 25, 2012.

OPS maintains HSIN on the Sensitive but Unclassified network. HSIN is designed to facilitate the secure integration and interoperability of information-sharing resources between federal, state, local, tribal, territorial, private sector, international, and other non-governmental partners involved in identifying and preventing terrorism as well as in undertaking incident management activities. HSIN is a user-driven, web-based, information-sharing platform that connects all homeland security mission partners within a wide spectrum of homeland security mission areas. OPS conducted this PIA because the substantive material posted and shared within the HSIN collaboration spaces contains PII about members of the public who are the subject of documents, reports, or bulletins contained in those spaces.

System: DHS/NPPD/PIA–009 Chemical Facility Anti-Terrorism Standards (CFATS).

Component: NPPD.

Date of approval: July 26, 2012.

NPPD consolidated and updated this PIA for the CFATS regulations, 6 CFR Part 27. This PIA replaced the former PIAs for the Chemical Security Assessment Tool and CFATS, in order to provide a unified analysis of the collection and use of PII as part of CFATS. CFATS is the DHS regulation that governs security at high-risk chemical facilities and represents a national-level effort to minimize terrorism risk to such facilities.

System: DHS/USCIS/PIA–006(a) Systematic Alien Verification for Entitlements (SAVE).

Component: U.S. Citizenship and Immigration Services (USCIS).

Date of approval: July 27, 2012.

USCIS's Verification Division published an update to the SAVE Program PIA dated August 26, 2011. SAVE is a fee-based, inter-governmental initiative designed to help federal, state, tribal, and local government agencies confirm immigration status prior to the granting of benefits and licenses, as well as for other lawful purposes. USCIS updated this PIA to: (1) Describe the new collection of foreign passport country of issuance from agencies issuing benefits and from the United States Visitor and Immigrant Status Indicator Technology Arrival and Departure Information System, (2) describe the addition of Enterprise Citizenship and Immigration Services Centralized Operational Repository, (3) describe the decommissioning of the Image Storage and Retrieval System and replacement by the Customer Profile Management System, and (4) describe the decommissioning of the Reengineered Naturalization Applications Casework System and replacement by Claims Linked Application Information Management System 4.

System: DHS/USCIS/PIA–030(d) E-Verify Program.

Component: USCIS.

Date of approval: July 27, 2012.

USCIS's Verification Division published an update to the DHS/USCIS–030 E-Verify Program PIA. USCIS administers the E-Verify program, which allows participating employers the ability to verify the employment eligibility of all newly hired employees. USCIS updated this PIA to: (1) describe collection and verification of the foreign passport country of issuance through the U.S. Visitor and Immigrant Status Indicator Technology program's Arrival and Departure Information System, and (2) discuss the decommissioning of the Image Storage and Retrieval System (ISRS) and the Reengineered Naturalization Applications Casework System (RNACS) subsystems. The functionality previously provided by ISRS and RNACS will be replaced by the Customer Profile Management System and Claims Linked Application Information Management System 4, respectively.

System: DHS/USCIS/PIA–036(a) Employment Eligibility Verification Requirements Under the Form I–9.

Component: USCIS.

Date of approval: July 27, 2012.

The Verification Division of USCIS manages the business process in support of the statutory requirement that employers in the United States complete and maintain the Form I–9, *Employment Eligibility Verification*, to identify and verify employment authorization for all of their new employees. While the recent rulemakings that implemented changes to the Form I–9 did not impact what information DHS collects directly from individuals, which would trigger the requirement for a PIA, under the E-Government Act, USCIS conducted this PIA to provide more transparency into the design and use of the Form I–9, a key aspect of the employment eligibility verification process.

System: DHS/TSA/PIA–030(a) Access to Sensitive Security Information (SSI) in Contract Solicitations.

Component: TSA.

Date of approval: July 27, 2012.

TSA currently conducts security threat assessments (STA) on individuals and companies that seek access to SSI necessary to prepare a proposal in the pre-contract award phase of contracting with TSA. SSI is a form of unclassified information that if publicly released would be detrimental to transportation security. The standards governing SSI are promulgated under 49 U.S.C. 114(r) in 49 CFR. part 1520. There may, however, also be circumstances under which individuals and companies will require access to SSI in order to prepare a proposal for contracts with other governmental agencies (federal, state, or local level) or with private industry. TSA updated this PIA to reflect that TSA will perform STA on individuals and companies seeking access to SSI in order to prepare a proposal with such other entities.

System: DHS/OPS/PIA–009 National Operations Center Operations Counterterrorism Desk (NCOD) Database.

Component: OPS.

Date of approval: July 30, 2012.

The National Operations Center (NOC), within OPS, operates the NOC Counterterrorism Operations Desk (NCOD) and serves as the primary Department of Homeland Security point of contact to streamline counterterrorism Requests for Information (RFI). The NCOD Database is a tracking tool used by NCOD Officers to track all counterterrorism related incoming and outgoing inquiries. OPS conducted this PIA because the NCOD Database contains PII.

System: DHS/NPPD/PIA–026 National Cybersecurity Protection System (NCPS).

Component: NPPD.

Date of approval: July 30, 2012.

NCPS is an integrated system for intrusion detection, analysis, intrusion prevention, and information sharing capabilities that are used to defend the federal civilian government agencies' information technology infrastructure from cyber threats. The NCPS includes the hardware, software, supporting processes, training, and services that are developed and acquired to support its mission. NPPD conducted this PIA because PII may be collected by the NCPS, or through submissions of known or suspected cyber threats received by US–CERT for analysis. This PIA will serve as a replacement for previously published PIAs submitted by NSCD for the 24/7 Incident Handling Center (March 29, 2007), and the Malware Lab Network (May 4, 2010), and is a program-focused PIA to better characterize the efforts of NCPS and US–CERT.

System: DHS/USCIS/PIA–044 Fraud Detection and National Security Directorate (FDNS).

Component: USCIS.

Date of approval: July 30, 2012.

USCIS created the FDNS to strengthen the integrity of the nation's immigration system and to ensure that immigration benefits are not granted to individuals that may pose a threat to national security and/or public safety. In addition, the FDNS is responsible for detecting, deterring, and combating immigration benefit fraud. USCIS conducted this PIA to document and assess how the FDNS collects, uses, and maintains PII.

System: DHS/USCIS/PIA–045 Deferred Action for Childhood Arrivals.

Component: USCIS.

Date of approval: August 14, 2012.

On June 15, 2012, Secretary of Homeland Security Janet Napolitano (the Secretary) issued a DHS memorandum entitled, "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children." The Secretary addressed the memorandum to the Acting Commissioner of U.S. Customs and Border Protection, and to the Directors of USCIS and U.S. Immigration and Customs Enforcement. The Secretary's memorandum set forth how prosecutorial discretion may be exercised in cases involving certain people who arrived in the United States as children. The Secretary emphasized that generally, this population lacked the intent to violate the law, and that her memorandum would ensure enforcement resources would not be expended on these low priority cases.

The basis for the Secretary's memorandum is the Secretary's authority to exercise prosecutorial discretion by deferring action in appropriate cases. Prosecutorial discretion is the authority to determine how and when to exercise enforcement authority in line with agency priorities. Deferred action is an exercise of this prosecutorial discretion to defer removal action against certain individuals who are unlawfully present in the United States in order to devote scarce enforcement resources to the highest priority removal cases, including individuals who pose a danger to national security or public safety or have been convicted of specific crimes. USCIS published this PIA because the deferred action for childhood arrivals process associated with this memorandum involves the collection and use of PII.

System: DHS/ALL/PIA–042 Department of Homeland Security (DHS) Personal Identity Verification (PIV).

Component: DHS-Wide.

Date of approval: August 23, 2012.

DHS updated the PIV Privacy Impact Assessment Update to reflect changes in Departmental requirements and enhanced interoperability with US–VISIT Automated Biometric Identification System and the Federal Bureau of Investigation Criminal Justice Information Services, Integrated Automated Fingerprint Identification System, DHS Component Physical Access Control Systems, DHS Component Active Directories, as well as issuance of PIV-compatible credentials to visitors to DHS.

System: DHS/S&T/PIA–001(a) Border Network (BorderNet) and Northeast Test Bed (NET–B).

Component: S&T.

Date of approval: August 23, 2012.

BorderNet (formerly named the Border and Transportation Security Network, or BTSNet) is a technology test bed developed and maintained by the Department of Homeland Security (DHS), Science and Technology Directorate (S&T) located at the United States-Mexico border. The purpose of the test bed is to test and evaluate technologies in an operational environment that assist DHS Customs and Border Protection field agents in securing our nation's borders. S&T updated this PIA to reflect the addition of mobile enrollment technology and surveillance cameras, and the deployment of an additional test bed site at the United States-Canada border, called NET–B.

System: DHS/S&T/PIA–024 Rapid Deoxyribonucleic Acid (DNA) System.

Component: S&T.

Date of approval: September 14, 2012.

S&T developed the Rapid DNA System primarily to meet the need of U.S. Citizenship and Immigration Services (USCIS) to verify family relationships in refugee immigration processes. The Rapid DNA System performs rapid, low-cost DNA analysis to meet this USCIS need and may also address operational needs of other DHS components. S&T conducted this PIA because the collection and analysis of DNA information raises potential privacy concerns.

System: DHS/TSA/PIA–038 Performance and Results Information System (PARIS).

Component: TSA.

Date of approval: September 18, 2012.

TSA PARIS system is a database used for maintaining information associated with TSA's regulatory investigations, security incidents, and enforcement actions, as well as for recording the

details of security incidents involving passenger and property screening. PARIS maintains PII about individuals, including witnesses, involved in security incidents or regulatory enforcement activities. PARIS also creates and maintains a list of individuals who, based upon their involvement in security incidents of sufficient severity or frequency, are disqualified from receiving expedited screening for some period of time or permanently. The purpose of this PIA is to inform the public of changes in the use of PARIS and any resulting impact to personal privacy.

System: DHS/CBP/PIA–004(f) Western Hemisphere Travel Initiative (WHTI).

Component: CBP.

Date of approval: September 24, 2012.

CBP published this PIA to give notice of an update to the WHTI PIA. This update describes Phase I of the Beyond the Border entry/exit program, which is an initiative of the U.S.-Canada Beyond the Border Action Plan. The Beyond the Border entry/exit program will expand the sharing of border crossing information with the Canada Border Services Agency by exchanging biographic, travel document, and other border crossing information collected from individuals entering the United States from Canada and vice versa at land ports of entry. This exchange of border crossing entry information will assist both countries so that the record of an entry into one country establishes an exit record from the other, ultimately supporting each nation in their immigration and law enforcement missions, as well as facilitating cross-border travel. This PIA update covered Phase I of the entry/exit program only, which is limited to exchanging entry records from certain individuals (other than U.S. and Canadian citizens) at certain land ports of entry to measure the ability to reconcile biographic entry records between Canada and the United States. DHS will publish additional updates to this PIA in advance of deployment of any subsequent phases to the Beyond the Border entry/exit program.

System: DHS/NPPD/PIA–011 Federal Protective Service (FPS) Information Support Tracking System (FISTS).

Component: National Protection and Programs Directorate (NPPD).

Date of review: October 4, 2012.

This PIA was reviewed using the three-year PIA checklist. U.S. Immigration and Customs Enforcement (ICE), Federal Protective Service (FPS), Information Support Tracking System (FISTS), Contract Suitability Module is a web-based application used to automate the process for assessing the suitability of FPS and General Services Administration contract personnel to work in secure Federal buildings, and to track periodic background re-investigations of those contract employees. The system collects and maintains information on applicants and contractor personnel who work in secure Federal buildings such as security officers, childcare workers, cleaners, and other contracted service positions. FPS conducted this PIA because FISTS collects and uses PII on members of the public who seek or are currently employed in these positions within Federal facilities.

System: DHS/FEMA/PIA–011 National Flood Insurance Program Information Technology System.

Component: FEMA.

Date of approval: October 12, 2012.

DHS FEMA FIMA National Flood Insurance Program (NFIP) owns and operates the NFIP Information Technology System (ITS). The NFIP ITS processes flood insurance policies and claims, specifically, policies and claims from the FEMA Direct Servicing Agent (DSA) contractor on behalf of the NFIP and by Write Your Own Companies (WYO) that sell and service flood insurance policies. An NFIP flood insurance policy can be obtained directly from a DSA through a licensed insurance broker or from WYOs. Since 1983, participating insurance companies have delivered and serviced NFIP policies in their own names, through the "Write Your Own" arrangement. The policy coverage and premiums do not differ if purchased from the DSA or WYOs. FEMA conducted this PIA because NFIP ITS collects, uses, maintains, retrieves, and disseminates PII about individuals who purchase, as well as those who process, flood insurance policies from NFIP and individuals requesting access to the system.

System: DHS/TSA/PIA–040 Port Authority of New York/New Jersey (PANYNJ) Secure Worker Access Consortium Vetting Services (SWAC).

Component: TSA.

Date of approval: November 13, 2012.

TSA will conduct terrorism watch list checks of workers at PANYNJ facilities and job sites, including critical infrastructure such as airports, marine ports, bus terminals, rail transit facilities, bridges, tunnels, and real estate such as the World Trade Center memorial site. TSA will also conduct terrorism watch list checks of individuals identified by PANYNJ as requiring such checks for access to sensitive information, and for workers at facilities and job sites of PANYNJ regional partners. Results of the checks will not be reported to PANYNJ, but instead will be forwarded to the Federal Bureau of Investigation Terrorist Screening Center. This PIA was conducted pursuant to the E-Government Act of 2002 because PII will be collected to conduct terrorism watch list checks of workers at PANYNJ facilities and job sites.

System: DHS/TSA/PIA–039 Trends and Patterns Branch (TPB).

Component: TSA.

Date of approval: November 13, 2012.

TSA, Trends and Patterns Branch (TPB) seeks to improve the ability to identify potential risks to transportation security by discovering and analyzing previously unknown links or patterns among individuals who undergo a TSA security threat assessment, aviation passengers identified as a match to a watch list, and passengers who do not present acceptable identification documents to access the sterile area of an airport whose identity is unverified. TSA conducted this PIA because the TPB will collect and use PII to perform these functions.

System: DHS/FEMA/PIA–012(a) Disaster Assistance Improvement Program (DAIP).

Component: FEMA.

Date of approval: November 16, 2012.

FEMA, Office of Response & Recovery, Recovery Directorate, National Processing Service Center Operations Branch, sponsors and funds the DAIP. In accordance with Executive Order 13411 "Improving Assistance for Disaster Victims," DAIP developed the Disaster Assistance Center (DAC) system. As a part of DAIP, DAC maintains disaster survivor application and registration information collected through various media including: (1) DAIP paper forms, (2) the *www.disasterassistance.gov* Web site, (3) the *http://m.fema.gov* mobile Web site, and (4) via telephone. DAIP/DAC shares the information with the National Emergency Management Information System– Individual Assistance (IA) module to facilitate eligibility determinations and with other federal, tribal, state, local, and non-profit agencies/organizations that also service disaster survivors. FEMA conducted this PIA because DAIP/DAC collects, uses, maintains, retrieves, and disseminates PII of disaster survivors who either request IA benefits from FEMA or whom FEMA may refer to its partners.

System: DHS/S&T/PIA–026 Robotic Aircraft for Public Safety (RAPS).

Component: S&T.

Date of approval: November 16, 2012.

S&T and the State of Oklahoma are partnering on the RAPS project to test and evaluate Small Unmanned Aircraft Systems (SUAS) for potential use by the first responder community and DHS operational components. SUAS include small aircraft (typically under 55 pounds and having wingspans of 3–6 feet or less) that are operated using a wireless ground control station. The aircraft are equipped with sensors and cameras that can capture images and transmit them to a ground control system to provide aerial views of emergency situations and situational awareness. S&T conducted a PIA to address the privacy impact of the system's surveillance and image capturing capabilities.

System: DHS/USCG/PIA–001(b) Homeport Internet Portal.

Component: USCG.

Date of approval: November 16, 2012.

USCG currently uses the Homeport Internet Portal to provide secure information dissemination, advanced collaboration for Area Maritime Security Committees, electronic submission and approval for facility security plans, and complex electronic notification capabilities. Homeport includes a subsystem called the Alert Warning System (AWS), which provides USCG Headquarters, Districts, Sectors, and other units an enterprise solution for sending alerts and warnings to maritime security (MARSEC) partners, stakeholders, and appropriate port constituents for MARSEC level changes and other MARSEC-related activities requiring port-wide notifications. Through a Memorandum of Agreement between the USCG and the Transportation Security Administration (TSA), use of AWS capabilities will be shared between these two DHS components, thereby leveraging DHS investment in the system and avoiding duplicative operations and maintenance costs within DHS. The USCG issued this PIA update to include TSA operations center personnel as authorized users of Homeport's AWS, which contains non-sensitive PII and disseminates airport security information to authorized recipients.

System: DHS/ICE/PIA–029 Alien Medical Records Systems.

Component: ICE.

Date of approval: November 27, 2012.

ICE maintains medical records on aliens that ICE detains for violations of U.S. immigration law. Aliens held in ICE custody in a facility staffed by the ICE Health Services Corps, a division of ICE's Office of Enforcement and Removal Operations, receive physical exams and treatment, dental services, and pharmacy services, depending on the alien's medical conditions and length of stay. To properly record the medical assessments and services, ICE operates the following information technology systems that maintain electronic medical record information: CaseTrakker, MedEZ, Dental X-Ray System, the Criminal Institution Pharmacy System, the Medical Payment Authorization Request Web System (MedPAR), and the Medical Classification Database. This PIA was originally published on July 25, 2011, and described the information in these medical record systems, the purposes for which this information was collected and used, and the safeguards ICE had implemented to mitigate the privacy and security risks to PII stored in these systems. The PIA was republished in full primarily to modify the description of the MedPAR system, which originally was to be hosted by the U.S. Department of Veterans Affairs, but now remains at ICE.

Dated: February 13, 2013.

Jonathan R. Cantor,

Acting Chief Privacy Officer, Department of Homeland Security.

[FR Doc. 2013–04109 Filed 2–21–13; 8:45 am]

BILLING CODE 9110–9L–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5687–N–04]

Notice of Proposed Information Collection: Comment Request; Funds Authorization

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

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* April 23, 2013.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Reports Liaison Officer, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410, Room 9120 or the number for the Federal Information Relay Service (1–800–877–8339).

FOR FURTHER INFORMATION CONTACT: Program Contact, Harry Messner, The Office of Asset Management, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410, telephone (202) 402–2626 (this is not a toll free number) for copies of the proposed forms and other available information.

SUPPLEMENTARY INFORMATION: The Department is submitting the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection 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 estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Funds Authorization.

OMB Control Number, if applicable: 2502–0555.

Description of the need for the information and proposed use: the purpose of this information collection is to ensure that advances from the Reserve for Replacement and/or Residual Receipts Funds are reviewed and authorized by HUD in accordance with regulatory and administrative guidelines.

Agency form numbers, if applicable: form HUD–9250.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: The number of burden hours is 20,595. The number of respondents is 9,153, the number of responses is 9,153, the frequency of response is on occasion, and the burden hour per response is 30 minutes.

Status of the proposed information collection: This is an extension of a previously approved collection.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C., chapter 35, as amended.

Dated: February 15, 2013.

Laura M. Marin,

Acting General Deputy Assistant, Secretary for Housing-Acting General Deputy Federal Housing Commissioner.

[FR Doc. 2013–04056 Filed 2–21–13; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5687–N–05]

Notice of Proposed Information Collection: Comment Request; Application and Re-Certification Packages for Approval of Nonprofit Organization in FHA Activities

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

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* April 23, 2013.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Reports Liaison Officer, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410, Room 9120 or the number for the Federal Information Relay Service (1–800–877–8339).

FOR FURTHER INFORMATION CONTACT: Program Contact, Arlene Nunes Director, Home Mortgage Insurance Division, Office of Single Family Program Development, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410, telephone (202) 402–2532 (this is not a toll free number) for copies of the proposed forms and other available information.

SUPPLEMENTARY INFORMATION: The Department is submitting the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection 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 estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Application and Re-certification Packages for Approval of Nonprofit Organizations in FHA Activities.

OMB Control Number, if applicable: 2502–0540.

Description of the need for the information and proposed use: HUD-Approved nonprofit organizations participate in the Discount Sales program as FHA insured mortgagors or provide down payment assistance to homebuyers in the form of secondary financing. A nonprofit organization must be HUD-approved and meet specific requirements to remain on the Nonprofit Organization Roster (Roster). This includes an application, affordable housing plan, annual reports, and required record keeping. HUD uses the information to ensure that a nonprofit organization meets the requirements to participate in Single Family programs.

Agency form numbers, if applicable: None.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: The number of burden hours is 7,433. The number of respondents is 225, the number of responses is 1,056, the frequency of response is one, four or five depending on activity, and the average burden hour per response is 7.04.

Status of the proposed information collection: This is an extension of a currently approved collection.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C., Chapter 35, as amended.

Dated: February 14, 2013.

Laura M. Marin,

Acting General Deputy Assistant Secretary for Housing—Acting General Deputy Federal Housing Commissioner.

[FR Doc. 2013–04054 Filed 2–21–13; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5681–N–08]

Federal Property Suitable as Facilities To Assist the Homeless

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for possible use to assist the homeless.

FOR FURTHER INFORMATION CONTACT: Juanita Perry, Department of Housing and Urban Development, 451 Seventh Street SW., Room 7262, Washington, DC 20410; telephone (202) 402–3970; TTY number for the hearing- and speech-impaired (202) 708–2565, (these telephone numbers are not toll-free), or call the toll-free Title V information line at 800–927–7588.

SUPPLEMENTARY INFORMATION: In accordance with the December 12, 1988 court order in *National Coalition for the Homeless* v. *Veterans Administration*, No. 88–2503–OG (D.D.C.), HUD publishes a Notice, on a weekly basis, identifying unutilized, underutilized, excess and surplus Federal buildings and real property that HUD has reviewed for suitability for use to assist the homeless. Today's Notice is for the purpose of announcing that no additional properties have been determined suitable or unsuitable this week.

Dated: February 14, 2013.

Mark R. Johnston,

Deputy Assistant Secretary for Special Needs.

[FR Doc. 2013–03866 Filed 2–21–13; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

[NPS–SERO–RTCA–12129; PPMPSPD1T.Y00000; PPSESERO10]

Wekiva River System Advisory Management Committee Meetings (FY2013)

AGENCY: National Park Service, Interior.

ACTION: Notice of upcoming scheduled meetings.

SUMMARY: This notice announces a schedule of upcoming meetings for the Wekiva River System Advisory Management Committee.

DATES: The meetings are scheduled for: April 3, 2013; June 4, 2013; August 7,

2013; October 1, 2013; and December 4, 2013.

Time: All scheduled meetings will begin at 3:00 p.m. and will end by 5:00 p.m.

ADDRESSES: All scheduled meetings will be held at the Wekiwa Springs State Park, 1800 Wekiwa Circle, Apopka, FL 32712. Call (407) 884–2006 or visit online at *http://www.floridastateparks.org/wekiwasprings/* for additional information on this facility.

FOR FURTHER INFORMATION CONTACT: Jaime Doubek-Racine, DFO, Wekiva Wild and Scenic River, RTCA Program, Florida Field Office, Southeast Region, 5342 Clark Road, PMB #123, Sarasota, Florida 34233; telephone (941) 685–5912.

SUPPLEMENTARY INFORMATION: The scheduled meetings will be open to the public. Each scheduled meeting will result in decisions and steps that advance the Wekiva River System Advisory Management Committee towards its objective of managing and implementing projects developed from the Comprehensive Management Plan for the Wekiva Wild and Scenic River. Any member of the public may file with the Committee a written statement concerning any issues relating to the development of the Comprehensive Management Plan for the Wekiva Wild and Scenic River. Before including your address, telephone number, email address, or other personal identifying information in your comments, 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. The statement should be addressed to the Wekiva River System Advisory Management Committee, National Park Service, 5342 Clark Road, PMB #123, Sarasota, Florida 34233.

The Wekiva River System Advisory Management Committee was established by Public Law 106–299 to assist in the development of the comprehensive management plan for the Wekiva River System and provide advice to the Secretary in carrying out management responsibilities of the Secretary under the Wild and Scenic Rivers Act (16 U.S.C. 1274). Efforts have been made locally to ensure that the interested public is aware of the meeting dates.

Dated: February 13, 2013.

Jaime Doubek-Racine,

DFO, Wekiva Wild and Scenic River, Southeast Region.

[FR Doc. 2013–04121 Filed 2–21–13; 8:45 am]

BILLING CODE 4310–JD–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R1–ES–2013–N028; FXES11130100000F5–134–FF01E00000]

Endangered and Threatened Wildlife and Plants; Recovery Permit Application

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service, invite the public to comment on the following application for a permit to conduct activities with the purpose of enhancing the survival of endangered species. The Endangered Species Act of 1973, as amended (Act), prohibits certain activities with respect to endangered species unless a Federal permit allows such activity. The Act also requires that we invite public comment before issuing such permits.

DATES: To ensure consideration, please send your written comments by March 25, 2013.

ADDRESSES: Endangered Species Program Manager, Ecological Services, U.S. Fish and Wildlife Service, Pacific Regional Office, 911 NE 11th Avenue, Portland, OR 97232–4181. Please refer to the permit number for the application when submitting comments.

FOR FURTHER INFORMATION CONTACT: Grant Canterbury, Fish and Wildlife Biologist, at the above address or by telephone (503–231–6131) or fax (503–231–6243).

SUPPLEMENTARY INFORMATION:

Background

The Act (16 U.S.C. 1531 et seq.) prohibits certain activities with respect to endangered and threatened species unless a Federal permit allows such activity. Along with our implementing regulations in the Code of Federal Regulations (CFR) at 50 CFR part 17, the Act provides for certain permits, and requires that we invite public comment before issuing these permits for endangered species.

A permit granted by us under section 10(a)(1)(A) of the Act authorizes the permittee to conduct activities (including take or interstate commerce) with respect to U.S. endangered or threatened species for scientific purposes or enhancement of propagation or survival. Our regulations implementing section 10(a)(1)(A) of the Act for these permits are found at 50 CFR 17.22 for endangered wildlife species, 50 CFR 17.32 for threatened wildlife species, 50 CFR 17.62 for endangered plant species, and 50 CFR 17.72 for threatened plant species.

Application Available for Review and Comment

We invite local, State, and Federal agencies, and the public to comment on the following application. Please refer to the appropriate permit number for the application when submitting comments.

Documents and other information submitted with this application are available for review by request from the Endangered Species Program Manager at the address listed in the **ADDRESSES** section of this notice, subject to the requirements of the Privacy Act (5 U.S.C. 552a) and Freedom of Information Act (5 U.S.C. 552).

Permit Number: TE–95648A

Applicant: Lori Cossell, Connellsville, Pennsylvania.

The applicant requests an interstate commerce permit to purchase nene geese (*Branta sandvicensis*) in conjunction with captive propagation for the purpose of enhancing their survival. This notification covers activities conducted by the applicant over the next 5 years.

Public Availability of Comments

All comments and materials we receive in response to this request will be available for public inspection, by appointment, during normal business hours at the address listed in the **ADDRESSES** section of this notice.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority

We provide this notice under section 10 of the Act (16 U.S.C. 1531 *et seq.*).

Dated: February 13, 2013.

Hugh Morrison,

Acting Regional Director, Pacific Region, U.S. Fish and Wildlife Service.

[FR Doc. 2013–04094 Filed 2–21–13; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R8–ES–2013–N029; 1112–0000–81440–F2]

Jennings Low-Effect Habitat Conservation Plan for the Morro Shoulderband Snail, Community of Los Osos, San Luis Obispo County, CA

AGENCY: U.S. Fish and Wildlife Service, Interior.

ACTION: Notice of availability; request for comment.

SUMMARY: We, the U.S. Fish and Wildlife Service, have received an application from Andrew A. Jennings for a 10-year incidental take permit under the Endangered Species Act of 1973, as amended. The application addresses the potential for "take" of the federally endangered Morro shoulderband snail (= banded dune snail; *Helminthoglypta walkeriana*) that is likely to occur incidental to the construction, maintenance, and occupation of a single-family residence on an existing legal single-family-zoned parcel in the unincorporated community of Los Osos, San Luis Obispo County, California. The applicants would implement a conservation program to minimize and mitigate project activities that are likely to result in take of the Morro shoulderband snail as described in their plan. We invite comments from the public on the application package that includes the Jennings Low-Effect Habitat Conservation Plan for the Morro Shoulderband Snail. This proposed action has been determined to be eligible for a Categorical Exclusion under the National Environmental Policy Act of 1969, as amended (NEPA).

DATES: To ensure consideration, please send your written comments by March 25, 2013.

ADDRESSES: You may download a copy of the Habitat Conservation Plan, draft Environmental Action Statement and Low-Effect Screening Form, and related documents on the Internet at *http://www.fws.gov/ventura/*, or you may request copies of the documents by U.S. mail or phone (see below). Please address written comments to Diane K. Noda, Field Supervisor, Ventura Fish and Wildlife Office, U.S. Fish and Wildlife Service, 2493 Portola Road, Suite B, Ventura, CA 93003. You may alternatively send comments by facsimile to (805) 644–3958.

FOR FURTHER INFORMATION CONTACT: Julie M. Vanderwier, Fish and Wildlife Biologist, at the above address or by calling (805) 644–1766.

SUPPLEMENTARY INFORMATION:

Background

The U.S. Fish and Wildlife Service (Service) listed the Morro shoulderband snail as endangered on December 15, 1994 (59 FR 64613). Section 9 of the Endangered Species Act of 1973, as amended (Act) and its implementing regulations (16 U.S.C. 1531 *et seq.*) prohibit the take of fish or wildlife species listed as endangered or threatened. "Take" is defined under the Act to include the following activities: "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct" (16 U.S.C. 1532); however, under section 10(a)(1)(B) of the Act, we may issue permits to authorize incidental take of listed species. The Act defines "Incidental Take as take that is not the purpose of carrying out of an otherwise lawful activity. Regulations governing incidental take permits for threatened and endangered species are provided in at 50 CFR 17.32 and 17.22. Issuance of an incidental take permit must not jeopardize the existence of federally listed fish, wildlife, or plant species.

Take of listed plants is not prohibited under the Act unless such take would violate State law. As such, take of plants cannot be authorized under an incidental take permit. Plant species may be included on a permit in recognition of the conservation benefits provided them under a habitat conservation plan. All species, including plants, covered by the incidental take permit receive assurances under our "No Surprises" regulations (50 CFR 17.22(b)(55) and 17.32(b)(5)). In addition to meeting other specific criteria, actions undertaken through implementation of the HCP must not jeopardize the continued existence of federally listed animal or plant species.

Andrew A. Jennings (hereafter, the applicant) has submitted a Low-Effect Habitat Conservation Plan (HCP) in support of his application for an incidental take permit (ITP) to address take of Morro shoulderband snail that is likely to occur as the result of direct impacts to up to 0.23 acre (10,224 square feet) of highly disturbed coastal dune scrub and veldt grass (*Ehrharta calycina*)-dominated non-native grassland occupied by the species. Take would be associated with the construction, maintenance, and occupation of a single-family residence on an existing parcel legally described as Assessor Parcel Number 074–052–028 and located at 460 Los Osos Valley Road in western portion of Los Osos, an unincorporated community of San Luis Obispo County, California. The applicant is requesting a permit for take of Morro shoulderband snail that would result from "Covered Activities" that include the construction, maintenance, and occupation of a single-family residence and associated landscaping/infrastructure.

The applicant proposes to minimize and mitigate take of Morro shoulderband snail associated with the covered activities by fully implementing the HCP. The following measures will be implemented to minimize the effects of the taking: (1) Pre-construction and concurrent construction monitoring surveys for Morro shoulderband snail will be conducted, (2) all identified individuals of any life stage of Morro shoulderband snail will be captured and moved out of harm's way to a Service-approved receptor site by an individual in possession of a current valid recovery permit for the species, and (3) development and presentation of a contractor and employee training program for Morro shoulderband snail. To mitigate for unavoidable take, the applicants will contribute $5,114 to an Impact-Directed Environmental Account held and administered by the National Fish and Wildlife Foundation. These funds will be used to implement recovery tasks identified in the *Recovery Plan for the Morro Shoulderband Snail and Four Plants from Western San Luis Obispo County, California* (USFWS 1998). The applicants will fund up to $6,700, as needed, to ensure implementation of all minimization measures and reporting requirements identified in the HCP.

In the proposed HCP, the applicants consider two alternatives to the proposed action: "No Action" and "Project Design." Under the "No Action" alternative, an ITP for the Jennings single-family residence would not be issued. The Jennings single-family residence would not be built and a contribution of in-lieu fees would not be provided to effect recovery actions for Morro shoulderband snail. Since the property is privately owned, there are ongoing economic considerations associated with continued ownership without use, which include payment of associated taxes. The sale of this

property for purposes other than the identified activity is not considered economically feasible. Because of economic considerations and because the proposed action results in a net benefit for the covered species, Morro shoulderband snail, the No Action Alternative has been rejected. Under the "Project Redesign" alternative, the project would be redesigned to avoid or further reduce take of Morro shoulderband snail. The onsite habitats occupied by Morro shoulderband snail are highly degraded in nature and the parcel is not of sufficient size to accommodate a redesign that would substantially improve the conservation benefit to the species beyond what would be achieved in the proposed project. For these reasons, the alternate design alternative has also been rejected.

We are requesting comments on our preliminary determination that the applicant's proposal will have a minor or negligible effect on the Morro shoulderband snail and that the plan qualifies as a low-effect HCP as defined by our Habitat Conservation Planning Handbook (November 1996). We base our determinations on three criteria: (1) Implementation of the proposed project as described in the HCP would result in minor or negligible effects on federally listed, proposed, and/or candidate species and their habitats; (2) implementation of the HCP would result in minor negligible effects on other environmental values or resources; and (3) HCP impacts, considered together with those of other past, present, and reasonably foreseeable future projects, would not result in cumulatively significant effects. In our analysis of these criteria, we have made a preliminary determination that the approval of the HCP and issuance of an ITP qualify for categorical exclusion under the NEPA (42 U.S.C. 4321 *et seq.*), as provided by the Department of Interior Manual (516 DM 2 Appendix 2 and 516 DM 8); however, based upon our review of public comments that we receive in response to this notice, this preliminary determination may be revised.

Next Steps

We will evaluate the permit application, including the plan and comments, we receive, to determine whether the application meets the requirements of Section 10(a)(1)(B) of the Act. We will also evaluate whether issuance of the ITP would comply with Section 7(a)(2) of the Act by conducting an intra-Service Section 7 consultation.

Public Review

We provide this notice under section 10(c) of the Act and the NEPA public involvement regulations (40 CFR 1500.1(b), 1500.2(d), and 1506.6). We are requesting comments on our determination that the applicants' proposal will have a minor or neglible effect on the Morro shoulderband snail and that the plan qualifies as a low-effect HCP as defined by our 1996 Habitat Conservation Planning Handbook. We will evaluate the permit application, including the plan and comments, we receive, to determine whether the application meets the requirements of section 10(a)(1)(B) of the Act. We will use the results of our internal Service consultation, in combination with the above findings, in our final analysis to determine whether to issue the permits. If the requirements are met, we will issue an ITP to the applicant for the incidental take of Morro shoulderband snail. We will make the final permit decision no sooner than 30 days after the date of this notice.

Public Comments

If you wish to comment on the permit applications, plans, and associated documents, you may submit comments by any one of the methods in **ADDRESSES**.

Public Availability of Comments

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment including your personal identifying information-may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public view, we cannot guarantee that we will be able to do so.

Authority

We provide this notice under section 10 of the Act (16 U.S.C. 1531 *et seq.*) and NEPA regulations (40 CFR 1506.6).

Dated: February 14, 2013.

Diane K. Noda,

Field Supervisor, Ventura Fish and Wildlife Office, Ventura, California.

[FR Doc. 2013–04046 Filed 2–21–13; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLWYR05000 L16100000.DQ0000 LXSS04 K0000]

Notice of Availability of the Proposed Resource Management Plan and Final Environmental Impact Statement for the Lander Field Office Planning Area, WY

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability.

SUMMARY: In accordance with the National Environmental Policy Act of 1969, as amended, and the Federal Land Policy and Management Act of 1976, as amended, the Bureau of Land Management (BLM) has prepared a proposed Resource Management Plan (RMP)/final environmental impact statement (EIS) for the Lander, Wyoming, Field Office and by this notice is announcing its availability.

DATES: BLM planning regulations state that any person who meets the conditions described in the regulations may protest the BLM's proposed RMP/final EIS. A person who meets the conditions and files a protest must file the protest within 30 days of the date that the Environmental Protection Agency publishes its Notice of Availability of the proposed RMP/final EIS in the **Federal Register**.

ADDRESSES: Copies of the Lander proposed RMP/final EIS have been sent to affected Federal, State, and local Government agencies and to other stakeholders, tribal Governments and members of the public who have requested copies. Copies of the Lander proposed RMP/final EIS are available for public inspection at the BLM Lander Field Office, 1335 Main Street, Lander, Wyoming; BLM Wind River/Bighorn Basin District Office, 101 South 23rd Street, Worland, Wyoming; Fremont County public libraries in Riverton, Lander, and Dubois and Central Wyoming College and at the Eastern Shoshone and the Northern Arapaho Tribal Business Councils in Fort Washakie, Wyoming. Interested persons may also review the proposed RMP/final EIS on the Internet at *http://www.blm.gov/wy/st/en/programs/Planning/rmps/lander.html.* All protests must be in writing and mailed to one of the following addresses:

Regular mail	Overnight mail
BLM Director (210), Attention: Brenda Williams, P.O. Box 71383, Washington, DC 20024–1383.	BLM Director (210), attention: Brenda Williams, 20 M Street SE., Room 2134LM, Washington, DC 20003.

FOR FURTHER INFORMATION CONTACT: For further information contact Kristin Yannone, Planner; telephone 307–332–8400; address BLM Lander Field Office, 1335 Main Street, Lander, WY 82520; email *BLM_WY_LRMP_WYMail@blm.gov*. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The planning area includes lands within the BLM Lander Field Office's administrative boundaries, including all of Fremont County and some of Teton, Sweetwater, Hot Springs, Carbon, and Natrona counties in Wyoming. The planning area includes all lands, regardless of jurisdiction, totaling approximately 6.6 million acres; however, the BLM will only make decisions on lands that fall under the BLM's jurisdiction. The decision area includes approximately 2.4 million acres of BLM-administered surface and 2.8 million acres of Federal mineral estate. The proposed RMP will replace the 1987 Lander RMP.

The Draft RMP/EIS was made available for public review for a 90-day period on September 9, 2011. The Draft RMP/EIS described and analyzed a series of goals, objectives, and management actions, within four management alternatives, designed to address new management challenges and issues raised during scoping. These included, but were not limited to, mineral development, livestock grazing, air quality, special management areas including areas of critical environmental concern (ACEC), wildlife habitats including that of the Greater Sage-Grouse, and management of the settings of the National Historic trails. The four alternatives were:

- *Alternative A:* Continues existing management practices (no action alternative);
- *Alternative B:* Emphasizes conservation of natural and cultural resources while providing for compatible development and use;
- *Alternative C:* Emphasizes resource development and use while protecting natural and cultural resources; and
- *Alternative D:* Provides development opportunities while protecting sensitive resources (proposed RMP).

Comments on the Draft RMP/EIS received from the public and internal BLM review were carefully considered and incorporated as appropriate into the proposed RMP. The proposed RMP would provide comprehensive, long-range decisions for the use and management of resources in the planning area administered by the BLM and focus on the principles of multiple use and sustained yield.

Alternative D includes objectives and management actions to ensure future BLM actions support the nature and purposes of the five congressionally designated National Historic Trails within the Lander Field Office. Alternative D adopts a National Trails Management Corridor with allowable uses, management actions, and necessary restrictions for all resources and resource uses within the corridor in order to effectively support the nature and purposes of the National Historic Trails, and the resources, qualities, values, and associated settings and the primary use or uses of each trail. Descriptions and maps of the proposed National Trail Management Corridor(s) have been prepared and are found within the Lander proposed RMP/final EIS, and are also available for review at the BLM Wyoming State Office and at the Lander Field Office.

Instructions for filing a protest with the Director of the BLM regarding the proposed RMP/final EIS may be found in the "Dear Reader" letter of the proposed Lander RMP/final EIS and at 43 CFR 1610.5–2. All protests must be in writing and mailed to the appropriate address, as set forth in the **ADDRESSES** section above. Emailed and faxed protests will not be accepted as valid protests unless the protesting party also provides the original letter by either regular or overnight mail postmarked by the close of the protest period. Under these conditions, the BLM will consider the emailed or faxed protest as an advance copy and it will receive full consideration. If you wish to provide the BLM with such advance notification, please direct emails to *Brenda_Hudgens-Williams@blm.gov* and faxed protests to the attention of the BLM protest coordinator at 202–245–0028.

Before including your phone number, email address, or other personal identifying information in your protest, you should be aware that your entire protest—including your personal identifying information—may be made publicly available at any time. While you can ask us in your protest to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: 40 CFR 1506.6, 40 CFR 1506.10, 43 CFR 1610.2, 43 CFR 1610.5.

Donald A. Simpson,

State Director.

[FR Doc. 2013–03991 Filed 2–21–13; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLCO956000 L14200000.BJ0000]

Notice of Filing of Plats of Survey; Colorado

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Filing of Plats of Survey; Colorado.

SUMMARY: The Bureau of Land Management (BLM) Colorado State Office is publishing this notice to inform the public of the official filing of the survey plats listed below. The plats will be available for viewing at *http://www.glorecords.blm.gov*.

DATES: The plats described in this notice were filed on February 12, 2013.

ADDRESSES: BLM Colorado State Office, Cadastral Survey, 2850 Youngfield Street, Lakewood, Colorado 80215–7093.

FOR FURTHER INFORMATION CONTACT: Randy Bloom, Chief Cadastral Surveyor for Colorado, (303) 239–3856.

Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The plat and field notes of the dependent resurvey and survey in Township 5 South, Range 80 West, Sixth Principal Meridian, Colorado, were accepted on January 31, 2013, and filed on February 12, 2013.

The plat and field notes of the dependent resurvey, survey, and supplemental plat in Township 5 South, Range 81 West, Sixth Principal Meridian, Colorado, were accepted on January 31, 2013, and filed on February 12, 2013.

The plat, in 2 sheets, and field notes of the dependent resurvey and survey in Township 4 South, Range 82 West, Sixth Principal Meridian, Colorado, were accepted on January 31, 2013, and filed on February 12, 2013.

Randy Bloom,

Chief Cadastral Surveyor for Colorado.

[FR Doc. 2013–04104 Filed 2–21–13; 8:45 am]

BILLING CODE 4310–JB–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLCO956000 L14200000.BJ0000]

Notice of Filing of Plats of Survey; Colorado

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Filing of Plats of Survey; Colorado.

SUMMARY: The Bureau of Land Management (BLM) Colorado State Office is publishing this notice to inform the public of the intent to officially file the survey plats listed below and afford a proper period of time to protest this action prior to the plat filing. During this time, the plats will be available for review in the BLM Colorado State Office.

DATES: Unless there are protests of this action, the filing of the plats described in this notice will happen on March 25, 2013.

ADDRESSES: BLM Colorado State Office, Cadastral Survey, 2850 Youngfield Street, Lakewood, Colorado 80215–7093.

FOR FURTHER INFORMATION CONTACT: Randy Bloom, Chief Cadastral Surveyor for Colorado, (303) 239–3856.

Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The plat and field notes of the dependent resurvey in Township 41 North, Range 11 East, New Mexico Principal Meridian, Colorado, were accepted on October 31, 2012.

The plat, in 2 sheets, and field notes of the dependent resurvey and survey in Township 35 North, Range 12 West, New Mexico Principal Meridian, Colorado, were accepted on November 13, 2012.

The plat, in 2 sheets, and field notes of the dependent resurvey and survey in Township 40 North, Range 11 East, New Mexico Principal Meridian, Colorado, were accepted on November 14, 2012.

The plat, in 2 sheets, and field notes of the dependent resurvey and metes-and-bounds survey in Luis Maria Baca Grant No. 4, Colorado, were accepted on November 28, 2012.

The plat, in 4 sheets, and field notes of the survey and metes-and-bounds survey in Luis Maria Baca Grant No. 4, Colorado, were accepted on November 28, 2012.

The plat and field notes of the dependent resurvey in Township 26 South, Range 73 West, Sixth Principal Meridian, Colorado, were accepted on December 11, 2012.

The plat and field notes of the dependent resurvey and survey of the NE¼ of section 31, in Township 7 South, Range 70 West, Sixth Principal Meridian, Colorado, were accepted on December 31, 2012.

The plat, in 3 sheets, and field notes of the dependent resurvey and survey in Township 9 South, Range 70 West, Sixth Principal Meridian, Colorado, were accepted on December 31, 2012.

The plat and field notes of the dependent resurvey and survey in Township 11 South, Range 69 West, Sixth Principal Meridian, Colorado, were accepted on January 10, 2013.

The plat, in 2 sheets, and field notes of the dependent resurvey in Township 11 South, Range 70 West, Sixth Principal Meridian, Colorado, were accepted on February 13, 2013.

Randy Bloom,

Chief Cadastral Surveyor for Colorado.

[FR Doc. 2013–04105 Filed 2–21–13; 8:45 am]

BILLING CODE 4310–JB–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–PVE–LWCF–12021; WBS#: PSSSLAD0004011]

Proposed Information Collection; Land and Water Conservation Fund State Assistance Program

AGENCY: National Park Service, Interior.

ACTION: Notice; request for comments.

SUMMARY: We (National Park Service, NPS) 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 October 31, 2013. 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 April 23, 2013.

ADDRESSES: Send your comments on the IC to Madonna L. Baucum, Information Collection Clearance Officer, National Park Service, 1201 I Street NW., MS 1237, Washington, DC 20005 (mail); or *madonna_baucum@nps.gov* (email). Please include "1024–0031" in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this IC, contact Elisabeth Fondriest, Recreation Grants Chief, State and Local Assistance Programs Division at 202–354–6916; or 1849 C Street NW., (2225), Washington, DC 20240 (mail); or *elisabeth_fondriest@nps.gov* (email). Please include "1024–0031" in the subject line.

SUPPLEMENTARY INFORMATION:

I. Abstract

The Land and Water Conservation Fund Act of 1965 (LWCF Act) (16 U.S.C. 460*l*–4 et seq.) was enacted to help preserve, develop, and ensure public access to outdoor recreation facilities. The LWCF Act provides funds for and authorizes Federal assistance to the States for planning, acquisition, and development of needed land and water areas and facilities. As used for this information collection, the term "States" includes the 50 States; the Commonwealths of Puerto Rico and the Northern Mariana Islands; the District of

Columbia; and the territories of Guam, the U.S. Virgin Islands, and American Samoa.

In accordance with the LWCF Act, we administer the LWCF State Assistance Program, which provides matching grants to States, and through the States to local units of government. LWCF grants are provided to States on a matching basis for up to 50 percent of the total project-related allowable costs. Grants to eligible insular areas may be for 100 percent assistance. The LWCF State Assistance Program gives maximum flexibility and responsibility to the States. States establish their own priorities and criteria and award their grant money through a competitive selection process based on a Statewide recreation plan. Payments for all projects are made to the State agency that is authorized to accept and administer funds paid for approved projects. Local units of government participate in the program as subgrantees of the State with the State retaining primary grant compliance responsibility.

The information collection requirements associated with the LWCF State Assistance Program are currently approved under five OMB control numbers, all of which expire on October 31, 2013. During our review for this renewal, we identified some other collection requirements that need OMB approval. In this revision of 1024–0031, we are including all of the information collection requirements for the LWCF State Assistance Program. If OMB approves this revision, we will discontinue OMB Control Numbers 1024–0032, 1024–0033, 1024–0034, and 1024–0047. Following are the information collection requirements for the LWCF State Assistance Program, which are discussed in detail in the Land and Water Conservation Fund State Assistance Program Federal Financial Assistance Manual, available online at *http://www.nps.gov/ncrc/programs/lwcf/manual/lwcf.pdf*:

(1) Statewide Comprehensive Outdoor Recreation Plan (SCORP). The LWCF Act requires that to be eligible for LWCF financial assistance, each State must prepare and submit to NPS for approval a new or revised SCORP at least once every 5 years. The SCORP must include:

- The name of the State agency that will have the authority to represent and act for the State;
- An evaluation of the demand for and supply of outdoor recreation resources and facilities in the State;
- A program for the implementation of the plan;
- Certification by the Governor that ample opportunity for public participation has taken place in plan development; and
- Other necessary information, as may be determined by the Secretary.

(2) Open Project Selection Process (OPSP). Each State must develop an OPSP that provides objective criteria and standards for grant selection that are explicitly based on each State's priority needs for the acquisition and development of outdoor recreation resources as identified in the SCORP. The OPSP is the connection between the SCORP and the use of LWCF grants to assist State efforts in meeting high priority outdoor recreation resource needs. To ensure continuing close ties between the SCORP and the OPSP, States must review project selection criteria each time that a new or amended SCORP is approved by the NPS. States must submit to the NPS a revised set of OPSP criteria that conform to any changes in SCORP priorities or submit an appropriate certification that no such revisions are necessary.

(3) Application. States may seek financial assistance for acquisition, development, or planning projects to be conducted under the LWCF Act. To receive a grant, States must submit an application to NPS for review and approval. Project proposals for LWCF grants comprise the following:

- *Proposal Description and Environmental Screening Form (PD/ESF).* The PD assists the applicant in developing a narrative that provides administrative and descriptive information to help the Federal decisionmaker understand the nature of the proposed project NPS is being asked to fund. The ESF indicates the resources that could be impacted by the project, enabling States and/or local project sponsors to more accurately follow an appropriate pathway for compliance with the National Environmental Policy Act (NEPA). The analysis serves as part of the Federal administrative record required by NEPA and its implementing regulations.
- *Project Agreement (Form 10–902).* This form documents the agreement between the NPS and the State for accomplishing the project. It binds the Federal Government and the State to certain obligations through its acceptance of Federal assistance, including the rules and regulations applicable to the conduct of a project under the Act and any special terms and conditions to the project established by the NPS and agreed to by the State. It obligates the United States to provide grants up to a designated amount for eligible costs; sets forth methods of costing, accounting, incurrence of costs, and similar matters. The form also establishes the project performance period and briefly describes the scope of the project. (Currently approved under OMB Control Number 1024–0033.)
- *Description and Notification Form (DNF) (Form 10–903).* The State must submit a DNF for each project. This form provides data about assisted project sites, such as location, acreages and details about improvements, as understood at the beginning of each project. (Currently approved under OMB Control Number 1024–0031.)
- *Pre-award Onsite Inspection Report.* The State must physically inspect proposed project sites prior to the award of grant funds and report on the findings. The inspection must be conducted in accord with the onsite inspection agreement between the State and NPS. See additional information under Reports, below. (Currently approved under 1024–0034.)
- *Maps and other supporting documentation.* Applicants must develop and submit two maps: one depicting the general location of the park as well as the entrance area; the other delineating the boundaries of the outdoor recreation area that will be subject to the conversion provisions of Section 6(f)(3) of the Act. Applicants should submit other documents that have a significant bearing on the project.

(4) Grant Amendments. After initial award but during the award performance period, a State or project sponsor may seek to modify the agreed-upon terms, such as the award end date, the scope of work, or the budget. NPS must review and approve such changes. States must submit an amendment request on behalf of themselves or the local sponsor, which depending on the nature of the change, could comprise the following elements: Amendment to Project Agreement, revised Standard Forms, a letter from the SLO describing the proposed changes and the impact to the project, the PD/ESF, a revised boundary map, and a revised DNF.

- *Amendment to Project Agreement (Form 10–902A).* An amendment form is required to alter the signed Project Agreement. When the amendment is signed by the NPS, it becomes part of the agreement and supersedes it in the specified matters. (Currently approved under 1024–0033.)
- *Description and Notification Form (Form 10–903).* A revised DNF may be required for changes in scope that alter the planned facility development or the acreage of the site or area to be protected under 6(f).

(5) Conversions of Use. In accordance with section 6(f)(3) of the Act and as codified in 36 CFR 59, no lands acquired or developed with LWCF

funds can be converted to other than public outdoor recreation uses unless the NPS approves. States must submit a formal request to the appropriate NPS Regional Office with documentation to substantiate that: (a) All alternatives to the conversion have been evaluated and then rejected on a sound basis; (b) required replacement land being offered as a substitute is of reasonably equivalent location and recreational usefulness as the assisted sites proposed for conversion; (c) the property proposed for substitution meets the eligibility requirements for LWCF assistance; and (d) replacement property is of at least equal fair market value as established by an appraisal developed in accordance with Federal appraisal standards. Required documentation is similar to that submitted for grant amendment requests. Additional documents include maps identifying the existing 6(f) boundary with the area to be converted, and of the proposed replacement property; and appraisal reports establishing property values. (Currently approved under OMB Control Number 1024–0047.)

(6) Proposal for a Public Facility. Project sponsors must seek NPS approval to construct public indoor or non-recreation facilities within a Section 6(f) area. In most cases, development of such facilities would constitute a conversion, but, in certain cases NPS may approve them where it can be shown that there will be a net gain in outdoor recreation benefits and enhancements for the entire park. The request comprises the PD/ESF, which is used to describe the nature of the facility, how it will support and enhance the outdoor recreation use of the site, and ownership and management; as well as a copy of a proposed revised 6(f) map indicating the location of the proposed facility.

(7) Requests for Temporary Non-Conforming Uses Within Section 6(f)(3) Areas. Project sponsors must seek NPS approval for the temporary (up to 6 months) use of an LWCF-assisted site for purposes that do not conform to the public outdoor recreation requirement. The State's proposal to NPS must include: (a) The PD/ESF (used to describe the proposed temporary use); (b) SLO recommendations; and (c) an acknowledgement by the SLO that a full conversion will result if the temporary use has not ceased after 6 months.

(8) Proposal for a Significant Change of Use. Project sponsors must seek NPS approval to change the use of an assisted site from one eligible use to another when the proposed use significantly contravenes the plans or intent for the area as they were outlined in the original LWCF application for Federal assistance; e.g., changing a site's use from passive to active recreation. The PD/ESF is used for this request.

(9) Proposal to Shelter Facilities. Project sponsors must seek NPS approval to construct new or partially or fully enclose an existing outdoor recreation facility, such as a pool or ice rink to shelter them from cold climatic conditions and thereby increase the recreational opportunities. This approval is required whether seeking to use grant funds for this purpose or not. The PD/ESF is used for this request.

(10) Extension of the 3-year Limit for Delayed Outdoor Recreation Development. Project sponsors must seek NPS approval to continue a non-recreation use beyond the 3-year limit for acquisition projects that were previously approved with delayed outdoor recreation development. The State must submit a written request and justification for such an extension to NPS before the end of the initial 3-year period. This request must include: (a) A full description of the property's current public outdoor recreation resources and the public's current ability to use the property; and (b) an update of the project sponsor's plans and schedule for developing outdoor recreation facilities on the property.

(11) Reports.

- *Onsite Inspection Reports.* States must administer a regular and continuing program of onsite inspections of projects. Onsite inspection reports are prepared for all inspections conducted and are included in the official project files maintained by the State. Progress onsite inspection reports occur during the project period and are generally combined with the annual performance report or when grant payments are made. Final onsite inspection reports must be submitted to the NPS within 90 days after the date of completing a project and prior to final reimbursement and administrative closeout. Post-completion onsite inspection reports must be completed within 5 years after the final project reimbursement and every 5 years thereafter. If there are problems, the report should include a description of the discrepancy and the corrective action to be taken. Reports indicating problems are forwarded to the NPS for review and necessary action; all other reports are maintained in State files. (Currently approved under OMB Control Number 1024–0034.)
- *Financial and Program Performance Reports.* In accordance with 43 CFR part 12 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments), grantees must monitor grant and subgrant supported activities to ensure compliance with applicable Federal requirements and that performance goals are being achieved. States must submit reports to NPS at least annually that include performance and financial information. (Currently approved under OMB Control Number 1024–0032.)

(12) Recordkeeping. In accordance with OMB Circular A–102, States must maintain financial records, supporting documents, statistical records, and all other records pertinent to a grant program for a period of 3 years after final payment on a project. The records must be retained beyond the 3 year period if audit findings have not been resolved.

(13) Request for Reimbursement/ Record of Electronic Payment. States use the Automated Standard Application for Payments (ASAP) system for drawing funds on approved grants. For planning grants, States must submit to NPS a progress report and request for reimbursement before they may request payments. Acquisition and development projects do not require prior approval, but upon completion of an electronic payment on a given date the State must concurrently (within 24 hours) submit a completed "LWCF Record of Electronic Payment" to the program offices in Washington, DC and their applicable NPS Region.

II. Data

OMB Control Number: 1024–0031.

Title: Land and Water Conservation Fund State Assistance Program, 36 CFR 59.

Service Form Numbers: 10–902, 10–902A, and 10–903.

Type of Request: Revision of a currently approved collection.

Description of Respondents: States; the Commonwealths of Puerto Rico and the Northern Mariana Islands; the District of Columbia; and the territories of Guam, U.S. Virgin Islands, and American Samoa.

Number of Respondents: 56.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: On occasion.

Activity	Number of annual responses	Completion time per response (hours)	Total annual burden hours *
Statewide Comprehensive Outdoor Recreation Plan	11	200	2,200
Open Project Selection Process	11	10	110
Applications	250	5	1,250
Grant Amendments	180	3.5	630
Conversions of Use	50	35	1,750
Public Facility Requests	8	2	16
Requests for Temporary Non-Conforming Uses	5	2	10
Request for a Significant Change of Use	2	1	2
Request to Shelter Facilities	1	1	1
Extension of 3-Year Limit for Delayed Outdoor Recreation Development	5	1	5
Onsite Inspection Reports	4,350	1.5	6,525
Financial and Program Performance Reports	660	1	660
Recordkeeping	56	40	2,240
Requests for Reimbursement/Record of Electronic Payment	325	.5	163
Totals	5,914		15,562

* rounded.

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, email address, or other personal identifying information in your comment, you should be aware that your entire comment, including your personal identifying information, may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: February 15, 2013.

Madonna L. Baucum,

Information Collection Clearance Officer, National Park Service.

[FR Doc. 2013-04119 Filed 2-21-13; 8:45 am]

BILLING CODE 4312-EH-P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS-PWR-PWRO-11651;PPPWOLYMS1]

Notice of Intent To Prepare an Environmental Impact Statement for the Wilderness Stewardship Plan, Olympic National Park, Clallam, Grays Harbor, Jefferson and Mason County, WA

AGENCY: National Park Service, Interior.

ACTION: Notice of Intent.

SUMMARY: In accordance with § 102(2)(C) of the National Environmental Policy Act of 1969 (Pub. L. 91-190) Olympic National Park is initiating the conservation planning and environmental impact analysis process required to inform consideration of alternative strategies for the future management of the Olympic Wilderness. In November 1988, Congress designated about 95% (876,669 acres) of park lands as the Olympic Wilderness. Through this planning process a Wilderness Stewardship Plan (WSP) and Environmental Impact Statement (EIS) will be developed to provide guidance and direction to meet the requirements of the Wilderness Act of 1964 and 2006 NPS Management Policies, as well as to implement actions identified in the park's 2008 General Management Plan (GMP). This process will include identifying and analyzing a range of alternatives for achieving wilderness stewardship objectives and conducting wilderness eligibility studies for areas identified in the GMP Record of Decision (2008). The WSP will identify standards, conditions, and thresholds to preserve wilderness character, protect cultural and natural resources, and adhere to legally mandated management and preservation requirements.

DATES: All comments must be postmarked or transmitted not later than April 23, 2013.

SUPPLEMENTARY INFORMATION: When Olympic National Park approved the Record of Decision for the GMP/Final EIS in August 2008 (the approved GMP is available at *http://parkplanning.nps.gov/documentsList.cfm?projectID=10233*), the final plan provided broad direction for wilderness stewardship at the park, with the overarching vision to ensure that the park's wilderness resources and character are valued, enjoyed, protected, preserved, and restored for the benefit of current and future generations. The GMP committed to development of a detailed WSP for specific management actions for wilderness based on the desired conditions and strategies prescribed in the GMP. Accordingly, the WSP will provide detailed guidance on a variety of topics including, but not limited to: wildlife management, cultural resource management, trail maintenance, trail bridges, and other necessary infrastructure in wilderness, day use and overnight use in wilderness, wilderness permitting, use of campfires, proper food storage, human waste management, stock use, group and party size, camping and camp areas, ecological restoration and rehabilitation in wilderness, scientific research activities, and commercial services.

To inform development of the WSP, the park will host a series of public scoping meetings, which are expected to occur in Clallam, Jefferson, Grays Harbor, Kitsap, and Mason Counties, and the greater Seattle area during January through March 2013. Confirmed

details on dates, times, and locations of these meetings will be published in a newsletter, announced via local and regional newspapers, and posted online on the wilderness plan Web site *http://parkplanning.nps.gov/olymwild*. The purpose of the public scoping meetings is to obtain pertinent environmental information, as well as to identify park stakeholder issues and concerns that should be addressed in the WSP. After the public scoping period is complete and the NPS has reviewed and considered all comments, a scoping report will be prepared and posted on the wilderness plan Web site; also, printed copies may be obtained by contacting the park (see contact information below).

Following the scoping phase, the wilderness planning team will develop preliminary alternatives for wilderness stewardship. The preliminary range of alternatives will be released for public review and comment prior to the park's determination or development of the agency-preferred alternative. Notification of the opportunity to review and comment on the preliminary alternatives will be published in local and regional newspapers, announced via direct mailings from the park, and posted online at the wilderness plan Web site.

Following the preliminary alternatives outreach effort, the park will undertake preparation of the Draft EIS. The complete range of stewardship alternatives (including a "no action" baseline alternative) will be identified and analyzed, potential environmental consequences of each alternative (and appropriate conservation and mitigation strategies) will be assessed, and both the "environmentally preferred" course of action and "agency preferred" alternative will be identified.

The status of the overall EIS process will be updated periodically on the wilderness plan Web site. If you would like to be added to the project mailing list, you may mail or fax your request to the address or number noted above. Please indicate if you prefer to receive a printed or compact disk copy of the Draft EIS when it is released, or if you only wish to receive a notice that the document is available for review on the wilderness plan Web site.

How to Provide Scoping Comments: To ensure your information is fully considered, please provide your response either electronically at the wilderness plan Web site *http://parkplanning.nps.gov/olymwild*, or you may mail or fax your written comments to Superintendent Sarah Creachbaum, Olympic National Park, Attn: Wilderness Stewardship Plan, 600 East Park Ave., Port Angeles, WA 98362, Fax (360) 565–3015. Written comments may also be hand-delivered at any of the public scoping meetings. Comments in any format (written or electronic) submitted by an individual or organization on behalf of another individual or organization will not be accepted.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can request in your comment that your personal identifying information be withheld from public review, the NPS cannot guarantee that we would be able to do so.

Decision Process: After the analysis of all responses and information received during the scoping period, a Draft EIS will be prepared (at this time, release of the document is expected to occur during Winter 2014). Subsequently, a Final EIS will be prepared after consideration of all comments received. Thereafter, but not sooner than 30 days after the release of the Final EIS, a Record of Decision will be prepared. Because this is a delegated EIS, the official responsible for final approval of the WSP/EIS is the Regional Director, Pacific West Region. Thereafter, the official responsible for implementation of the approved wilderness plan is the Superintendent, Olympic National Park.

Dated: February 7, 2013.

Christine S. Lehnertz,

Regional Director, Pacific West Region.

[FR Doc. 2013–04129 Filed 2–21–13; 8:45 am]

BILLING CODE 4312–FF–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–IMR–YELL–12081; PPWONRADE2, PMP00EI05.YP0000]

Winter Use Plan, Supplemental Environmental Impact Statement, Yellowstone National Park

AGENCY: National Park Service, Interior.

ACTION: Notice of Availability.

SUMMARY: Pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C), the National Park Service (NPS) announces the availability of a Final Supplemental Environmental Impact Statement (SEIS) for a Winter Use Plan for Yellowstone National Park, located in Idaho, Montana and Wyoming.

DATES: The National Park Service will execute a Record of Decision no sooner than 30 days following publication by the Environmental Protection Agency of the Notice of Availability of the Final Supplemental Environmental Impact Statement.

ADDRESSES: Information will be available for public review and comment online at *http://parkplanning.nps.gov/YELL* (click on the link to the 2012 Supplemental Winter Use Plan EIS), and at Yellowstone National Park headquarters, Mammoth Hot Springs, WY.

FOR FURTHER INFORMATION CONTACT: Wade Vagias, P.O. Box 168, Yellowstone National Park, WY 82190, telephone (307) 344–2035.

SUPPLEMENTARY INFORMATION: The Final SEIS supplements the 2011 Final Winter Use Plan/EIS. Four alternatives are considered in the SEIS. Alternative 1, the no-action alternative, would not permit public over-snow vehicle (OSV) use in Yellowstone but would allow for approved non-motorized use to continue. Alternative 1 has been identified as the environmentally preferable alternative. Alternative 2 would manage OSV use at the same levels as the interim regulations in place from the 2009/2010 winter season through the 2012/2013 winter season (318 best available technology (BAT) snowmobiles and 78 snowcoaches per day). Sylvan Pass would remain open. Alternative 3 would initially allow for the same level of use as alternative 2 (318 BAT snowmobiles and 78 snowcoaches per day), but would transition to snowcoaches only over a three-year period beginning in the 2017/2018 winter season. Upon complete transition, there would be 0 snowmobiles and up to 120 snowcoaches per day in the park, and Sylvan Pass would be closed.

Alternative 4 is the NPS preferred alternative. This alternative would manage OSV use by transportation events. A total of 110 transportation events would be allowed in the park each day. A transportation event would initially equal one snowcoach or one group of snowmobiles (average of 7 snowmobiles per group, averaged over the winter use season; groups could not exceed a maximum of 10 snowmobiles). Operators would decide whether to use their daily allocation of transportation events for snowmobiles or snowcoaches, but no more than 50 daily transportation events could come from snowmobiles. OSV use would continue to be 100 percent guided, with four transportation events per day (one per gate) of up to

5 snowmobiles each allocated for non-commercially guided access. BAT requirements for snowmobiles would remain the same as the BAT requirements in the 2011/2012 interim regulation until the 2017/2018 winter season, at which time additional sound and air emission requirements would be implemented. BAT requirements for snowcoaches would also be implemented beginning in the 2017/2018 season. If OSVs meet additional voluntary standards for air and sound emissions beyond those required for BAT, the group size of snowmobiles would be allowed to increase from an average of 7 to an average of 8 per transportation event, and snowcoaches would be allowed to increase from one to two snowcoaches per transportation event. Sylvan Pass would remain open.

More information regarding Yellowstone in the winter, including educational materials and a detailed history of winter use in Yellowstone, is available at *http://www.nps.gov/yell/planvisit/winteruse/index.htm*.

Dated: January 15, 2013.

John Wessels,

Regional Director, Intermountain Region, National Park Service.

[FR Doc. 2013–04124 Filed 2–21–13; 8:45 am]

BILLING CODE 4312–CB–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–853]

Certain Wireless Consumer Electronics Devices and Components Thereof; Commission Determination Concerning an Initial Determination Granting a Motion To Amend Complaint and Notice of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission did not determine to review the presiding administrative law judge's ("ALJ") initial determination ("ID") (Order No. 17) granting a motion of complainants Technology Properties Limited LLC and Phoenix Digital Solutions LLC of Cupertino, California and Patriot Scientific Corporation of Carlsbad, California (collectively "Complainants") to amend the Complaint and Notice of Investigation ("NOI"). The ID therefore became the determination of the Commission.

FOR FURTHER INFORMATION CONTACT: Megan M. Valentine, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 708–2301. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server at *http://www.usitc.gov*. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on August 24, 2012, based on a complaint filed by Complainants. 77 FR 51572–573 (August 24, 2012). The complaint alleges violations of Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, by reason of infringement of certain claims of U.S. Patent No. 5,809,336. The complaint further alleges the existence of a domestic industry. The Commission's notice of investigation named numerous respondents, including Huawei Technologies Co. Ltd. of Shenzhen, China ("Huawei"); Huawei North America of Plano, Texas ("Huawei North America"); Sierra Wireless, Inc. of British Columbia, Canada and Sierra Wireless America, Inc. of Carlsbad, California (collectively "Sierra"). The Office of Unfair Import Investigation was also named as a participating party. On February 4, 2013, the Commission terminated the investigation with respect to Sierra. Notice (Feb. 4, 2013); *see* Order No. 17 (Jan. 15, 2013).

On November 13, 2012, Complainants filed a motion to amend the Complaint and NOI to remove Huawei North America as a respondent and to add Huawei Device Co., Ltd., Huawei Device USA Inc., and Futurewei Technologies, Inc. (collectively, "Proposed Respondents") as respondents. On November 23, 2012, the Commission investigative staff filed a response in support of the motion. On November 26, 2012, Huawei and Proposed Respondents filed a response opposing the motion.

On January 8, 2013, the ALJ issued the subject ID, granting Complainants' motion to amend the Complaint and NOI pursuant to section 210.14(b)(1) of the Commission's Rules of Practice and Procedure (19 CFR 210.14(b)(1)). The ALJ found that good cause supported granting the motion because the public interest will be best served by the inclusion of all relevant parties in a single investigation. No petitions for review of this ID were filed.

The subject ID became the determination of the Commission on February 8, 2013, under section 210.42(h)(3) of the Commission's Rules of Practice and Procedure (19 CFR 210.42(h)(3)).

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in section 210.42 of the Commission's Rules of Practice and Procedure (19 CFR 210.42).

Issued: February 15, 2013.

By order of the Commission.

Lisa R. Barton,

Acting Secretary to the Commission.

[FR Doc. 2013–04068 Filed 2–21–13; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–781]

Certain Microprocessors, Components Thereof, and Products Containing Same; Termination of Investigation With a Finding of No Violation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review in part the final initial determination ("ID") issued by the presiding administrative law judge ("ALJ") on December 14, 2012, finding no violation of section 337 of the Tariff Act of 1930, 19 U.S.C. 1337, in this investigation. On review, the Commission has determined to reverse or vacate certain findings, and to terminate the investigation with a finding of no violation.

FOR FURTHER INFORMATION CONTACT: Sidney A. Rosenzweig, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 708–2532. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000. General

information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on July 7, 2011, based on a complaint filed by X2Y Attenuators, LLC of Erie, Pennsylvania ("X2Y"). 76 FR 39,895 (July 7, 2011). The respondents are Intel Corporation and Intel America, Inc., both of Santa Clara, California; Componentes Intel de Costa Rica S.A. of Heredia, Costa Rica; Intel Technology Sdn Bhd of Penang, Malaysia; and Intel Products (Chengdu) Ltd. of Chengdu, China (collectively, "Intel"), as well as two of Intel's customers who import computers containing accused Intel microprocessors, Apple Inc. of Cupertino, California ("Apple"); and Hewlett-Packard Company of Palo Alto, California ("HP").

Originally, X2Y asserted numerous claims from five patents. X2Y later received leave to amend the notice of investigation to add a sixth patent. Order No. 13 (Oct. 14, 2011), *not reviewed*, Nov. 14, 2011, but X2Y later moved to terminate the investigation as to three of the six patents and as to certain claims of the remaining three. Order No. 35 (June 13, 2012), *not reviewed*, June 29, 2012; Order No. 59 (Sept. 7, 2012), *not reviewed*, Oct. 4, 2012. What remains are claims 23 and 30 of U.S. Patent No. 7,609,500 ("the '500 patent"); claims 29, 31, 33, and 36 of U.S. Patent No. 7,916,444 ("the '444 patent"); and claims 20, 28–31 of U.S. Patent No. 8,023,241 ("the '241 patent").

On December 14, 2012, the presiding ALJ issued the ID. The ALJ found no violation of section 337. Based substantially on adoption of certain of respondents' claim constructions, the ALJ found that none of the patent claims were infringed and that most were invalid as indefinite under 35 U.S.C. 112(b). The ALJ rejected the respondents' other section 112 challenges, as well as their equitable defenses based upon equitable estoppel, unclean hands, and laches. The ALJ found in the alternative that if X2Y's claim constructions were adopted, all of the asserted claims would be invalid under 35 U.S.C. 102 or 103 in view of the prior art.

On December 31, 2012, X2Y filed a petition for review that challenged certain claim constructions, as well as the ALJ's findings of noninfringement and invalidity. That same day, the respondents filed a contingent petition for review arguing additional bases for no violation. On January 9, 2013, the private parties opposed each other's petitions. In addition, the Commission investigative attorney filed a narrow opposition, which recommended against Commission review of the domestic industry issues raised by the private parties.

Having examined the record of this investigation, including the ALJ's final ID, the petition for review, and the responses thereto, the Commission has determined to review the final ID in part.

With respect to the issues raised in X2Y's petition for review, the Commission has determined to review the ALJ's determination that the term "portion" in the '444 and '241 patents is indefinite under 35 U.S.C. 112(b). The Commission finds that the term is not insolubly ambiguous and affords the term its ordinary meaning. The Commission has also determined to review and reverse the ALJ's determination that all of the asserted patent claims have a "capacitance" requirement not part of the adopted claim constructions. The Commission has determined not to review the ALJ's constructions of the terms "electrode" (all asserted patents) and "perimeter edge" (the '241 patent). The Commission has determined not to review the ALJ's finding of noninfringement based upon these constructions. Regarding the ALJ's alternative invalidity findings under 35 U.S.C. 102 and 103 based upon claim constructions rejected by the ALJ and the Commission, the Commission reviews and vacates those determinations.

In view of the foregoing, the Commission, like the ALJ, therefore does not reach the written description and anticipation arguments raised by the respondents in their contingent petition, both of which rely on claim constructions inconsistent with the Commission's findings.

X2Y petitioned for review of the ALJ's determination that X2Y did not demonstrate the existence of a domestic industry under 19 U.S.C. 1337(a)(3)(C) through its licensing activities. The respondents petitioned for review of the ALJ's determination that X2Y did demonstrate the existence of a domestic industry under section 337(a)(3)(C) through the engineering, research and development activities and investments of X2Y's licensee. The Commission has determined to vacate the ALJ's determinations under section 337(a)(3)(C) without reaching the merits. The ALJ's findings under this subsection are nondispositive in view of the Commission's adopted claim constructions. Moreover, it appears that the issues would be nondispositive even under X2Y's proposed claim constructions, in view of the ALJ's findings under section 337(a)(3)(A) and (a)(3)(B).

The Commission has determined not to review the remainder of the ID. Accordingly, the Commission has terminated this investigation with a finding of no violation. The Commission's determinations will be set forth more fully in the Commission's forthcoming opinion.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in sections 210.42–46 of the Commission's Rules of Practice and Procedure (19 CFR 210.42–46).

Issued: February 15, 2013.

By order of the Commission.

Lisa R. Barton,

Acting Secretary to the Commission.

[FR Doc. 2013–04070 Filed 2–21–13; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

[Docket No. OLP 153]

Notice of Establishment of the National Commission on Forensic Science and Solicitation of Applications for Commission Membership

AGENCY: Department of Justice.

ACTION: Notice of Establishment and Solicitation of Applications for Membership.

SUMMARY: Pursuant to the Federal Advisory Committee Act, as amended, the Attorney General will be establishing the National Commission on Forensic Science. This notice establishes criteria and procedures for the selection of members.

DATES: Applications must be received on or before March 25, 2013.

ADDRESSES: All applications should be submitted to: Armando Bonilla by email at *Armando.Bonilla2@usdoj.gov* or by mail at Department of Justice, 950 Pennsylvania Ave NW., Room 4313, Washington, DC 20530.

FOR FURTHER INFORMATION CONTACT: Armando Bonilla by email at *Armando.Bonilla2@usdoj.gov* or by mail at Department of Justice, 950 Pennsylvania Ave NW., Room 4313, Washington, DC 20530.

SUPPLEMENTARY INFORMATION:

Background and Authority: Pursuant to the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), the Attorney General will be establishing the National Commission on Forensic Science ("Commission"). The Attorney General has determined that the Commission is necessary and in the public interest.

The Commission will recommend strategies for enhancing quality assurance in forensic science units. The duties of the Commission will include: (a) Recommending priorities for standards development; (b) reviewing and recommending endorsement of guidance identified or developed by subject-matter experts; (c) developing proposed guidance concerning the intersection of forensic science and the courtroom; (d) developing policy recommendations, including a uniform code of professional responsibility and minimum requirements for training, accreditation and/or certification; and (e) identifying and assessing the current and future needs of the forensic sciences to strengthen their disciplines and meet growing demand.

Structure: The Commission will be co-chaired by the Department of Justice and the National Institute of Standards and Technology. Members will be appointed by the Attorney General in consultation with the Director of the National Institute of Standards and Technology and the co-chairs of the Commission. Members will be selected to achieve a diversity of experiences, including Federal, State, and Local forensic science service providers; research scientists and academicians; Federal, State, Local prosecutors, defense attorneys and judges; law enforcement; and other relevant stakeholders. DOJ encourages submissions from diverse applicants with respect to backgrounds, professions, ethnicities, gender, and geography. The Commission shall consist of approximately 30 members. Members will serve without compensation. The Commission will generally meet four times each year at approximately three-month intervals.

Applications: Any qualified person may apply to be considered for appointment to this advisory committee. Each application should include: (1) A resume or curriculum vitae; (2) a statement of interest describing the applicant's relevant experience; (3) a letter of recommendation; and (4) a statement of support from the applicant's employer. Potential candidates may be asked to provide detailed information as necessary regarding financial interests, employment, and professional affiliations to evaluate possible sources of conflicts of interest.

The application period will remain open through March 25, 2013. The applications must be sent in one complete package, by paper or email, to Armando Bonilla (contact information above). If an application is submitted electronically, please title the subject line of the email, "NCFS Membership 2013." Other sources, in addition to the **Federal Register** notice, may be utilized in the solicitation of applications.

Dated: February 19, 2013.

Elana Tyrangiel,

Acting Assistant Attorney General, Office of Legal Policy.

[FR Doc. 2013-04140 Filed 2-21-13; 8:45 am]

BILLING CODE 4410-BB-P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Telemanagement Forum

Notice is hereby given that, on January 22, 2013, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), TeleManagement Forum ("The Forum") has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, the following parties have been added as members to this venture: 4GOSS, Gatineau, CANADA; AAPT Limited, Sydney, AUSTRALIA; ABIS & Associates, Chessington, UNITED KINGDOM; Agama Technologies, Linköping, SWEDEN; ARSAT, Buenos Aires, ARGENTINA; Boliviatel S.A., Cochabamba, BOLIVIA; Caribbean Knowledge & Learning Network (CKLN), St George's, GRENADA; ClickSoftware, Inc., Burlington, MA; CODIX USA, Atlanta, GA; Concordus Applications Inc, Sacramento, CA; Delta Partners, Dubai, UNITED ARAB EMIRATES; Digicel Fiji, Suva, FIJI; George Mason University, Fairfax, VA; i Engineering Group, Accra, GHANA; Incoma, Moscow, RUSSIA; International Software Techniques, Athens, GREECE; Japan Mobile Platform, Tokyo, JAPAN; Latin American Byte, Inc., Wickhams Cay I—Road Town, VIRGIN ISLANDS (BRITISH); LIRIS Lab (Personne Morale), Villeurbanne Cédex, FRANCE; MEASAT Broadcast Network Systems Sdn Bhd (MBNS—Astro), Bukit Jalil, MALAYSIA; MicroNova AG, Vierkirchen, GERMANY; Mobinil—The Egyptian Company for Mobile Services, Cairo, EGYPT; ms-CNS Communication Network Solutions GmbH, Vienna, AUSTRIA; Network Laboratory, Department of Information and Communication Engineering, The University of Tokyo, Tokyo, JAPAN; New Generation Management Consulting Pty Ltd, Rivonia, SOUTH AFRICA; Onesto Services Oy, Jyvaskyla, FINLAND; Orange System Group, St.Petersburg, RUSSIA; Osaka University, Osaka, JAPAN; Pictor Consulting, Danderyd, SWEDEN; Seconda Universita' di Napoli—Dipartimento di Ingegneria Industriale e dell' Informazione, Aversa (CE), ITALY; Sitronics Telecom Solutions Co. (Pvt.) Ltd, Lahore, PAKISTAN; Speedy Movil Servicios SA De CV, Delegacion Miguel Hidalgo, MEXICO; T2 Yazılım Ltd. Şti., Ankara, TURKEY; Technical University of Sofia—Department of Communications Networks, Sophia, BULGARIA; TECNOCOM, Madrid, SPAIN; Telcocell, Broomfield, CO; Telefonica Moviles SA, Lima, PERU; Terminus Technologies Pvt. Limited, Ras Al Khaimah, UNITED ARAB EMIRATES; The Open University, Milton Keynes, UNITED KINGDOM; The Rural Link, Calgary, CANADA; TMSConsult.net, Kuala Lumpur, MALAYSIA; Ultrapower Software Co., Ltd, Beijing, PEOPLE'S REPUBLIC OF CHINA; Universidad del Cauca, Cauca, COLOMBIA; Universita degli Studi di Milano, Crema, ITALY; University of Colorado School of Law, Boulder, CO; VIA FERRATA, Hasselt, BELGIUM; Videotron G.P., Montreal, CANADA; Visa, San Francisco, CA; Vulliens Group snc, Lausanne, SWITZERLAND.

The following members have changed their names: Nato C3 Agency to NATO Communications and Information Agency, The Hague, NETHERLANDS; OOCorp to ultraBASE, Miami, FL; SMI Telecoms LLC to Quindell Telecoms, London, UNITED KINGDOM; Northrop Grumman Corporation—(Information Systems, Defense Enterprise Solutions) to Northrop Grumman Systems Corporation, acting through its Northrop Grumman Information Systems Sector, Defense Technologies Division, McLean, VA; Net Servicos to Net Servicos—Membership, Chacara Santo Antonio, BRAZIL; China Communication Service Application and Solution Technology Co., Ltd. to China Conservice Software Technology Co., Ltd., Beijing, PEOPLE'S REPUBLIC OF CHINA.

The following members have withdrawn as parties to this venture: Istanbul Bilgi University, Istanbul, TURKEY; 3Consulting, Lagos, NIGERIA; A.S.T.R.I.D. SA/NV, Brussels, BELGIUM; ABHIDEEP LTD, Kidlington, UNITED KINGDOM; Aircel Limited, Gurgaon, INDIA; Al-Quds College, Amman, JORDAN; Astramind Consulting Pvt. Ltd., Pune, INDIA; BridgeWorks, Haarlem, NETHERLANDS; Broadband Infraco (Pty) Ltd, Johannesburg Gauteng, SOUTH AFRICA; BroadHop, Inc., Denver, CO; CanGo Networks Private Ltd, Chennai, INDIA; Council for Scientific and Industrial Research (CSIR), Pretoria, SOUTH AFRICA; Cycle Computing, Greenwich, CT; Deutsche Bank, New York, NY; Enghouse Networks Limited, Markham, CANADA; Focus Consulting Services bvba, Sint-Truiden, BELGIUM; iGate Patni, Fremont, CA; Inca Informatics Pvt. Ltd, Noida, INDIA; ING Bank N.V., Amsterdam, NETHERLANDS; IOQB Nordic AB, Karlskrona, SWEDEN; IS Governance and Assurance Training (Pty) Ltd., Groenkloof, SOUTH AFRICA; KPMG International, Amstelveen, NETHERLANDS; Lockheed Martin Corporation, Bethesda, MD; London School of Economics, LSE Network Economy Forum, London, UNITED KINGDOM; NASA JPL, Pasadena, CA; Network Critical, LLC, Buffalo, NY; NeuString FZE, Dubai, UNITED ARAB EMIRATES; Praesidium, Reading, UNITED KINGDOM; RAD Data Communications ltd, Tel Aviv, ISRAEL; Saudi eGovernment Program, Riyadh, SAUDI ARABIA; Selex Elsag, Genova, ITALY; SolveDirect Service Management, Inc., Sunnyvale, CA; Tango Telecom Ltd, Limerick, IRELAND; and ThomsonReuters, New York, NY.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and the Forum intends to file additional written notifications disclosing all changes in membership.

On October 21, 1988, the Forum filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on December 8, 1988 (53 FR 49615).

The last notification was filed with the Department on October 31, 2012. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on December 21, 2012 (77 FR 75663).

Patricia A. Brink,

Director of Civil Enforcement, Antitrust Division.

[FR Doc. 2013–04069 Filed 2–21–13; 8:45 am]

BILLING CODE P

DEPARTMENT OF LABOR

Public Availability of Department of Labor FY 2012 Service Contract Inventory

AGENCY: Office of the Assistant Secretary for Administration and Management.

ACTION: Notice of Public Availability of FY 2012 Service Contract Inventories.

SUMMARY: In accordance with Section 743 of Division C of the Consolidated Appropriations Act of 2010 (Pub. L. 111–117), the Department of Labor (DOL) is publishing this notice to advise the public of the availability of its FY 2012 Service Contract Inventory. This inventory provides information on service contract actions over $25,000 made in FY 2012. The information is organized by function to show how contracted resources are distributed throughout the agency. The inventory has been developed in accordance with guidance issued on November 5, 2010, by the Office of Management and Budget's Office of Federal Procurement Policy (OFPP). OFPP's guidance is available at *http://www.whitehouse.gov/sites/default/files/omb/procurement/memo/service-contract-inventories-guidance-11052010.pdf.* The Department of Labor has posted its inventory and a summary of the inventory on the agency's Web site at the following link: *http://www.dol.gov/dol/aboutdol/main.htm#inventory.*

FOR FURTHER INFORMATION CONTACT: Questions regarding the service contract inventory should be directed to Gladys M. Bailey in the DOL/Office of Acquisition Management Services at (202) 693–7244 or *bailey.gladys@dol.gov.*

Dated: February 15, 2013.

Edward C. Hugler,

Deputy Assistant Secretary for Administration and Management.

[FR Doc. 2013–04125 Filed 2–21–13; 8:45 am]

BILLING CODE 4510–23–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–81,862]

Brockway Mould, Inc., a Division of Ross International Ltd. Including Robert Lerch From BJR Trucking, Brockport, PA; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended ("Act"), 19 U.S.C. 2273, the Department of Labor (Department) issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on September 17, 2012, applicable to workers and former workers of Brockway Mould, Inc., a division of Ross International Ltd, Brockport, Pennsylvania (subject firm). The workers are engaged in activities related to the production of mould equipment primarily used to produce bottles, containers, and jars. The Department's Notice was published in the **Federal Register** on October 5, 2012 (77 FR 61030).

At the request of a company official, the Department reviewed the certification for workers of the subject firm. New information from the subject firm reflects that one employee (Robert Lerch) from BJR Trucking was employed on-site at the Brockport, Pennsylvania location of Brockway Mould, Inc. The Department has determined that this employee was sufficiently under the control of Brockway Mould, Inc. to be included in this certification.

The intent of the Department's certification is to include all workers of the subject firm who were adversely affected by a shift in the production of mould equipment for glass containers to Columbia and Hungary.

Based on these findings, the Department is amending this certification to include Robert Lerch from BJR Trucking.

The amended notice applicable to TA–W–81,862 is hereby issued as follows:

"All workers from Brockway Mould, Inc., a division of Ross International Ltd., including Robert Lerch from BJR Trucking, Brockway, Pennsylvania, who became totally or partially separated from employment on or after August 31, 2012, through September 17, 2014, and all workers in the group threatened with total or partial separation from employment on September 17, 2012 through September 17, 2014, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended."

Signed at Washington, DC this 6th day of February, 2013.

Del Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2013–04019 Filed 2–21–13; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–82,300]

UBS Financial Services, Inc., Wealth Management Americas Operations, Including On-Site Leased Workers From Leafstone, Cognizant Technology Solutions U.S. Corporation, Atika Technologies, Clairvoyant Tech Solutions, Inc., E-Solutions, Inc., d/b/a Vidhwan, Inc., IDC Technologies, Inc., Local Information Services, Inc., Mindlance, Inc., Mobius, Inc., Net2source, Inc., Pyramid Consulting, Simplion Technologies, Inc., TTS Solutions, LLC, and Ztek Consulting, Inc., Weehawken, NJ; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended ("Act"), 19 U.S.C. 2273, the Department of Labor (Department) issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on January 10, 2013, applicable to workers of UBS Financial Services, Inc., Wealth Management Americas Operations (UBS), Weehawken, New Jersey. The workers are engaged in activities related to the supply of operational support for WMA Financial Advisors and trading partners.

New information obtained by the Department revealed that workers from several leasing agencies are part of the certified worker group at UBS, Weehawken, New Jersey. These leased workers worked both on-site at UBS, Weehawken, New Jersey and remotely.

The intent of the Department's certification is to include all leased workers on-site at UBS Financial Services, Inc., Wealth Management Americas Operations (UBS), Weehawken, New Jersey, who were all adversely affected by the subject firm's acquisition of like or directly competitive services from a foreign country. The amended notice applicable to TA–W–82,300 is hereby issued as follows:

All workers of UBS Financial Services, Inc., Wealth Management Americas Operations, including on-site leased workers from Leafstone, Cognizant Technology Solutions U.S. Corporation, Atika Technologies, Clairvoyant Tech Solutions, Inc., E-Solutions, Inc., d/b/a Vidhwan, Inc., IDC Technologies, Inc., Local Information Services, Inc., Mindlance, Inc., Mobius, Inc., Net2source, Inc., Pyramid Consulting, Simplion Technologies, Inc., TTS Solutions, LLC and Ztek Consulting, Inc., Weehawken, New Jersey, who became totally or partially separated from employment on or after December 27, 2011 through January 10, 2015, and all workers in the group threatened with total or partial separation from employment on January 10, 2013 through January 10, 2015, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed at Washington, DC, this 4th day of February, 2013.

Del Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2013–04021 Filed 2–21–13; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–82,253]

Cardinal Health, Financial Shared Services West, Including On-Site Leased Workers From Aerotek, eXcel Staffing, Experis Finance (Manpower), Ricoh, USA, Dawson Creative, Mergis Group and Tailored Management, Albuquerque, NM; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended ("Act"), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on December 21, 2012, applicable to workers of Cardinal Health, Financial Shared Services West, including on-site leased workers from Aerotek, eXcel Staffing, and Experis Finance (Manpower), Albuquerque, New Mexico. The workers are engaged in activities related to the supply of back office financial services. The Department's Notice was published in the **Federal Register** on January 10, 2013 (78 FR 2289).

At the request of a company official, the Department reviewed the certification applicable to the workers and former workers of the subject firm. New information shows that workers leased from Ricoh, USA, Dawson Creative, Mergis Group, and Tailored Management were employed on-site at the Albuquerque, New Mexico location of the subject firm. The Department has determined that these workers were sufficiently under the control of Cardinal Health, Financial Shared Services West to be considered leased workers.

The intent of the Department's certification is to include all workers of the subject firm who were adversely affected by an acquisition of back office financial services from India and the Philippines. Based on these findings, the Department is amending this certification to include workers leased from Ricoh, USA, Dawson Creative, Mergis Group, and Tailored Management working on-site at the Albuquerque, New Mexico location of the subject firm.

The amended notice applicable to TA–W–82,253 is hereby issued as follows:

"All workers from Cardinal Health, Financial Shared Services West, including Aerotek, eXcel Staffing, Experis Finance (Manpower), Ricoh, USA, Dawson Creative, Mergis Group, and Tailored Management, Albuquerque, New Mexico, who became totally or partially separated from employment on or after December 13, 2011, through December 21, 2014, and all workers in the group threatened with total or partial separation from employment on date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended."

Signed at Washington, DC this 8th day of February, 2013.

Del Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2013–04020 Filed 2–21–13; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–81,776; TA–W–81,776B]

HCL America, Inc., a Subsidiary of HCL Technologies Limited, Including On-Site Leased Workers From Xerox Corporation, V Dart Inc., KRG Technologies Inc., Genuent Inc., BMC Corporation Professional Services, and Fusion Storm, Webster, NY; HCL America, Inc., a Subsidiary of HCL Technologies Limited, Wilsonville, OR; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended ("Act"), 19 U.S.C. 2273, the Department of Labor (Department) issued a Certification of

Eligibility to Apply for Worker Adjustment Assistance on August 3, 2012, applicable to the workers of HCL America Inc., a subsidiary of HCL Technologies Limited, Webster, New York (subject firm). The Department's Notice of determination was published in the **Federal Register** on August 16, 2012. Workers are engaged in activities related to the supply of application support and development services and infrastructure services (hardware/software testing) for clients.

New information revealed that workers at the Wilsonville, Oregon facility (TA–W–81,776A) operated in conjunction with workers at the Webster, New York facility (TA–W–81,776).

The intent of the Department's certification is to include all workers of HCL America, Inc., Webster, New York (TA–W–81,776) and Wilsonville, Oregon (TA–W–81,776A), who were all adversely affected by an acquisition of services from a foreign Country.

The amended notice applicable to TA–W–81,776 is hereby issued as follows:

All workers of HCL America Inc., a subsidiary of HCL Technologies Limited, including on-site leased workers from Xerox Corporation, V Dart, Inc., KRG Technologies, Inc., Genuent, Inc., BMC Corporation Professional Services, and Fusion Storm, Webster, New York (TA–W–81,776) and all workers of HCL America, Inc., a subsidiary of HCL Technologies Limited, Wilsonville, Oregon (TA–W–81,776A), who became totally or partially separated from employment on or after July 3, 2011 through August 3, 2014, and all workers in the group threatened with partial or total separation from employment on August 3, 2012 through August 3, 2014, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed at Washington, DC, this 6th day of February, 2013.

Del Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2013–04022 Filed 2–21–13; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–81,846]

Goodman Networks, Inc., Core Network Engineering (Deployment Engineering) Division Including Workers in the Core Network Engineering (Deployment Engineering) Division in Alpharetta, GA, Hunt Valley, MD, Naperville, IL, and St. Louis, MO, Who Report to Plano, TX; Notice of Revised Determination on Reconsideration

On December 12, 2012, the Department of Labor issued a Notice of Affirmative Determination Regarding Application for Reconsideration applicable to workers and former workers of Goodman Networks, Inc., Core Network Engineering (Deployment Engineering) Division, including workers in the Core Network Engineering (Deployment Engineering) Division in Alpharetta, Georgia, Hunt Valley, Maryland, Naperville, Illinois, and St. Louis, Missouri, who report to Plano, Texas (subject firm). The suffixes used in the initial determination to identify the workers have been removed; however, the subject worker group remains the same.

The workers are engaged in activities related to the supply of services of installation specification writing and maintenance customer record drawings for the installation of telecommunication equipment. The workers are not separately identifiable function or service supplied. The worker group does not include any leased workers.

Section 222(a)(1) has been met because a significant number or proportion of the workers in the subject firm have become totally or partially separated, or are threatened with such separation.

Section 222(a)(2)(A)(i) has been met because subject firm sales of installation specification writing and maintenance customer record drawings services have decreased absolutely.

Section 222(a)(2)(A)(ii) has been met because customer imports of services like or directly competitive with installation specification writing and maintenance customer record drawings services supplied by the subject firm have increased during the relevant period.

Finally, Section 222(a)(2)(A)(iii) has been met because increased customer imports contributed importantly to the worker group separations and sales declines at the subject firm.

Conclusion

After careful review of the additional facts obtained during the reconsideration investigation, I determine that workers of Goodman Networks, Inc., Core Network Engineering (Deployment Engineering) Division, including workers in the Core Network Engineering (Deployment Engineering) Division in Alpharetta, Georgia, Hunt Valley, Maryland, Naperville, Illinois, and St. Louis, Missouri, who report to Plano, Texas, who were engaged in employment related to the supply of services for installation specification writing and maintenance customer record drawings for the installation of telecommunication equipment, meet the worker group certification criteria under Section 222(a) of the Act, 19 U.S.C. 2272(a). In accordance with Section 223 of the Act, 19 U.S.C. 2273, I make the following certification:

All workers Goodman Networks, Inc., Core Network Engineering (Deployment Engineering) Division, including workers in the Core Network Engineering (Deployment Engineering) Division in Alpharetta, Georgia, Hunt Valley, Maryland, Naperville, Illinois, and St. Louis, Missouri, who report to Plano, Texas who became totally or partially separated from employment on or after July 31, 2011, through two years from the date of certification, and all workers in the group threatened with total or partial separation from employment on the date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed at Washington, DC, this 8th day of February, 2013.

Del Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2013–04025 Filed 2–21–13; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–81,575]

Wipro Limited, Wipro Technologies, Alliance Managers Including Remote Workers and Workers in Oakbrook Terrace, IL, Mountain View, CA, Atlanta, GA, Bellevue, WA, Addison, TX, and Boston, MA Who Report to East Brunswick, NJ; Notice of Revised Determination on Reconsideration

On August 23, 2012, the Department of Labor issued a Notice of Affirmative Determination Regarding Application for Reconsideration applicable to

workers and former workers of Wipro Limited, Wipro Technologies, Alliance Managers, including remote workers and workers in Oakbrook Terrace, Illinois, Mountain View, California, Atlanta, Georgia, Bellevue, Washington, Addison, Texas, and Boston Massachusetts, who report to East Brunswick, New Jersey (Wipro Limited, Wipro Technologies, Alliance Managers). The Department's Notice was published in the **Federal Register** on September 6, 2012 (77 FR 54927). The suffixes used in the initial determination to identify the workers have been removed; however, the subject worker group remains the same.

The subject workers are engaged in activities related to the supply of the supply of sales of alliance related services or products through sales employees of the subject firm and are not separately identifiable function or service supplied. The subject worker group does not include any leased workers.

Section 222(a)(1) has been met because a significant number or proportion of the workers in Wipro Limited, Wipro Technologies, Alliance Managers have become totally or partially separated, or are threatened with such separation.

Section 222(a)(2)(B) has been met because the subject firm has shifted a portion of the supply of services like or directly competitive with the supply of sales of alliance related services or products through sales employees of the subject firm, which contributed importantly to worker group separations at Wipro Limited, Wipro Technologies, Alliance Managers.

Conclusion

After careful review of the additional facts obtained during the reconsideration investigation, I determine that workers of Wipro Limited, Wipro Technologies, Alliance Managers, who were engaged in employment related to the supply of sales of alliance related services or products through sales employees of the subject firm, meet the worker group certification criteria under Section 222(a) of the Act, 19 U.S.C. 2272(a). In accordance with Section 223 of the Act, 19 U.S.C. 2273, I make the following certification:

All workers of Wipro Limited, Wipro Technologies, Alliance Managers, including remote workers and workers in Oakbrook Terrace, Illinois, Mountain View, California, Atlanta, Georgia, Bellevue, Washington, Addison, Texas, and Boston Massachusetts, who report to East Brunswick, New Jersey, who became totally or partially separated from employment on or after May 6, 2011, through two years from the date of certification, and all workers in the group threatened with total or partial separation from employment on the date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed at Washington, DC, this 11th day of February, 2013.

Del Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2013–04024 Filed 2–21–13; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–82,188; TA–W–82,188A]

PNC Bank, National Association, Retail Bank Franklin, PA; PNC Bank, National Association, Retail Bank West Chester, IL; Notice of Negative Determination Regarding Application for Reconsideration

By application received on January 25, 2013, petitioners requested administrative reconsideration of the negative determination regarding workers' eligibility to apply for Trade Adjustment Assistance (TAA) applicable to workers and former workers of PNC Bank, National Association, Retail Bank, Franklin, Pennsylvania (TA–W–82,188), and PNC Bank, National Association, Retail Bank, West Chester, Illinois (TA–W–82,188A) (hereafter referred to collectively as "the subject firm"). The negative determination was issued on December 27, 2012. The Department's Notice of Determination was published in the **Federal Register** on January 10, 2013 (78 FR 2290). The subject firm supplies banking and financial services; the subject worker groups supply call center services.

Pursuant to 29 CFR 90.18(c), administrative reconsideration may be granted under the following circumstances:

(1) If it appears on the basis of facts not previously considered that the determination complained of was erroneous;

(2) If it appears that the determination complained of was based on a mistake in the determination of facts not previously considered; or

(3) If in the opinion of the Certifying Officer, a misinterpretation of facts or of the law justified reconsideration of the decision.

The negative determination was based on the Department's findings that the subject firm did not shift to a foreign country the call center services supplied by the workers, or like or directly competitive services, or acquire such services from a foreign country; that increased imports by the subject firm of the supply of services like or directly competitive with the call center services supplied by the workers did not contribute importantly to the workers' separation, or threat of separation; and that the workers' firm is not a supplier or a downstream producer to a firm that employed a group of workers who are eligible to apply for TAA.

The request for reconsideration alleges that worker group separations at PNC's Retail Banks in Franklin, Pennsylvania and West Chester, Illinois are attributable to a shift of services to foreign countries; specifically, that the subject firm's confirmation that there were no increased imports of call center services in 2010, 2011, and during January through October 2012 is "an admission on the part of PNC that it does outsource services like or directly competitive with call center services" and that PNC Bank has advertised for a "Project Manager for PNC Bank at Tata Consultancy Services" in India. The request also states that the "other facilities within the United States" to which call center services shifted from the Franklin, Pennsylvania and West Chester, Illinois facilities are "over 90 miles away resulting in a 2-hour one-way commute."

The request for reconsideration also repeated assertions in the TAA petition, included copies of certifications applicable to workers of several banks (TA–W–82,037; TA–W–81,995; TA–W–81,832; TA–W–81,616; TA–W–80,440; TA–W–80,361; and TA–W–80,278), and referred to attachments to the TAA petition.

A careful review of previously-submitted information shows that the Department received information from the subject firm that directly addressed the allegations of a shift in the supply of call center services (and like or directly competitive services) to a foreign country (including the specific allegation of the shift of services to Canada and the United Kingdom); use of call centers outside the United States; and increased imports of call center services (and like or directly competitive services). The review also shows that the Department had considered the supplemental petition material prior to issuing the negative determination.

The petitioners did not supply facts not previously considered or provide

additional documentation indicating that there was either a mistake in the determination of facts not previously considered or a misinterpretation of facts or of the law justifying reconsideration of the initial determination. Based on these findings, the Department determines that 29 CFR 90.18(c) has not been met.

Conclusion

After review of the applications and investigative findings, I conclude that there has been no error or misinterpretation of the law or of the facts which would justify reconsideration of the Department of Labor's prior decision. Accordingly, the application is denied.

Signed at Washington, DC, this 12th day of February, 2013.

Del Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2013–04023 Filed 2–21–13; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (19 U.S.C. 2273) the Department of Labor herein presents summaries of determinations regarding eligibility to apply for trade adjustment assistance for workers by (TA–W) number issued during the period of February 4, 2013 through February 8, 2013.

In order for an affirmative determination to be made for workers of a primary firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(a) of the Act must be met.

I. Under Section 222(a)(2)(A), the following must be satisfied:

(1) a significant number or proportion of the workers in such workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) the sales or production, or both, of such firm have decreased absolutely; and

(3) One of the following must be satisfied:

(A) imports of articles or services like or directly competitive with articles produced or services supplied by such firm have increased;

(B) imports of articles like or directly competitive with articles into which one or more component parts produced by such firm are directly incorporated, have increased;

(C) imports of articles directly incorporating one or more component parts produced outside the United States that are like or directly competitive with imports of articles incorporating one or more component parts produced by such firm have increased;

(D) imports of articles like or directly competitive with articles which are produced directly using services supplied by such firm, have increased; and

(4) the increase in imports contributed importantly to such workers' separation or threat of separation and to the decline in the sales or production of such firm; or

II. Section 222(a)(2)(B) all of the following must be satisfied:

(1) a significant number or proportion of the workers in such workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) One of the following must be satisfied:

(A) there has been a shift by the workers' firm to a foreign country in the production of articles or supply of services like or directly competitive with those produced/supplied by the workers' firm;

(B) there has been an acquisition from a foreign country by the workers' firm of articles/services that are like or directly competitive with those produced/supplied by the workers' firm; and

(3) the shift/acquisition contributed importantly to the workers' separation or threat of separation.

In order for an affirmative determination to be made for adversely affected workers in public agencies and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(b) of the Act must be met.

(1) a significant number or proportion of the workers in the public agency have become totally or partially separated, or are threatened to become totally or partially separated;

(2) the public agency has acquired from a foreign country services like or directly competitive with services which are supplied by such agency; and

(3) the acquisition of services contributed importantly to such workers' separation or threat of separation.

In order for an affirmative determination to be made for adversely affected secondary workers of a firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(c) of the Act must be met.

(1) a significant number or proportion of the workers in the workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) the workers' firm is a Supplier or Downstream Producer to a firm that employed a group of workers who received a certification of eligibility under Section 222(a) of the Act, and such supply or production is related to the article or service that was the basis for such certification; and

(3) either—

(A) the workers' firm is a supplier and the component parts it supplied to the firm described in paragraph (2) accounted for at least 20 percent of the production or sales of the workers' firm; or

(B) a loss of business by the workers' firm with the firm described in paragraph (2) contributed importantly to the workers' separation or threat of separation.

In order for an affirmative determination to be made for adversely affected workers in firms identified by the International Trade Commission and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(f) of the Act must be met.

(1) the workers' firm is publicly identified by name by the International Trade Commission as a member of a domestic industry in an investigation resulting in—

(A) an affirmative determination of serious injury or threat thereof under section 202(b)(1);

(B) an affirmative determination of market disruption or threat thereof under section 421(b)(1); or

(C) an affirmative final determination of material injury or threat thereof under section 705(b)(1)(A) or 735(b)(1)(A) of the Tariff Act of 1930 (19 U.S.C. 1671d(b)(1)(A) and 1673d(b)(1)(A));

(2) the petition is filed during the 1-year period beginning on the date on which—

(A) a summary of the report submitted to the President by the International Trade Commission under section 202(f)(1) with respect to the affirmative determination described in paragraph (1)(A) is published in the **Federal Register** under section 202(f)(3); or

(B) notice of an affirmative determination described in subparagraph (1) is published in the **Federal Register**; and

(3) the workers have become totally or partially separated from the workers' firm within—

(A) the 1-year period described in paragraph (2); or

(B) notwithstanding section 223(b)(1), the 1-year period preceding the 1-year period described in paragraph (2).

Affirmative Determinations for Worker Adjustment Assistance

The following certifications have been issued. The date following the company name and location of each determination references the impact date for all workers of such determination.

The following certifications have been issued. The requirements of Section 222(a)(2)(A) (increased imports) of the Trade Act have been met.

TA–W number	Subject firm	Location	Impact date
82,105	Thorco Industries LLC, Penmac	Cassville, MO	October 19, 2011.
82,155	Juniata Fabrics, Inc., Manpower	Altoona, PA	October 26, 2011.
82,176	Rock Tenn Company, dba Rocktenn, Container Division.	Martinsville, VA	November 16, 2011.
82,302	Wausau Paper, Brainerd Converting Operation, Employment Resource Center.	Brainerd, MN	December 27, 2011.

The following certifications have been issued. The requirements of Section 222(a)(2)(B) (shift in production or services) of the Trade Act have been met.

TA–W number	Subject firm	Location	Impact date
82,305	YP Connecticut Information Services LLC, Publishing Operations, YP LLC, YP Holdings LLC , Ameritraining, Inc..	New Haven, CT	January 2, 2012.
82,320	Steelcase, Inc., The Manpower Group/Tapfin	Grand Rapids, MI	February 5, 2013.
82,320A	Steelcase, Inc., The Manpower Group/Tapfin	Kentwood, MI	January 7, 2012.
82,321	Stoneridge, Inc., Global Wiring Division, Product Cost Department and Business Development.	Warren, OH	January 1, 2012.
82,322	American Silk Mills LLC, Gerli and Company	Plains, PA	January 7, 2012.
82,324	Wells Fargo Bank, Online Customer Service Department, Email Division, Wells Fargo, etc.	Concord, CA	January 4, 2012.
82,367	Athena Health, Inc	Birmingham, AL	January 24, 2012.
82,377	Allied-Baltic Rubber, Inc., dba Zhongding USA, Anhui Zhongding Sealing Parts, Mancan, Randstad, etc.	Strasburg, OH	January 24, 2012.

The following certifications have been issued. The requirements of Section 222(c) (supplier to a firm whose workers are certified eligible to apply for TAA) of the Trade Act have been met.

TA–W number	Subject firm	Location	Impact date
82,282	Exide Technologies, Recycling Division	Laureldale, PA	December 19, 2011.

Negative Determinations for Worker Adjustment Assistance

In the following cases, the investigation revealed that the eligibility criteria for worker adjustment assistance have not been met for the reasons specified.

The investigation revealed that the criteria under paragraphs(a)(2)(A) (increased imports) and (a)(2)(B) (shift in production or services to a foreign country) of section 222 have not been met.

TA–W number	Subject firm	Location	Impact date
82,261	Genzyme Corporation, Research and Development Group, PRO-Unlimited.	Waltham, MA	
82,312	Eaton Corporation, Clutch Division, Bartech	Auburn, IN	

Determinations Terminating Investigations of Petitions for Worker Adjustment Assistance

After notice of the petitions was published in the **Federal Register** and on the Department's Web site, as required by Section 221 of the Act (19 U.S.C. 2271), the Department initiated investigations of these petitions.

The following determinations terminating investigations were issued because the petitioning groups of workers are covered by active certifications. Consequently, further investigation in these cases would serve no purpose since the petitioning group of workers cannot be covered by more than one certification at a time.

TA–W number	Subject firm	Location	Impact date
82,209	Cognizant Technology Solutions U.S. Corporation	Teaneck, NJ	
82,212	BJR Selected Trucking, Inc.	Washington, PA	
82,310	HCL America, HCL Technologies Limited	Wilsonville, OR	

The following determinations terminating investigations were issued because the petitions are the subject of ongoing investigations under petitions filed earlier covering the same petitioners.

TA–W number	Subject firm	Location	Impact date
82,359	American Silk Mills LLC, Gerli and Company	Plains, PA	

I hereby certify that the aforementioned determinations were issued during the period of February 4, 2013 through February 8, 2013. These determinations are available on the Department's Web site *tradeact/taa/taa search form.cfm* under the searchable listing of determinations or by calling the Office of Trade Adjustment Assistance toll free at 888–365–6822.

Dated: February 12, 2013.

Elliott S. Kushner

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 2013–04018 Filed 2–21–13; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Investigations Regarding Eligibility To Apply for Worker Adjustment Assistance

Petitions have been filed with the Secretary of Labor under Section 221 (a) of the Trade Act of 1974 ("the Act") and are identified in the Appendix to this notice. Upon receipt of these petitions, the Director of the Office of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to Section 221 (a) of the Act.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under Title II, Chapter 2, of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separations began or threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may request a public hearing, provided such request is filed in writing with the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than March 4, 2013.

Interested persons are invited to submit written comments regarding the subject matter of the investigations to the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than March 4, 2013.

The petitions filed in this case are available for inspection at the Office of the Director, Office of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of Labor, Room N–5428, 200 Constitution Avenue NW., Washington, DC 20210.

Signed at Washington, DC this 13th day of February 2013.

Elliott S. Kushner,

Certifying Officer, Office of Trade Adjustment Assistance.

APPENDIX

[30 TAA petitions instituted between 2/4/13 and 2/8/13]

TA–W	Subject firm (petitioners)	Location	Date of institution	Date of petition
82407	Superior Fibers (Company)	Bremen, OH	02/04/13	02/01/13
82408	Bush Industries, Inc. of PA (Company)	Erie, PA	02/04/13	02/01/13
82409	Dominion Resources Inc (State/One-Stop)	Kewaunee, WI	02/04/13	02/01/13
82410	Sabreliner Corporation (3 Locations) (Union)	Perryville, MO	02/05/13	02/04/13
82411	FPL Food LLC (Workers)	Augusta, GA	02/05/13	02/04/13
82412	The Body Shop (Workers)	Wake Forest, NC	02/05/13	01/17/13
82413	Mersen USA Bn Corp, Bay City Branch (Company).	Bay City, MI	02/05/13	02/04/13
82414	Sears Holdings (Workers)	Round Rock, TX	02/05/13	02/04/13
82415	Masco Cabinetry LLC (Company)	Atkins, VA	02/05/13	02/04/13
82416	Xerox Corporation (Workers)	Wilsonville, OR	02/05/13	02/04/13

APPENDIX—Continued

[30 TAA petitions instituted between 2/4/13 and 2/8/13]

TA–W	Subject firm (petitioners)	Location	Date of institution	Date of petition
82417	Technicolor Creative Services (Workers)	Burbank, CA	02/05/13	01/17/13
82418	Getinge Sourcing LLC (Company)	Rochester, NY	02/06/13	01/25/13
82419	ZF Marine Propulsion Systems, Miramar (Workers).	Mukilteo, WA	02/06/13	02/04/13
82420	Owens Brockway Inc. (Union)	Brockport, PA	02/06/13	01/30/13
82421	Super Media LLC (Union)	Bensalem, PA	02/06/13	02/05/13
82422	St. Marys Carbon Company (Company)	Brookville, PA	02/06/13	01/31/13
82423	Adirondack Medical Center (State/One-Stop)	Saranac Lake, NY	02/06/13	02/05/13
82424	Technicolor (State/One-Stop)	Romulus, MI	02/07/13	02/06/13
82425	IBM (State/One-Stop)	Southbury, CT	02/07/13	02/06/13
82426	Destron Fearing (State/One-Stop)	South St. Paul, MN	02/07/13	02/06/13
82427	VT Fleece Co. (Company)	Hyde Park, VT	02/07/13	02/06/13
82428	Vette Thermal Solutions (Workers)	Ontario, NY	02/07/13	02/05/13
82429	Colville Indian Precision Pine (Company)	Omak, WA	02/07/13	01/29/13
82430	Segula Technologies (State/One-Stop)	Rochester, NY	02/07/13	02/06/13
82431	Walterboro Veneer (Workers)	Walterboro, SC	02/07/13	02/06/13
82432	Flextronics (formerly Known Solectron) (Company).	Creedmoor, NC	02/08/13	02/07/13
82433	Robinson Nevada Mining Co. (Workers)	Ruth, NV	02/08/13	01/23/13
82434	Dell Inc (State/One-Stop)	Austin, TX	02/08/13	02/07/13
82435	Pfizer Inc. (Union)	Pearl River, NY	02/08/13	02/07/13
82436	Teleflex Inc. (Union)	Reading, PA	02/08/13	01/31/13

[FR Doc. 2013–04017 Filed 2–21–13; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Office of Workers' Compensation Programs

Proposed Extension of Existing Collection; Comment Request

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Office of Workers' Compensation Programs is soliciting comments concerning the proposal to extend OMB approval of the information collection: Certification by School Official (CM–981). A copy of the proposed information collection request can be obtained by contacting the office listed below in the addresses section of this Notice.

DATES: Written comments must be submitted to the office listed in the addresses section below on or before April 23, 2013.

ADDRESSES: Ms. Yoon Ferguson, U.S. Department of Labor, 200 Constitution Ave. NW., Room S–32331, Washington, DC 20210, telephone (202) 693–0701, fax (202) 693–1447, Email *Ferguson.Yoon@dol.gov*. Please use only one method of transmission for comments (mail, fax, or Email).

SUPPLEMENTARY INFORMATION:

I. Background

In order to qualify as a dependent that is eligible for black lung benefits, a child aged 18 to 23 must be a full-time student as described in the Black Lung Benefits Act, 30 U.S.C. 901 et. seq. and attending regulations 20 CFR 725.209. The CM–981 is partially completed by the appropriate district office so that the school official or registrar's office will know for which student and time period the information is being requested and is also used to verify the full-time student status. This information collection is currently approved for use through July 31, 2013.

II. Review Focus

The Department of Labor is particularly interested in comments which:

* Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

* Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

* Enhance the quality, utility and clarity of the information to be collected; and

* Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

III. Current Actions

The Department of Labor seeks the approval for the extension of this currently-approved information collection in order to determine the continued eligibility of students.

Type of Review: Extension.

Agency: Office of Workers' Compensation Programs.

Title: Certification by School Official.

OMB Number: 1240–0031.

Agency Number: CM–981.

Affected Public: Individuals or households, Not-for-profit institutions, State, Local or Tribal Government.

Total Respondents: 493.

Total Annual Responses: 493.

Estimated Time per Response: 10 minutes.

Frequency: On occasion.

Estimated Total Burden Hours: 82

Total Burden Cost (capital/startup): $0.

Total Burden Cost (operating/maintenance): $0.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: February 14, 2013.

Yoon Ferguson,

Agency Clearance Officer, Office of Workers' Compensation Programs, U.S. Department of Labor.

[FR Doc. 2013–04002 Filed 2–21–13; 8:45 am]

BILLING CODE 4510–CK–P

LEGAL SERVICES CORPORATION

Sunshine Act Meeting

DATE AND TIME: The Legal Services Corporation's Institutional Advancement Committee will meet telephonically on February 26, 2013. The meeting will commence at 4:00 p.m., Eastern Standard Time (EST), and will continue until the conclusion of the Committee's agenda.

LOCATION: F. William McCalpin Conference Center, Legal Services Corporation Headquarters, 3333 K Street NW., Washington DC 20007.

STATUS OF MEETING: Closed. Upon a vote of the Board of Directors, the meeting may be closed to the public to receive a presentation on and to discuss prospective funders for LSC's development activities and 40th anniversary celebration.

A verbatim written transcript will be made of the closed session of the Board and Institutional Advancement Committee meetings. The transcript of any portions of the closed session falling within the relevant provisions of the Government in the Sunshine Act, 5 U.S.C. 552b(c)(9) will not be available for public inspection. A copy of the General Counsel's Certification that, in his opinion, the closing is authorized by law will be available upon request.

MATTERS TO BE CONSIDERED: 1. Presentation on and discussion of prospective funders for LSC's development activities and 40th anniversary celebration

2. Consider and act on adjournment of meeting

CONTACT PERSON FOR INFORMATION: Katherine Ward, Executive Assistant to the Vice President & General Counsel, at (202) 295–1500. Questions may be sent by electronic mail to *FR_NOTICE_QUESTIONS@lsc.gov*.

ACCESSIBILITY: LSC complies with the Americans with Disabilities Act and Section 504 of the 1973 Rehabilitation Act. Upon request, meeting notices and materials will be made available in alternative formats to accommodate individuals with disabilities. Individuals who need other accommodations due to disability in order to attend the meeting in person or telephonically should contact Atitaya Rok, at (202) 295–1500 or *FR_NOTICE_QUESTIONS@lsc.gov*, at least 2 business days in advance of the meeting. If a request is made without advance notice, LSC will make every effort to accommodate the request but cannot guarantee that all requests can be fulfilled.

Dated: February 19, 2013.

Victor M. Fortuno,

Vice President & General Counsel.

[FR Doc. 2013–04214 Filed 2–20–13; 11:15 am]

BILLING CODE 7050–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2013–0037]

Tennessee Valley Authority; Notice of Receipt and Availability of Application for Renewal of Sequoyah Nuclear Plant, Units 1 and 2 Facility Operating License Nos. DPR–77 and DPR–79 for an Additional 20-Year Period

The U.S. Nuclear Regulatory Commission (NRC) has received an application, dated January 7, 2013, from Tennessee Valley Authority, filed pursuant to Section 103 of the Atomic Energy Act of 1954, as amended, and part 54 of Title 10 of the *Code of Federal Regulations* (10 CFR), to renew the operating licenses for the Sequoyah Nuclear Plant (SQN), Units 1 and 2. Renewal of the licenses would authorize the applicant to operate each facility for an additional 20-year period beyond the period specified in the respective current operating licenses. The current operating license for SQN, Unit 1 (DPR–77), expires on September 17, 2020. The current operating license for SQN, Unit 2 (DPR–79), expires on September 15, 2021. Both units are pressurized-water reactors designed by Westinghouse, and are located in Soddy-Daisy, Tennessee. The acceptability of the tendered application for docketing, and other matters, including an opportunity to request a hearing, will be the subject of subsequent **Federal Register** notices.

Copies of the application are available to the public at the NRC's Public Document Room (PDR), located at One White Flint North, t1555 Rockville Pike, Rockville, Maryland 20852, or through the internet from the NRC's Agencywide Documents Access and Management System (ADAMS) Public Electronic Reading Room under Accession Number ML130240007. The ADAMS Public Electronic Reading Room is accessible from the NRC Web site at *http://www.nrc.gov/reading-rm/adams.html*. In addition, the application is available at *http://www.nrc.gov/reactors/operating/licensing/renewal/applications.html*. Persons who do not have access to the internet or who encounter problems in accessing the documents located in ADAMS should contact the NRC's PDR reference staff at 1–800–397–4209, extension 4737, or by email to *pdr.resource@nrc.gov*.

A copy of the license renewal application for SQN, Units 1 and 2, will also be available to local residents near the site at the Chattanooga-Hamilton County Library—Northgate Branch, 520 Northgate Mall, Chattanooga, Tennessee 37415, the Chattanooga-Hamilton County Library—Downtown Branch, 1001 Broad St., Chattanooga, Tennessee 37402, and the Signal Mountain Library, 1114 James Blvd., Signal Mountain, Tennessee 37377.

Dated at Rockville, Maryland, this 8th day of February, 2013.

For The Nuclear Regulatory Commission.

John W. Lubinski,

Director, Division of License Renewal, Office of Nuclear Reactor Regulation.

[FR Doc. 2013–04113 Filed 2–21–13; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 40–8907; NRC–2013–0036]

License Amendment Request for United Nuclear Corporation, Church Rock Mill—License No. SUA–1475

AGENCY: Nuclear Regulatory Commission.

ACTION: License amendment request; opportunity to request a hearing and to petition for leave to intervene.

DATES: A request for a hearing or petition for leave to intervene must be filed by April 23, 2013.

ADDRESSES: Please refer to Docket ID [NRC–2013–0036] when contacting the NRC about the availability of information regarding this document. You may access information related to this document, which the NRC possesses and is publicly available, using any of the following methods:

- *Federal Rulemaking Web site:* GO to *http://www.regulations.gov* and search

for Docket ID NRC–2013–0036. Address questions about NRC dockets to Carol Gallagher; telephone: 301–492–3668; email: *Carol.Gallagher@nrc.gov*.

- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may access publicly available documents online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html*. To begin the search, select "ADAMS Public Documents" and then select "Begin Web-based ADAMS Search." For problems with ADAMS, please contact the NRC Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *PDR.Resource@nrc.gov*. The ADAMS Accession Number for each document referenced is provided the first time the document is referenced. The license amendment request is available under ADAMS Package Accession No. ML120170452.
- *NRC's Public Document Room (PDR):* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: Yolande Norman, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 301–415–7741; email: *Yolande.Norman@nrc.gov*.

SUPPLEMENTARY INFORMATION:

I. Introduction

The U.S. Nuclear Regulatory Commission (NRC) has received a license amendment application from United Nuclear Corporation (UNC or the licensee), dated April 17, 2012, requesting an amendment to Source Materials License Number SUA–1475 for the UNC Church Rock Mill site located in New Mexico (the UNC license) [ADAMS Accession No. ML12150A146]. On October 12, 2012, UNC submitted a three-dimensional groundwater flow model for the UNC Church Rock Mill site and adjacent downgradient areas [ADAMS Accession Nos. ML12305A320 and ML12305A324]. In a letter dated November 16, 2012, UNC requested that the NRC consider the merits of this groundwater flow model in support of their April 2012 license amendment application [ADAMS Accession No. ML12334A292]. The requested amendment seeks to revise the NRC-approved background threshold values for groundwater constituents in point of compliance wells for all three hydrostratigraphic units as it pertains to license condition 30.B of Source Materials License Number SUA–1475 and Section 5(B)(5)(a) Part 40 Appendix A of Title 10 of the *Code of Federal Regulations* (10 CFR).

An NRC administrative review, documented in a letter to UNC dated January 10, 2013, (ADAMS Accession No. ML13007A069) determined that the application and supplemental information was acceptable to begin a technical review. Please note that the NRC technical review of the groundwater flow model will be narrowly focused on supplemental information pertinent to the amendment request to revise background concentration levels. If the NRC approves the requested amendment, the approval will be documented in an amendment to NRC Source Materials License Number SUA–1475. However, before approving the proposed amendment, the NRC will need to make the findings required by the Atomic Energy Act of 1954, as amended (the Act), and the NRC's regulations. These findings will be documented in a Safety Evaluation Report and an Environmental Assessment.

II. Opportunity to Request a Hearing; Petition for Leave To Intervene

Within 60 days after the date of publication of this **Federal Register** notice, any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene with respect to the license amendment request. Requirements for hearing requests and petitions for leave to intervene are found in 10 CFR 2.309, "Hearing requests, Petitions to Intervene, Requirements for Standing, and Contentions." Interested persons should consult 10 CFR 2.309, which is available at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852 (or call the PDR at 1–800–397–4209 or 301–415–4737). The NRC's regulations are also accessible electronically from the NRC Library on the NRC's Web site at *http://www.nrc.gov/reading-rm/doc-collections/cfr/*.

Any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written petition for leave to intervene. As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding and how that interest may be affected by the results of the proceeding. The petition must provide the name, address, and telephone number of the petitioner and specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) The nature of the petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order that may be entered in the proceeding on the petitioner's interest.

A petition for leave to intervene must also include a specification of the contentions that the petitioner seeks to have litigated in the hearing. For each contention, the petitioner must provide a specific statement of the issue of law or fact to be raised or controverted, as well as a brief explanation of the basis for the contention. Additionally, the petitioner must demonstrate that the issue raised by each contention is within the scope of the proceeding and is material to the findings that the NRC must make to support the granting of a license amendment in response to the application. The petition must also include a concise statement of the alleged facts or expert opinions which support the position of the petitioner and on which the petitioner intends to rely at the hearing, together with references to the specific sources and documents on which the petitioner intends to rely. Finally, the petition must provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact, including references to specific portions of the application for amendment that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application for amendment fails to contain information on a relevant matter as required by law, the identification of each failure, and the supporting reasons for the petitioner's belief. Each contention must be one that, if proven, would entitle the petitioner to relief.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing with respect to resolution of that person's admitted contentions, including the opportunity to present evidence and to submit a cross-examination plan for cross-examination of witnesses, consistent with NRC regulations, policies, and procedures. The Atomic Safety and Licensing Board will set the time and place for any prehearing conferences and evidentiary hearings, and the appropriate notices will be provided.

Requests for hearing, petitions for leave to intervene, and motions for leave to file contentions after the deadline in 10 CFR 2.309(b) will not be entertained absent a determination by the presiding officer that the new or amended filing demonstrates good cause by satisfying the following three factors in 10 CFR 2.309(c)(1): (i) The information upon which the filing is based was not previously available; (ii) the information upon which the filing is based is materially different from information previously available; and (iii) the filing has been submitted in a timely fashion based on the availability of the subsequent information.

A State, local governmental body, Federally-recognized Indian tribe, or agency thereof may submit a petition to the Commission to participate as a party under 10 CFR 2.309(h)(1). The petition should state the nature and extent of the petitioner's interest in the proceeding. The petition should be submitted to the Commission by April 23, 2013. The petition must be filed in accordance with the filing instructions in section III of this document, and should meet the requirements for petitions for leave to intervene set forth in this section, except that under 10 CFR 2.309(h)(2) a State, local governmental body, or Federally-recognized Indian tribe, or agency thereof does not need to address the standing requirements in 10 CFR 2.309(d) if the facility is located within its boundaries. A State, local governmental body, Federally-recognized Indian tribe, or agency thereof may also have the opportunity to participate in a hearing as a nonparty under 10 CFR 2.315(c).

If a hearing is granted, any person who does not wish, or is not qualified, to become a party to the proceeding may, in the discretion of the presiding officer, be permitted to make a limited appearance pursuant to the provisions of 10 CFR 2.315(a). A person making a limited appearance may make an oral or written statement of position on the issues, but may not otherwise participate in the proceeding. A limited appearance may be made at any session of the hearing or at any prehearing conference, subject to the limits and conditions as may be imposed by the presiding officer. Persons desiring to make a limited appearance are requested to inform the Secretary of the Commission by April 23, 2013.

III. Electronic Submissions (E-Filing)

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule (72 *FR* 49139; August 28, 2007). The E-Filing process requires participants to submit and serve all adjudicatory documents over the Internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least 10 days prior to the filing deadline, the participant should contact the Office of the Secretary by email at *hearing.docket@nrc.gov*, or by telephone at 301–415–1677, to request (1) a digital identification (ID) certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a request or petition for hearing (even in instances in which the participant, or its counselor representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html*. System requirements for accessing the E-Submittal server are detailed in the NRC's "Guidance for Electronic Submission," which is available on the agency's public Web site at *http://www.nrc.gov/site-help/e-submittals.html*.

Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E-Filing system does not support unlisted software, and the NRC Meta System Help Desk will not be able to offer assistance in using unlisted software.

If a participant is electronically submitting a document to the NRC in accordance with the E-Filing rule, the participant must file the document using the NRC's online, Web-based submission form. In order to serve documents through the Electronic Information Exchange System, users will be required to install a Web browser plug-in from the NRC's Web site. Further information on the Web-based submission form, including the installation of the Web browser plug-in, is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html*.

Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with the NRC guidance available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html*. A filing is considered complete at the time the documents are submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an email notice confirming receipt of the document. The E-Filing system also distributes an email notice that provides access to the document to the NRC's Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital led certificate before a hearing request/petition for leave to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the agency's adjudicatory E-Filing system may seek assistance by contacting the NRC Meta System Help Desk through the "Contact Us" link located on the NRC's Web site at *http://www.nrc.gov/site-help/e-submittals/contact-us-eie.html* by email at *MSHOResource@nrc.gov*, or by a toll-free call at 1–866–672–7640. The NRC Meta System Help Desk is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and

Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland, 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in the NRC's electronic hearing docket which is available to the public at *http://ehd1.nrc.gov/EHD/*, unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

Dated at Rockville, Maryland this 11th day of February 2013.

For the Nuclear Regulatory Commission.

Andrew Persinko,

Deputy Director, Decommissioning and Uranium Recovery Licensing Directorate, Division of Waste Management and Environmental Protection, Office of Federal and State Materials and Environmental Management Programs.

[FR Doc. 2013–04112 Filed 2–21–13; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket No. CP2013–7; Order No. 1660]

Priority Mail Contract; Negotiated Service Agreement

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing concerning an amendment to the existing Priority Mail Contract 47 Negotiated Service Agreement. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* February 22, 2013.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov*. Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction

On February 13, 2013, the Postal Service filed notice that it has agreed to an amendment to existing Priority Mail Contract 47, which was added to the competitive product list in this docket.[1] In its Notice, the Postal Service includes Attachment A, a redacted copy of the amended portion of Priority Mail Contract 47.

The Postal Service also filed the unredacted amendment under seal. It asserts that the "supporting financial documentation and financial certification initially provided in this docket remain applicable." *Id.* at 1. It also seeks to incorporate by reference the Application for Non-Public Treatment originally filed in this docket for the protection of customer-identifying information that it has filed under seal. *Id.*

The amendment changes the definition of the term "Contract Quarters" to provide that the first contract quarter begins on January 1 rather than July 1. *Id.* Attachment A at 1. The Postal Service intends for the amendment to become effective on the day after the date that the Commission completes its review of the Notice. *Id.*

II. Notice of Filing

Interested persons may submit comments on whether the changes presented in the Postal Service's Notice are consistent with the policies of 39 U.S.C. 3632, 3633, or 3642, 39 CFR 3015.5, and 39 CFR part 3020, subpart B. Comments are due no later than February 22, 2013. The public portions of these filings can be accessed via the Commission's Web site (*http://www.prc.gov*).

James F. Callow will continue to serve as Public Representative in this docket.

III. Ordering Paragraphs

It is ordered:

1. The Commission shall reopen Docket No. CP2013–7 to consider the amendment to Priority Mail Contract 47.

2. James F. Callow will continue to serve as an officer of the Commission (Public Representative) to represent the interests of the general public in this proceeding.

3. Comments by interested persons in these proceedings are due no later than February 22, 2013.

4. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

Ruth Ann Abrams,

Acting Secretary.

[FR Doc. 2013–04042 Filed 2–21–13; 8:45 am]

BILLING CODE 7710–FW–P

[1] Notice of United States Postal Service of Amendment to Priority Mail Contract 47, With Portions Filed Under Seal, February 13, 2013 (Notice).

POSTAL SERVICE

Privacy Act of 1974; System of Records

AGENCY: Postal Service™.

ACTION: Notice of modification to existing system of records.

SUMMARY: The United States Postal Service® is proposing to modify a General Privacy Act System of Records. These updates are being made due to changes to a Web site developed for retired postal employees.

DATES: The revision will become effective without further notice on March 25, 2013, unless comments received on or before that date result in a contrary determination.

ADDRESSES: Comments may be mailed or delivered to the Records Office, United States Postal Service, 475 L'Enfant Plaza SW., Room 9431, Washington, DC 20260–2201. Copies of all written comments will be available at this address for public inspection and photocopying between 8 a.m. and 4 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Jane Eyre, Manager, Records Office, 202–268–2608.

SUPPLEMENTARY INFORMATION: This notice is in accordance with the Privacy Act requirement that agencies publish

their amended systems of records in the **Federal Register** when there is a revision, change, or addition. The Postal Service™ has reviewed this system of records and has determined that this General Privacy Act System of Records should be revised to modify Categories of Records in the System, Purpose(s), and Retention and Disposal.

I. Background

The U.S. Postal Service has a Web site called keepingposted.org available for retired USPS employees who want to stay connected with postal news, events and people. This site also provides links to other retirement resources and services.

II. Rationale for Changes to USPS Privacy Act Systems of Records

The Postal Service wants to contact postal retirees to make them aware they can find on the Keeping Posted Web site up-to-date news and information about the organization, messages to retirees from the Postmaster General, as well as continuing federal retiree benefit information.

III. Description of Changes to Systems of Records

The Postal Service is modifying one system of records listed below. Pursuant to 5 U.S.C. 552a(e)(11), interested persons are invited to submit written data, views, or arguments on this proposal. A report of the proposed modifications has been sent to Congress and to the Office of Management and Budget for their evaluation. The Postal Service does not expect this amended notice to have any adverse effect on individual privacy rights. The affected system is as follows:

USPS 100.000

SYSTEM NAME:

General Personnel Records

Accordingly, for the reasons stated, the Postal Service proposes changes in the existing system of records as follows:

USPS 100.000

SYSTEM NAME:

General Personnel Records

CATEGORIES OF RECORDS IN THE SYSTEM

* * * * *

[CHANGE TO READ]

1. *Employee, former employee, and family member information:* Name(s), Social Security Number(s), Employee Identification Number, date(s) of birth, place(s) of birth, marital status, postal assignment information, work contact information, home address(es) and phone number(s), finance number(s), duty location, and pay location.

* * * * *

[ADD NEW TEXT]

9. *Email Addresses:* personal email address(es) for retired employees are retained in a separate database and file from other current and former employee information.

PURPOSE(S):

* * * * *

[ADD NEW TEXT]

6. To provide federal benefit information to retired employees.

* * * * *

RETENTION AND DISPOSAL:

* * * * *

[ADD NEW TEXT]

7. Records to provide federal benefit information to retired employees are retained 10 years. The record may be purged at the request of the retired employee.

Stanley F. Mires,

Attorney, Legal Policy & Legislative Advice.

[FR Doc. 2013–04053 Filed 2–21–13; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Parcel Return Service Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Effective date:* February 22, 2013.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on February 15, 2013, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Parcel Return Service Contract 3 to Competitive Product List.* Documents are available at *www.prc.gov*, Docket Nos. MC2013–39, CP2013–51.

Stanley F. Mires,

Attorney, Legal Policy & Legislative Advice.

[FR Doc. 2013–04055 Filed 2–21–13; 8:45 am]

BILLING CODE 7710–12–P

RAILROAD RETIREMENT BOARD

Sunshine Act Meeting

Notice is hereby given that the Railroad Retirement Board will hold a meeting on March 6, 2013, 10:00 a.m. at the Board's meeting room on the 8th floor of its headquarters building, 844 North Rush Street, Chicago, Illinois, 60611. The agenda for this meeting follows:

Portion open to the public:

(1) Executive Committee Reports.

The person to contact for more information is Martha P. Rico, Secretary to the Board. Phone No. 312–751–4920.

Dated: February 15, 2013.

Martha P. Rico,

Secretary to the Board.

[FR Doc. 2013–04181 Filed 2–20–13; 11:15 am]

BILLING CODE 7905–01–P

OFFICE OF SCIENCE AND TECHNOLOGY POLICY

United States Government Policy for Institutional Oversight of Life Sciences Dual Use Research of Concern

AGENCY: Office of Science and Technology Policy (OSTP).

ACTION: Notice; request for comment.

SUMMARY: The United States Government (USG) invites comments on the proposed United States Government Policy for Institutional Oversight of Life Sciences Dual Use Research of Concern. The proposed Policy establishes institutional review and oversight requirements for certain categories of life sciences research at institutions that accept Federal funding for such research. These requirements are intended to address risks of dual use research not addressed under existing Federal regulations or guidelines. Requirement for compliance with this Policy, once finalized, will be incorporated by Federal funding agencies in accordance with their relevant statutory authorities, into the terms and conditions of awards with funded institutions that conduct research falling into the categories identified in the Policy. The public input provided through this Notice will inform future deliberations and issuance of a final Policy.

DATES: *Release date:* February 22, 2013. *Response date:* April 23, 2013.

ADDRESSES: Comments may be submitted electronically to: *durcpolicy@ostp.gov*. Comments may also be mailed to: Dr. Franca R. Jones, Assistant Director—Chemical and Biological Countermeasures, Office of

Science and Technology Policy, Eisenhower Executive Office Building, 1650 Pennsylvania Avenue, Washington, DC 20504. See **SUPPLEMENTARY INFORMATION** for specific information about submitting comments.

The proposed Policy is available on the U.S. Department of Health and Human Services Science Safety Security (S3) Web site: *http://www.phe.gov/s3/dualuse/Pages/default.aspx*.

FOR FURTHER INFORMATION CONTACT: Dr. Franca R. Jones, Assistant Director—Chemical and Biological Countermeasures, Office of Science and Technology Policy, Eisenhower Executive Office Building, 1650 Pennsylvania Avenue, Washington, DC 20504, *durcpolicy@ostp.gov*.

SUPPLEMENTARY INFORMATION:

Background

The United States Government (USG) invites comments on the proposed United States Government Policy for Institutional Oversight of Life Sciences Dual Use Research of Concern. The proposed Policy establishes institutional review and oversight requirements for certain categories of life sciences research at institutions that accept Federal funding for such research. These requirements are intended to address risks of dual use research not addressed under existing Federal regulations or guidelines. Requirement for compliance with this Policy, once finalized, will be incorporated by Federal funding agencies in accordance with their relevant statutory authorities, into the terms and conditions of awards with funded institutions (see Applicability, Section 6.1) that conduct research falling into the categories identified in the Policy (see Scope, Section 6.2). The public input provided through this Notice will inform future deliberations and issuance of a final Policy.

Life sciences research is essential to the scientific advances that underpin improvements in the health and safety of the public, agricultural crops and other plants, animals, the environment, materiel,[1] and national security. Life sciences research has and will continue to yield benefits, but no life sciences research comes without risk. Indeed, certain types of research that are conducted for legitimate purposes may also be utilized for harmful purposes. Such research is called "dual use research." Dual use research of concern (DURC) is a smaller subset of dual use research defined as life sciences research that, based on current understanding, can be reasonably anticipated to provide knowledge, information, products, or technologies that could be directly misapplied to pose a significant threat with broad potential consequences to public health and safety, agricultural crops and other plants, animals, the environment, materiel, or national security.

In general, there are risks associated with life sciences research, such as accidental exposure of personnel or the environment to a pathogen or toxin. Many existing and synergistic statutes, regulations, and guidelines are in place to address risks associated with biosafety, physical security, and personnel reliability.[2] Some risks relate directly to the characteristics of DURC—the risk that knowledge, information, products, or technologies resulting from the research could be used in a manner that results in harm or threatens society. DURC should be evaluated for possible risks, as well as benefits, in all these domains to ensure that risks are appropriately managed and benefits realized. This proposed Policy addresses dual use research risks holistically, that is, the risk that knowledge, information, products, or technologies generated from life sciences research could be used in a manner that results in harm.

Given these dual use risks, the USG issued, on March 29, 2012, its Policy for Oversight of Life Sciences Dual Use Research of Concern (March 29 Policy). The March 29 Policy formalized a process of regular federal review of USG-funded or -conducted research with certain high-consequence pathogens and toxins to identify DURC and implement mitigation measures, where applicable. The goal of the March 29 Policy is to preserve the benefits of life sciences research while minimizing the risk that the knowledge, information, products, or technologies generated by such research could be used in a manner that results in harm.

Funders of life sciences research and the institutions and scientists who receive those funds have a shared responsibility for oversight of DURC and for promoting the responsible conduct and communication of such research. The proposed Policy herein, United States Government Policy for Institutional Oversight of Life Sciences Dual Use Research of Concern, addresses the institutional oversight of DURC, and will operate in tandem with the March 29 Policy that requires Federal agencies to implement similar measures for oversight of DURC. Oversight includes policies, practices, and procedures that are put in place to ensure DURC is identified and risk mitigation measures are implemented, where appropriate. Institutional oversight of DURC is a critical component of a comprehensive oversight system because institutions are most familiar with the life sciences research conducted in their facilities and are in the best position to promote and strengthen the responsible conduct and communication of DURC. This proposed Policy delineates the procedures for the oversight of DURC and responsibilities of Principal Investigators, research institutions, and the USG. This proposed Policy, in addition to the March 29 Policy, emphasizes a culture of responsibility by reminding all involved parties of the shared duty to uphold the integrity of science and prevent its misuse.[3] The components outlined in the March 29 Policy and in this Policy, once finalized, will be updated, as needed, following domestic dialogue, international engagement, and input from interested communities including scientists, national security officials, and global health specialists.

Because institutional oversight of DURC will be a new undertaking for many institutions, the USG is currently limiting the requirements in this proposed Policy, as well as the March 29 Policy, to research that meets the scope in Section 6.2, which focuses on a well-defined subset of life sciences research that involves 15 agents and toxins and seven categories of experiments. The USG will solicit feedback on the experience of institutions in implementing the Policy; will evaluate the impact of DURC oversight on the life sciences research enterprise; will assess the benefits and risks of expanding the scope of the Policy to encompass additional agents and toxins and/or categories of experiments; and will update the Policy, as warranted. Research institutions are

[1] Materiel includes food, water, equipment, supplies, or material of any kind.

[2] e.g. Select Agents and Toxins Program (42 CFR part 73, 9 CFR part 121, and 7 CFR part 331); National Institutes of Health Guidelines on Research Involving Recombinant DNA Molecules (*http://oba.od.nih.gov/oba/rac/Guidelines/NIH_Guidelines.pdf*); Biosafety in Microbiological and Biomedical Laboratories 5th Edition (*http://www.cdc.gov/biosafety/publications/bmbl5/BMBL.pdf*).

[3] The March 29 Policy and this proposed Policy are complemented by other extant laws and treaties (e.g. 18 U.S.C. 175 and the Biological and Toxin Weapons Convention) that prohibit the development, production, acquisition, or stockpiling of biological agents or toxins of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes and that prohibit the use of biological agents and toxins as weapons.

encouraged to be mindful that research outside of the categories articulated in this proposed Policy may also constitute DURC. Institutions have the discretion to consider other categories of research for DURC potential and may expand their oversight to other types of life sciences research as they deem appropriate.

Finally, and importantly, research that meets the definition of DURC often increases our understanding of the biology of pathogens and makes critical contributions to the development of new treatments and diagnostics, improvements in public health surveillance, and the enhancement of emergency preparedness and response efforts. Thus, designating research as DURC should not be seen as a negative categorization, but simply an indication that the research may warrant additional oversight in order to reduce the risks that the knowledge, information, products, or technologies generated could be used in a manner that results in harm. As a general matter, designation of research as DURC does not mean that the research should not be conducted or communicated.

Nothing in this proposed Policy supersedes the Department of Health and Human Services and the United States Department of Agriculture Select Agents and Toxins Program's (SAP) statutory authority or SAP regulations as published in 42 CFR part 73, 9 CFR part 121, and 7 CFR part 331.

Specific Questions

Public comments are sought on the entirety of the proposed United States Government Policy for Institutional Oversight of Life Sciences Dual Use Research of Concern. In addition, we are seeking input on the following specific questions:

1. For institutions conducting research that involves one or more of the 15 listed agents, please describe the feasibility and anticipated burden (administrative, resources, etc.), if any, to implement the requirements of this proposed Policy. What effect, if any, do you anticipate the proposed Policy would have on your ability to support or engage in research on any of the listed pathogens or toxins?

2. Are there alternatives to the administrative requirements of this proposed Policy that could be more easily implemented by Federally-funded research institutions and that would meet the intent of this proposed Policy or the March 29 Policy? If so, please specify.

3. How could DURC oversight be usefully integrated with other existing institutional oversight processes in order to reduce duplication and any resulting excess administrative burdens on institutions?

4. For institutions who have registered an Institutional Biosafety Committee (IBC) with the NIH Office of Biotechnology Activities in accordance with the NIH Guidelines for Research Involving Recombinant DNA Molecules, is it feasible for the IBC to conduct the DURC institutional review process? What are the benefits or limitations of using IBCs in this role?

5. Should research that has undergone institutional DURC review but has been determined not to be DURC be monitored for emerging DURC issues? If so, how often should such review take place?

6. Is it feasible for a single individual, the Institutional Contact for Dual Use Research (ICDUR), to be the point of contact for all dual use research-related questions to and from the funding agency? If not, who else could help fill this role?

7. The proposed Policy calls for principal investigators (PIs) to refer any research involving one or more of the 15 listed agents to an institutional dual use research review entity (Section 7.1.A). The institutional review entity will then determine whether the research can be reasonably anticipated to produce any of the seven effects, and if so, if that research meets the definition of DURC. Is it preferable to instead require PIs to determine both whether their research involves one or more of the listed agents and also whether their research can be reasonably anticipated to produce any of the listed effects? In this scenario, the institutional dual use research review entity would then only determine whether the research meets the definition of DURC. (Note: In either scenario, the institutional dual use research review entity would also then assess the risks and benefits of the research and develop a risk management plan.)

8. Is additional guidance or explanation needed for interpreting the seven effects/categories of experiments listed in Section 6.2.2?

9. The USG is developing a document that contains the following analytic tools and guidance to assist in implementation of the Policy, once finalized:

a. Understanding and identification of DURC
b. Assessment of risks and benefits associated with DURC
c. Developing a risk mitigation plan for DURC
d. Responsibly communicating DURC
e. Training and education on DURC

Are there any additional tools or guidance documents that would be useful in implementing and complying with this Policy, once finalized?

10. We are interested in views on the optimum relationship between the March 29 Policy and this proposed Policy. Are there any conflicts or challenges posed by implementing both policies? Should research institutions review projects for DURC issues prior to proposals being submitted to a funding agency for review? (If not, funding agencies implementing the March 29 Policy will not have the benefit of input from institutional dual use review when reviewing research proposals for DURC.) If so, should the PI and/or institution designate on the grant application that such a review has taken place and indicate its findings?

11. This proposed Policy is intended to apply to projects that directly use non-attenuated forms of the 15 agents or toxins listed in Section 6.2.1 and/or use botulinum toxin at any quantity. Should the scope also include (please provide information to support your answer):

a. The use of any of the listed 15 agents or toxins in attenuated forms;

b. The use of the genes from any of the listed 15 agents or toxins (all genes? Only certain types of genetic information? If the latter, how could this be specified?);

c. *In silico* experiments (e.g. modeling experiments, bioinformatics approaches) involving the biology of the listed 15 agents or toxins;

d. Research related to the public, animal, and agricultural health impact of any of the 15 listed agents or toxins (e.g. modeling the effects of a toxin, developing new methods to deliver a vaccine, developing surveillance mechanisms for a listed agent)?

12. Is the scope of the proposed Policy appropriate? If not, why not? Should the scope be expanded to all select agents, microbes, or all life sciences? If so, why? What factors should be considered in determining the final scope of oversight? What criteria might be used to determine what research should/should not be subject to oversight? If the Policy, once finalized, were expanded to cover other types of life sciences research (i.e. beyond the 15 listed agents), what effect, if any, would it have on your ability to conduct that research?

13. The USG recognizes that there may be some institutions that choose to expand their oversight beyond the 15 agents listed in Section 6.2.1 and/or beyond the seven categories listed in Section 6.2.2 or currently have a DURC oversight process in place that is beyond the scope of this proposed Policy. For

those institutions, what additional agents or toxins, other categories of experiments, and/or other domains within the life sciences were considered for potential oversight? What impact has the expanded oversight had on the conduct and administration of the institution's life sciences research?

14. The USG recognizes that there will be situations where a PI is conducting potential DURC at multiple institutions. Should each institution have oversight of these projects and if DURC is being conducted at their institution, develop and implement risk mitigation plans? Or should the PI's primary institution have this responsibility? (Refer to "Note" following Section 7.2.K)

15. The proposed Policy requires institutions that would be subject to the proposed Policy by virtue of Federal funding, to apply the proposed Policy to non-Federally funded research. Under the proposal, institutions would submit information about DURC reviews and risk mitigation plans on non-Federally funded projects to the National Institutes of Health (which may in turn refer the results and plans to the appropriate Federal agency based upon the nature of the research). Applying the DURC policy to Federally and non-Federally funded research promotes more meaningful oversight of DURC at the institutional level and fosters uniform approaches to the responsible conduct and communication of all research that may raise DURC concerns at an institution. Is this approach feasible? If not, what is the best mechanism for structuring oversight for non-Federally funded research?

16. The proposed Policy requires institutions to maintain records of DURC reviews, risk mitigation plans, and personnel training for three years. However, grant cycles are often longer than three years and DURC communications may arise even after funding has ended. This could result in situations where important records (e.g., the risk mitigation plan) are not available at the institution for certain DURC projects. Should the record-keeping requirements for this proposed Policy be longer to allow access to records over (and beyond) the lifetime of a DURC project? What is an appropriate amount of time that institutions should be required to retain such records?

Availability of the Proposed Policy

The proposed Policy is available on the U.S. Department of Health and Human Services Science Safety Security (S3) Web site: *http://www.phe.gov/s3/dualuse/Pages/default.aspx*.

Comment Submission

Comments may be submitted electronically to: *durcpolicy@ostp.gov*. Comments may also be mailed to: Dr. Franca R. Jones, Assistant Director—Chemical and Biological Countermeasures, Office of Science and Technology Policy, Eisenhower Executive Office Building, 1650 Pennsylvania Avenue Washington, DC 20504. In your response, please provide the following information:

Date
Name/Email/Phone Number
Affiliation/Organization
City, State

General Comments

Comments to Specific Questions (1–16) Listed in Supplementary Information as Follows:
Comment to Question 1
Comment to Question 2
Comment to Question 3
Comment to Question 4
Comment to Question 5
Comment to Question 6
Comment to Question 7
Comment to Question 8
Comment to Question 9
Comment to Question 10
Comment to Question 11
Comment to Question 12
Comment to Question 13
Comment to Question 14
Comment to Question 15
Comment to Question 16

You will receive an electronic confirmation acknowledging receipt of your response, but will not receive individualized feedback on any suggestions. No basis for claims against the U.S. Government shall arise as a result of a response to this request for comment or from the Government's use of such information.

Ted Wackler,

Deputy Chief of Staff.

[FR Doc. 2013–04127 Filed 2–21–13; 8:45 am]

BILLING CODE 3270–F3–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC–30383; 812–14105]

UBS AG, et al.; Notice of Application and Temporary Order

February 15, 2013.

AGENCY: Securities and Exchange Commission ("Commission").

ACTION: Temporary order and notice of application for a permanent order under section 9(c) of the Investment Company Act of 1940 ("Act").

Summary of Application: Applicants have received a temporary order exempting them from section 9(a) of the Act, with respect to a guilty plea entered on December 19, 2012, by UBS Securities Japan Co., Ltd. (the "Settling Firm") in the U.S. District Court for the District of Connecticut ("District Court") in connection with a plea agreement between the Settling Firm and the U.S. Department of Justice ("DOJ"), until the Commission takes final action on an application for a permanent order. Applicants have requested a permanent order.

Applicants: UBS AG; UBS IB Co-Investment 2001 GP Limited ("ESC GP"); UBS Financial Services Inc. ("UBSFS"); UBS Alternative and Quantitative Investments LLC ("UBS Alternative"); UBS Willow Management, L.L.C. ("UBS Willow"), UBS Encalyptus Management, L.L.C. ("UBS Encalyptus") and UBS Juniper Management, L.L.C. ("UBS Juniper") (UBS Willow, UBS Encalyptus, and UBS Juniper are referred to collectively as "UBS Alternative Managers"); UBS Global Asset Management (Americas) Inc. ("UBS Global AM Americas"); UBS Global Asset Management (US) Inc. ("UBS Global AM US"); and the Settling Firm (each an "Applicant" and collectively, the "Applicants").[1]

Filing Date: The application was filed on December 19, 2012, and amended on January 31, 2013.

Hearing or Notification of Hearing: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving Applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on March 12, 2013, and should be accompanied by proof of service on Applicants, in the form of an affidavit, or for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Elizabeth M. Murphy, Secretary, U.S. Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090. Applicants: UBS AG, ESC–GP, and the Settling Firm, c/o UBS Investment Bank, 677 Washington Boulevard, Stamford, CT 06901; UBSFS, 1200 Harbor

[1] Applicants request that any relief granted pursuant to the application also apply to any existing or future company of which the Settling Firm is or may become an affiliated person within the meaning of section 2(a)(3) of the Act (together with the Applicants, the "Covered Persons").

Boulevard, Weehawken, NJ 07086; UBS Alternative, 677 Washington Boulevard, Stamford, CT 06901; UBS Willow, UBS Encalyptus, and UBS Juniper, 299 Park Avenue, 29th Floor, New York, NY 10171; UBS Global AM Americas, One North Wacker Drive, Chicago, IL 60606 and UBS Global AM US, 1285 Avenue of the Americas, 12th Floor, New York, NY 10019.

FOR FURTHER INFORMATION CONTACT: Steven I. Amchan, Senior Counsel, at (202) 551–6826 or Jennifer L. Sawin, Branch Chief, at (202) 551–6821 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a temporary order and a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Applicants' Representations

1. UBS AG, a company organized under the laws of Switzerland, is a Swiss-based global financial services firm. UBS AG and its subsidiaries provide global wealth management, securities and retail and commercial banking services. Each of the other Applicants is either a direct or indirect majority-owned or wholly-owned subsidiary of UBS AG. UBSFS is a corporation organized under the laws of Delaware and provides a wide range of wealth management services, including financial planning and wealth management consulting, asset-based and advisory services and transaction-based services, to clients in the United States and throughout the world. UBSFS, UBS Alternative, UBS Alternative Managers,[2] and UBS Global AM Americas are investment advisers registered under the Investment Advisers Act of 1940, and all but UBSFS currently serve as investment advisers to registered management investment companies ("Funds"). UBSFS and UBS Global AM US are registered as broker-dealers under the Securities and Exchange Act of 1934 ("Exchange Act"). UBSFS is the co-principal underwriter to various registered unit investment trusts. UBS Global AM US serves as principal underwriter to various open-end Funds. UBS AG and ESC GP provide investment advisory services to employees' securities companies ("ESCs"), as defined in section 2(a)(13) of the Act, which provide investment opportunities for highly compensated key employees, officer, directors and current consultants of UBS AG and its affiliates. Applicants (other than the Settling Firm) collectively serve as investment adviser to Funds and ESCs, principal underwriter to open-end Funds, and co-principal underwriter to registered unit investment trusts (such activities, collectively, "Fund Service Activities").

2. On December 19, 2012, the Fraud Section of the Criminal Division of the DOJ filed a one-count criminal information (the "Information") in the District Court charging wire fraud, in violation of Title 18, United States Code, Sections 1343 and 2. The Information charges that between approximately 2006 and at least 2009, the Settling Firm engaged in a scheme to defraud counterparties to interest rate derivatives trades executed on its behalf by secretly manipulating benchmark interest rates to which the profitability of those trades was tied. The Information charges that, in furtherance of this scheme, on or about February 25, 2009, the Settling Firm committed wire fraud in violation of Title 18, United States Code, Sections 1343 and 2 by transmitting, or causing the transmission of: (i) An electronic chat between a derivatives trader employed by the Settling Firm and a broker employed at an interdealer brokerage firm; (ii) a subsequent submission for the London InterBank Offered Rate for Japanese Yen ("Yen LIBOR") to Thomson Reuters; and (iii) a subsequent publication of a Yen LIBOR rate through international and interstate wires.

3. Pursuant to a plea agreement (the "Plea Agreement"), the Settling Firm entered a plea of guilty (the "Guilty Plea") on December 19, 2012, in the District Court. In the Plea Agreement, the Settling Firm agreed to a fine of $100 million and other remedies. Applicants expect that the District Court will enter a judgment against the Settling Firm (the "Judgment") that will require remedies that are materially the same as set forth in the Plea Agreement. In addition, UBS AG has entered into a non-prosecution agreement with DOJ, dated December 18, 2012 (the "Non-Prosecution Agreement"), relating to submissions of the Yen LIBOR and other benchmark interest rates. In the Non-Prosecution Agreement, UBS AG has agreed to, among other things: (i) Provide full cooperation with DOJ and any other law enforcement or government agency designated by DOJ until the conclusion of all investigations and prosecutions arising out of the conduct described in the Non-Prosecution Agreement; (ii) strengthen its internal controls as required by certain other U.S. and non-U.S. regulatory agencies that have addressed the misconduct described in the Non-Prosecution Agreement; and (iii) the payment of $500 million, which includes amounts incurred by the Settling Firm for criminal penalties arising from the Judgment. The individuals at the Settling Firm and any other Covered Person who were identified by the Settling Firm, UBS AG or any U.S. or non-U.S. regulatory or enforcement agencies as being responsible for the conduct underlying the Plea Agreement (including the conduct described in any of the Exhibits thereto) (the "Conduct") have either resigned or have been terminated.

Applicants' Legal Analysis

1. Section 9(a)(1) of the Act provides, in pertinent part, that a person may not serve or act as an investment adviser or depositor of any registered investment company or a principal underwriter for any registered open-end investment company or registered unit investment trust, if such person within ten years has been convicted of any felony or misdemeanor arising out of such person's conduct, as, among other things, a broker or dealer. Section 2(a)(10) of the Act defines the term "convicted" to include a plea of guilty. Section 9(a)(3) of the Act extends the prohibitions of section 9(a)(1) to a company any affiliated person of which has been disqualified under the provisions of section 9(a)(1). Section 2(a)(3) of the Act defines "affiliated person" to include, among others, any person directly or indirectly controlling, controlled by, or under common control with, the other person. Applicants state that the Settling Firm is an affiliated person of each of the other Applicants within the meaning of section 2(a)(3). Applicants state that the guilty plea would result in a disqualification of each Applicant for ten years under section 9(a) of the Act because the Settling Fund would become the subject of a conviction described in 9(a)(1).

2. Section 9(c) of the Act provides that the Commission shall grant an application for exemption from the disqualification provisions of section 9(a) if it is established that these provisions, as applied to Applicants, are unduly or disproportionately severe or that the Applicants' conduct has been such as not to make it against the public interest or the protection of investors to grant the exemption. Applicants have filed an application pursuant to section 9(c) seeking temporary and permanent

[2] UBS Alternative is also managing member of the UBS Alternative Managers.

orders exempting the Applicants and the other Covered Persons from the disqualification provisions of section 9(a) of the Act. On December 19, 2012, Applicants received a temporary conditional order from the Commission exempting them from section 9(a) of the Act with respect to the Guilty Plea from December 19, 2012, until the Commission takes final action on an application for a permanent order or, if earlier, February 15, 2013.

3. Applicants believe they meet the standard for exemption specified in section 9(c). Applicants state that the prohibitions of section 9(a) as applied to them would be unduly and disproportionately severe and that the conduct of Applicants has been such as not to make it against the public interest or the protection of investors to grant the exemption from section 9(a).

4. Applicants assert that the Conduct did not involve any of the Applicants' Fund Service Activities, and that the Settling Firm does not serve in any of the capacities described in section 9(a) of the Act. Additionally, Applicants assert that the Conduct did not involve any Fund or ESC with respect to which the Applicants provided Fund Service Activities, or the assets of any such Fund or ESC. Applicants further assert that (i) none of the current or former directors, officers or employees of the Applicants (other than certain personnel of the Settling Firm and UBS AG who were not involved in any of the Applicants' Fund Service Activities) had any knowledge of, or had any involvement in, the Conduct; (ii) no former employee of the Settling Firm or any other Covered Person who previously has been or who subsequently may be identified by the Settling Firm, UBS AG or any U.S. or non-U.S. regulatory or enforcement agencies as having been responsible for the Conduct will be an officer, director, or employee of any Applicant or any other Covered Person; (iii) those identified employees have had no, and will not have any future, involvement in the Covered Persons' activities in any capacity described in section 9(a) of the Act; and (iv) because the personnel of the Applicants (other than certain personnel of the Settling Firm and UBS AG who were not involved in any of the Applicants' Fund Service Activities) did not have any involvement in the Conduct, shareholders of those RICs and ESCs were not affected any differently than if those RICs and ESCs had received services from any other non-affiliated investment adviser or principal underwriter. Applicants have agreed that neither they nor any of the other Covered Persons will employ any of the former employees of the Settling Firm or any other Covered Person who previously have been or who subsequently may be identified by the Settling Firm, UBS AG or any U.S. or non-U.S. regulatory or enforcement agency as having been responsible for the Conduct in any capacity without first making a further application to the Commission pursuant to section 9(c).

5. Applicants further represent that the inability of the Applicants (other than the Settling Firm) to continue providing Fund Service Activities would result in potential hardships for both the Funds and their shareholders. Applicants state that they will distribute written materials, including an offer to meet in person to discuss the materials, to the board of directors of each Fund, including the directors who are not "interested persons," as defined in section 2(a)(19) of the Act, of such Fund, and their independent legal counsel as defined in rule 0–1(a)(6) under the Act, if any, regarding the Guilty Plea, any impact on the Funds, and the application. The Applicants will provide the Funds with all information concerning the Plea Agreement and the application that is necessary for the Funds to fulfill their disclosure and other obligations under the federal securities laws.

6. Applicants also state that, if they (other than the Settling Firm) were barred from providing Fund Service Activities to Funds, the effect on their businesses and employees would be severe. The Applicants state that they have committed substantial capital and resources to establishing expertise in advising and sub-advising Funds and in support of their principal underwriting business.

7. Applicants state that several Applicants and certain of their affiliates have previously received orders under section 9(c), as described in greater detail in the application.

Applicants' Conditions

Applicants agree that any order granted by the Commission pursuant to the application will be subject to the following conditions:

1. Any temporary exemption granted pursuant to the application shall be without prejudice to, and shall not limit the Commission's rights in any manner with respect to, any Commission investigation of, or administrative proceedings involving or against, Covered Persons, including, without limitation, the consideration by the Commission of a permanent exemption from section 9(a) of the Act requested pursuant to the application or the revocation or removal of any temporary exemptions granted under the Act in connection with the application.

2. Neither the Applicants nor any of the other Covered Persons will employ any of the former employees of the Settling Firm or any other Covered Person who previously have been or who subsequently may be identified by the Settling Firm, UBS AG or any U.S. or non-U.S. regulatory or enforcement agency as having been responsible for the Conduct in any capacity without first making a further application to the Commission pursuant to section 9(c).

Temporary Order

The Commission has considered the matter and finds that Applicants have made the necessary showing to justify granting a temporary exemption.

Accordingly,

It is hereby ordered, pursuant to section 9(c) of the Act, that the Applicants and the other Covered Persons are granted a temporary exemption from the provisions of section 9(a), effective forthwith, solely with respect to the Guilty Plea, subject to the conditions in the application, until the date the Commission takes final action on their application for a permanent order.

By the Commission.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2013–04013 Filed 2–21–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68933; File No. SR–CBOE–2013–020]

Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Renew an Existing Pilot Program for an Additional Fourteen Months

February 14, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on February 7, 2013, Chicago Board Options Exchange, Incorporated (the "Exchange" or "CBOE") 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

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

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 renew an existing pilot program for an additional fourteen months. Under the existing pilot program, the Exchange is permitted to list P.M.-settled options on broad-based indexes that expire on: (a) any Friday of the month, other than the third Friday-of-the-month ("End of Week Expirations" or "EOWs"), and (b) the last trading day of the month ("End of Month Expirations" or "EOMs"). The text of the proposed rule change is provided below.

(additions are italicized; deletions are [bracketed])

* * * * *

Chicago Board Options Exchange, Incorporated Rules

* * * * *

Rule 24.9. Terms of Index Option Contracts

(a)–(d) No change.

(e) *End of Week/End of Month Expirations Pilot Program ("EOW/EOM Pilot Program")*

(1) End of Week ("EOW") Expirations. The Exchange may open for trading EOWs on any broad-based index eligible for regular options trading to expire on any Friday of the month, other than the third Friday-of-the-month. EOWs shall be subject to all provisions of this Rule and treated the same as options on the same underlying index that expire on the Saturday following the third Friday of the month; provided, however, that EOWs shall be P.M.-settled.

(2) End of Month ("EOM") Expirations. The Exchange may open for trading EOMs on any broad-based index eligible for regular options trading to expire on last trading day of the month. EOMs shall be subject to all provisions of this Rule and treated the same as options on the same underlying index that expire on the Saturday following the third Friday of the month; provided, however, that EOMs shall be P.M.-settled.

(3) Duration of EOW/EOM Pilot Program. The EOW/EOM Pilot Program shall be through [February 14, 2013] *April 14, 2014*.

(4) EOW/EOM Trading Hours on the Last Trading Day. On the last trading day, transactions in expiring EOWs and EOMs may be effected on the Exchange between the hours of 8:30 a.m. (Chicago time) and 3:00 p.m. (Chicago time). This subsection (4) applies to all outstanding expiring EOW and EOM Expirations listed on or before May 6, 2011 and all EOWs and EOMs listed thereafter under the EOW/EOM Pilot Program.

* * * Interpretations and Policies:

.01–.13 No change

* * * * *

The text of the proposed rule change is also available on the Exchange's Web site (*http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx*), at the Exchange's Office of the Secretary, and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the 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

On September 14, 2010, the Commission approved a CBOE proposal to establish a pilot program under which the Exchange is permitted to list P.M.-settled options on broad-based indexes to expire on (a) any Friday of the month, other than the third Friday-of-the-month, and (b) the last trading day of the month.[3] Under the terms of the End of Week/End of Month Expirations Pilot Program ("Program"), EOWs and EOMs are permitted on any broad-based index that is eligible for regular options trading. EOWs and EOMs are cash-settled and have European-style exercise. The proposal became effective on a pilot basis for a period of fourteen months that commenced on the next full month after approval was received to establish the Program[4] and was subsequently extended.[5] The Program is scheduled to expire on February 14, 2013. The Exchange believes that the Program has been successful and well received by its Trading Permit Holders and the investing public during that [sic] the time that it has been in operation. The Exchange hereby proposes to extend the Program for an additional fourteen months, so that it will expire on April 14, 2014. This proposal does not request any other changes to the Program.

Pursuant to the order approving the establishment of the Program, two months prior to the conclusion of the pilot period, CBOE is required to submit an annual report to the Commission, which addresses the following areas: Analysis of Volume & Open Interest, Monthly Analysis of EOW & EOM Trading Patterns and Provisional Analysis of Index Price Volatility. The Exchange has submitted, under separate cover, the annual report in connection with the present proposed rule change. Confidential treatment under the Freedom of Information Act is requested regarding the annual report.

If, in the future, the Exchange proposes an additional extension of the Program, or should the Exchange propose to make the Program permanent (which the Exchange currently intends to do), the Exchange will submit an annual report (addressing the same areas referenced above and consistent with the order approving the establishment of the Program) to the Commission at least two months prior to the expiration date of the Program. The annual report will be provided to the Commission on a confidential basis. Any positions established under the Program will not be impacted by the expiration of the Program.

The Exchange believes there is sufficient investor interest and demand in the Program to warrant its extension. The Exchange believes that the Program has provided investors with additional means of managing their risk exposures and carrying out their investment objectives. Furthermore, the Exchange has not experienced any adverse market effects with respect to the Program.

The Exchange believes that the proposed extension of the Program will not have an adverse impact on capacity.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the "Act") and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[6] Specifically, the Exchange believes the proposed rule change is consistent with the Section

[3] *See* Securities Exchange Act Release No. 62911 (September 14, 2010), 75 FR 57539 (September 21, 2010) (order approving SR–CBOE–2009–075).

[4] *Id.*

[5] *See* Securities Exchange Act Release No. 65741 (November 14, 2011), 76 FR 72016 (November 21, 2011) (immediately effective rule change extending the Program through February 14, 2013).

[6] 15 U.S.C. 78f(b).

6(h)(5) [7] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitation transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(h)(5) [8] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the Exchange believes that the Program has been successful to date and states that it has not encountered any problems with the Program. The proposed rule change allows for an extension of the Program for the benefit of market participants. Additionally, the Exchange believes that there is demand for the expirations offered under the Program and believes that that EOWs and EOMs will continue to provide the investing public and other market participants increased opportunities to better manage their risk exposure.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Specifically, the Exchange believes that, by extending the expiration of the Program, the proposed rule change will allow for further analysis of the Program and a determination of how the Program shall be structured in the future. In doing so, the proposed rule change will also serve to promote regulatory clarity and consistency, thereby reducing burdens on the marketplace and facilitating investor protection.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

[7] 15 U.S.C. 78f(b)(5).

[8] *Id.*

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [9] and Rule 19b–4(f)(6) thereunder.[10] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [11] and Rule 19b–4(f)(6)(iii) thereunder.[12]

The Exchange has asked the Commission to waive the 30-day operative delay.[13] The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because it will allow the Program to continue uninterrupted. Accordingly, the Commission designates the proposal operative upon filing.[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:

[9] 15 U.S.C. 78s(b)(3)(A)(iii).

[10] 17 CFR 240.19b–4(f)(6).

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f)(6)(iii). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[13] 17 CFR 240.19b–4(f)(6)(iii).

[14] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–CBOE–2013–020 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2013–020. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2013–020 and should be submitted on or before March 15, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–04014 Filed 2–21–13; 8:45 am]

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[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68944; File No. SR–CBOE–2013–019]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing of a Proposed Rule Change Relating to Market-Maker Continuous Quoting Obligations

February 15, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on February 4, 2013, Chicago Board Options Exchange, Incorporated (the "Exchange" or "CBOE") 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 amend its Rules relating to Market-Maker continuous quoting obligations. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx*), at the Exchange's Office of the Secretary, and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the 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 add language to Exchange Rules 8.7, 8.13, 8.15A, 8.85, and 8.93 to exclude intra-day add-on series ("Intra-day Adds") on the day during which such series are added for trading from Market-Makers' [3] quoting obligations.[4] Additionally, the proposed rule change clarifies in Rules 8.13, 8.15B, and 8.87 that Preferred Market-Makers ("PMMs")[5], Lead Market-Makers ("LMMs")[6], and Designated Primary Market-Makers ("DPMs")[7] and electronic DPMs ("e-DPMs")[8], respectively (Market-Makers, PMMs, LMMs, DPMs and e-DPMs are collectively referred to in this filing as "Market-Makers" unless the context provides otherwise) may still receive participation entitlements pursuant to those Rules in all Intra-day Adds on the day during which such series are added for trading in which they are quoting provided that Market-Maker meets all other entitlement requirements as set forth in the applicable rule.

Intra-Adds are series that are be [sic] added to the Exchange system after the opening of the Exchange. These series may be added throughout the trading day which differs from other newly added series which are only added prior to the beginning of trading. In the event a series is added after the open of trading on the Exchange, the Exchange, in real time, disseminates a message to the Exchange application program interfaces, which any Exchange Trading Permit Holder ("TPH") can receive, that a new series has been listed. In addition, there is a corresponding product state change message disseminated when the new series moves from pre-opening rotation to an open state. Any Market-Maker with an appointment in the class in which the series was added is permitted to quote in the new series.

Currently, Exchange Rules 8.7, 8.13, 8.15A, 8.85, and 8.93 impose certain obligations on Market-Makers, PMMs, LMMs, DPMs, and e-DPMs, respectively, including obligations to provide continuous electronic quotes. Upon implementation of the recent rule change to Market-Maker's continuous quoting obligations,[9] Rules 8.7, 8.13, 8.15A, 8.85, and 8.93 will require that Market-Makers generally maintain continuous electronic quotes as follows:

- Rule 8.7(d)(ii)(B) will require that Market-Makers provide continuous electronic quotes when quoting in a particular class on a given trading day in 60% of the non-adjusted option series of the Market-Maker's appointed class that have a time to expiration of less than nine months;
- Rule 8.13(d) will require that PMMs provide continuous electronic quotes when the Exchange is open for trading in at least the lesser of 99% or 100% minus one call-put pair [10] of the non-adjusted option series that have an expiration time of less than nine months

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] See Exchange Rule 8.1, which defines a "Market-Maker" as "an individual Trading Permit Holder or a TPH organization that is registered with the Exchange for the purpose of making transactions as a dealer specialist on the Exchange. * * *"

[4] The Exchange recently proposed to, among other things, (a) reduce to 90% the percentage of time for which a Market-Maker is required to provide electronic quotes in an appointed option class on a given trading day and (b) to increase to the lesser of 99% or 100% minus one call-put pair the percentage of series in which Lead Market-Makers, Designated Primary Market-Makers and Electronic Designated Primary Market-Makers must provide continuous electronic quotes in their appointed classes, which proposed rule change was immediately effective upon filing. *See* Securities Exchange Act Release No. 67410 (July 11, 2012), 77 FR 42040 (July 17, 2012) (SR–CBOE–2012–064); *see also* Securities Exchange Act Release No. 67644 (August 13, 2012), 77 FR 49846 (August 17, 2012) (SR–CBOE–2012–077) (immediately effective rule change to delay the implementation date of the proposed rule change in rule filing SR–CBOE–2012–064 and to indicate that the Exchange will announce the new implementation date by Regulatory Circular); *see also* Securities and Exchange Act Release No. 68218 (November 13, 2012), 77 FR 69667 (November 20, 2012) (SR–CBOE–2012–106) (immediately effective rule change to further delay the implementation date of the proposed rule change in rule filing SR–CBOE–2012–064 and to indicate that the Exchange will announce the new implement date by Regulatory Circular). In addition, the Exchange recently filed an effective rule proposing to exclude series that have a time to expiration of nine months or more from Exchange Preferred Market Maker's continuous quoting obligation. *See* Securities and Exchange Act Release No. 68691 (January 18, 2013), 78 FR 5548 (January 25, 2013)(SR–CBOE–2013–008). The rule text in this filing includes the effective (but not implemented) changes to the rule text made by rule filings SR–CBOE–2012–064 and SR–CBOE–2013–008. The Exchange expects to implement the effective rule changes to quoting obligations in filings SR–CBOE–2012–064 and SR–CBOE–2013–008 in conjunction with the implementation of the proposed rule change in this filing.

[5] See Exchange Rule 8.13, which defines a "Preferred Market-Maker" as a specific Market-Maker designated by a Trading Permit Holder to receive that Trading Permit Holder's orders in a specific class.

[6] See Exchange Rule 8.15A, which defines a "Lead Market-Maker" as a Market-Maker in good standing appointed by the Exchange "in an option class for which a DPM has not been appointed * * *."

[7] See Exchange Rule 8.80, which defines a "Designated Primary Market-Maker" as a "TPH organization that is approved by the Exchange to function in allocated securities as a Market-Maker * * * and is subject to the obligations under Rule 8.85 * * *."

[8] See Exchange Rule 8.92, which defines an "Electronic DPM" as a "TPH Organization that is approved by the Exchange to remotely function in allocated option classes as a DPM and to fulfill certain obligations required of DPMs * * *."

[9] *See supra* note 4.

[10] A "call-put pair" is one call and one put that cover the same underlying instrument and have the same expiration date and exercise price.

of each class for which it receives Preferred Market-Maker orders;

• Rule 8.15A(b)(i) will require that LMMs provide continuous electronic quotes when the Exchange is open for trading in at least the lesser of 99% or 100% minus one call-put pair of the non-adjusted option series within their assigned classes;

• Rule 8.85(a)(i) will require DPMs to provide continuous electronic quotes when the Exchange is open for trading in at least the lesser of 99% or 100% minus one call-put pair of the non-adjusted option series of each class allocated to it; and

• Rule 8.93(i) will require e-DPMs to provide continuous electronic quotes when the Exchange is open for trading in at least the lesser of 99% or 100% minus one call-put pair of the non-adjusted option series of each allocated class.

Exchange Rules 8.13, 8.15B, and 8.87 provide that PMMs, LMMs, and DPMs, and e-DPMs, respectively, generally will receive the following participation entitlements in their assigned classes when quoting at the best price if they satisfy their obligations and other conditions set forth in the rules:

• Rule 8.13(c) provides that a PMM will receive a participation entitlement of 40% when there are two or more Market-Makers quoting at the best price on the Exchange and 50% when there is only one other Market-Maker quoting at the best price on the Exchange;

• Rule 8.15B(c) provides that an LMM will receive a participation entitlement of 50% when there is one Market-Maker also quoting at the best price on the Exchange, 40% when there are two Market-Makers also quoting at the best price on the Exchange, and 30% when there are three or more Market-Makers also quoting at the best price on the Exchange;[11] and

• Rule 8.87(b)(2) provides that the collective DPM/e-DPM participation entitlement will be 50% when there is one Market-Maker also quoting at the best price on the Exchange, 40% when there are two Market-Makers also quoting at the best price on the Exchange, and 30% when there are three or more Market-Makers also quoting at the best price on the Exchange.[12]

Once the Exchange implements the rule change referenced above, Exchange Rule 1.1(ccc) will provide that a Market-Maker who is obligated by Exchange Rules to provide continuous electronic quotes will be deemed to have provided "continuous electronic quotes" if the Market-Maker provides electronic two-sided quotes for 90% of the time that the Market-Maker is required to provide electronic quotes in an appointed option class on a given trading day. The rule will still provide that if a technical failure or limitation of a system of the Exchange prevents the Market-Maker from maintaining, or from communicating to the Exchange, timely and accurate electronic quotes in a class, the duration of such failure will not be considered in determining whether the Market-Maker has satisfied the 90% quoting standard with respect to that option class. In addition, the rule will still provide that the Exchange may consider other exceptions to this continuous electronic quote obligation based on demonstrated legal or regulatory requirements or other mitigating circumstances.[13]

In order to comply with their continuous quoting obligations, Exchange Market-Makers have automated systems in place that use complex calculations based on a variety of market factors to compute quotes in their appointed classes and transmit these quotes to the Exchange's Hybrid Trading System (the "System").[14] Their system computations also factor in their market risk models. Several Market-Makers have communicated to the Exchange that their trading systems do not automatically produce continuous quotes in Intra-day Adds on the trading day during which those series are added. They further indicated that the only way they could quote in these series on the trading day during which they were added would be to completely shut down and restart their systems. As a result, it is the Exchange's understanding that several Market-Makers do not currently quote Intra-day Adds during the trading day on which such series are added (although the Market-Makers generally do quote these series upon the opening of the next trading day, assuming those series are still listed on the Exchange). The required work on Market-Makers' systems to quote Intra-day Adds, as further communicated to the Exchange, would be significant and costly.

Intra-day Adds make it extremely difficult for Market-Makers to comply with their obligation to quote in a substantial percentage of series in their appointed classes during a trading day on which Intra-day Adds are added in those classes. For example, if there are 1,000 series listed in an LMM's appointed class and the LMM is quoting in 900 of these series, the LMM is in compliance with the current minimum requirement to quote in 90% of series in its appointed class (assuming the LMM quotes in this number of series 99% of the trading day). However, if an Intra-day Add is added in the LMM's appointed class during the trading day, and the LMM's system does not automatically quote in this series, then the LMM would not comply, as it would be quoting in 900 of 1,001 series. This noncompliance would be compounded if more than one Intra-day Add is listed in a class during the same trading day. Further, if these Market-Makers turned their systems off to quote in Intra-day Adds on the trading day during which those series are added, then the Market-Makers could satisfy the standard to quote in a minimum percentage of series in their appointed classes but would then risk violating their obligation to quote for minimum percentage of the trading day as, theoretically, these Market-Makers might need to repeatedly turn their systems off to accommodate the Intra-day Adds.

As indicated above, the Exchange intends to implement changes to continuous quoting obligations that, among other things, will require PMMs, LMMs, DPMs and e-DPMs to continuously quote in at least the lesser of 99% or 100% minus one call-put pair of series in their appointed classes, which obligation includes Intra-day Adds.[15] Given this planned heightened standard, the risk that these Market-Makers may not satisfy their quoting obligations if they are required to quote Intra-day Adds increases.

As a result of this conflict, the pending heightened quoting obligations, and the considerable cost that would otherwise be involved to adjust their systems to quote Intra-day Adds on the trading day during which they are listed, several PMMs have informed the Exchange that they intend to withdraw from the PMM program, while other Market-Makers have requested that the Exchange suspend their pending applications to join the PMM program.

[11] If more than one LMM is entitled to a participation entitlement, the entitlement will be distributed equally among eligible LMMs.

[12] The participation entitlements of PMMs, LMMs, DPMs and e-DPMs are based on the number of contracts remaining after all public customer orders in the book at the best price on the Exchange have been satisfied. Additionally, a PMM, LMM, DPM or e-DPM may not be allocated a total quantity greater than the quantity for which the PMM, LMM, DPM or e-DPM is quoting at the best price. *See* Rules 8.13(c)(i) and (ii) (PMMs), 8.15B(b) and (c) (LMMs), and 8.87(b)(1)(ii) and (iii) (DPMs and e-DPMs).

[13] *See supra* note 4.

[14] "Hybrid Trading System" refers to the Exchange's trading platform that allows Market-Makers to submit electronic quotes in their appointed classes. *See* Rule 1.1(aaa).

[15] *See supra* note 4.

The Exchange believes that it would be impracticable, particularly given that a number of Market-Makers use their systems to quote on multiple markets and not solely on the Exchange, for Market-Makers to turn off their entire systems to accommodate quoting in Intra-day Adds on the day during which those series are added on the Exchange. In addition, the Exchange believes this would interfere with the continuity of its market and reduce liquidity, which would ultimately harm investors and contradicts the purpose of the Market-Maker continuous quoting obligation.

This proposed rule change excludes Intra-day Adds from these continuous quoting obligations to address this conflict. Specifically, the Exchange is proposing to add text to Rules 8.7, 8.13, 8.15A, 8.85, and 8.93 to exclude Intra-day Add on the day during which such series are added for trading from Market-Makers' quoting obligations. As mentioned above, based on communications from Market-Makers, the Exchange is concerned that additional PMMs may withdraw from the PMM program, that other types of Market-Makers (particularly LMMs, DPMs and e-DPMs given their heightened quoting obligations) may withdraw from their class appointments, and that other market participants may be discouraged from requesting Market-Maker appointments or applying to the LMM, DPM and e-DPM programs if they are required to quote Intra-day Adds on the trading day during which those series are added under the new quoting obligations. The Exchange believes that withdrawals from, and reduced applications for, Market-Maker appointments would negatively impact liquidity and volume on the Exchange in those classes. The Exchange believes that providing Market-Makers with relief from their quoting obligations with respect to Intra-day Adds on the trading day during which they are added for trading will prevent these withdrawals and encourage market participants to apply for or continue their Market-Maker class appointments.

The Exchange does not believe this relief will result in any material decrease in liquidity. As mentioned above, it is the Exchange's understanding that several Market-Makers currently do not quote Intra-day Adds on the trading day during which they are added, so the Exchange believes this proposed relief would result in a minimal reduction, if any, in liquidity in these series. These Market-Makers' systems would add these series the next trading day, so if there is any slight reduction in liquidity in these few series, it would only last for a short period of time (until the following trading day). Additionally, this potential small reduction in liquidity would be far outweighed by the reduction in liquidity that the Exchange believes would result from the withdrawals from and reductions in applications for Market-Maker appointments if the Exchange did not provide this relief.

The current quoting obligation in Intra-day Adds is a minor part of a Market-Maker's overall obligations. Intra-day Adds represent only approximately 0.0046% of the average number of series listed on the Exchange each trading day, so Market-Makers will still be obligated to provide continuous two-sided markets in a substantial number of series in their appointed classes.[16] Further, Market-Makers would still be obligated to quote the Intra-day Adds the following day, and, thus, their quoting relief is very short-lived and could, potentially, only last a few hours or until the opening of trading the following day. The Exchange believes that the burden of continuous electronic quoting in this extremely small number of series is counter to the Exchange's efforts to continuously increase liquidity in its listed option classes.

The Exchange believes the proposed rule change will continue to ensure that Market-Makers create a fair and orderly market in the option classes to which they are assigned, as it does not absolve Market-Makers from providing continuous electronic quotes in a significant percentage of series of each class for a substantial portion of the trading day. Market-Makers must engage in activities that constitute a course of dealings reasonably calculated to contribute to the maintenance of a fair and orderly market, including (1) Competing with other Market-Makers to improve markets in all series of options classes comprising their appointments, (2) making markets that, absent changed market conditions, will be honored in accordance with firm quote rules, and (3) updating market quotations in response to changed market condition in their appointed options classes and to assure that any market quote it causes to be disseminated is accurate.[17]

The relief proposed in this filing is mitigated by a Market-Maker's other obligations. The proposed rule change would not excuse a Market-Maker that is present on the trading floor from its obligation to provide a two-sided market complying with the bid/ask differential requirements in response to any request for quote by a floor broker, TPH or PAR Official.[18] The proposed rule change would also not excuse a Market-Maker that is present on the trading floor from its obligation to provide an open outcry two-sided market complying with the bid/ask differential requirements in response to a request for a quote by a TPH or PAR Official directed at that Market-Maker or when, in response to a general request for a quote by a TPH or PAR Official, a market is not then being vocalized by a reasonable number of Market-Makers.[19] Further, the proposed rule change would not excuse a Market-Maker from its obligation to submit a single quote or maintain continuous quotes in one or more series of a class to which the Maker-Maker is appointed when called upon by an Exchange official if, in the judgment of such official, it is necessary to do so in the interest of maintaining a fair and orderly market.[20] These obligations will continue to apply to all series.

The proposed rule change also clarifies in the Exchange Rules that while Market-Makers are not required to provide continuous electronic quotes in Intra-day Adds on the day during which such series are added for trading, a Market-Maker may still receive a participation entitlement in such series if it elects to quote in that series and otherwise satisfies the other entitlement requirements set forth in accordance with the Rules. Specifically, the Exchange is proposing to add language to Rules 8.13, 8.15B, and 8.87 clearly stating that Market-Makers may still receive participation entitlements pursuant to those Rules in all Intra-day Adds on the day during which such series are added for trading in which they are quoting provided that Market-Maker meets all other entitlement requirements as set forth in the applicable rule.

Market-Makers already receive participation entitlements in series they are not required to quote. For example, a DPM is currently required to provide continuous electronic quotes in at least 90% of the non-adjusted option series of each multiply listed option class allocated to it and in 100% of the non-adjusted option series of each singly listed option class allocated to it for

[16] For the month of October 2012, the average number of Intra-day Adds on a trading day was 18.5, and the average number of total series listed on the Exchange each trading day was approximately 400,000.

[17] *See* Rule 8.7(a) and (b).

[18] *See* Rule 8.7(d)(i)(C) (relating to a request for quote by a floor broker) and (ii)(C) (relating to a request for a quote by a Trading Permit Holder or PAR Official).

[19] *See* Rule 8.7(d)(iv).

[20] *Id.*

99% of the trading day.[21] If the DPM elects to quote in 100% of the non-adjusted series in a multiply listed option class allocated to it, it will receive a participation entitlement in all of those series when quoting at the best price, including the 10% of the series in which it is not required to quote in. Thus, under the proposed rule change, the market would continue to function as it does now. The Exchange believes this benefit is appropriate, as it incentivizes Market-Makers to quote in as many series as possible in their appointed classes, even those series in which the Rules do not require them to continuously quote.

The Exchange does not believe that the proposed rule change would adversely affect the quality of the Exchange's markets or lead to a material decrease in liquidity. Rather, the Exchange believes that its current market structure, with its high rate of participation by Market-Makers, permits the proposed rule change without fear of losing liquidity. The Exchange also believes that market-making activity and liquidity could materially decrease without the proposed rule change to exclude Intra-day Adds from Market-Maker continuous quoting obligations on the trading day during which they are added for trading. The Exchange believes that this proposed relief will encourage Market-Makers to continue appointments and other TPHs to request Market-Maker appointments, and, as a result, expand liquidity in options classes listed on the Exchange to the benefit of the Exchange and its TPHs and public customers. The Exchange believes that its Market-Makers would be disadvantaged without this proposed relief, and other TPHs and public customers would also be disadvantaged if Market-Makers withdrew from appointments in options classes, resulting in reduced liquidity and volume in these classes. Additionally, the Exchange believes that the proposed rule change to clarify that Market-Makers may receive participation entitlements in Intraday Adds on the day during which such series are added for trading if it satisfies the other entitlement requirements as set forth in Exchange Rules, even if the Rules do not require the Market-Makers to continuously quote in those series, will incent Market-Makers to quote in series in which they are not required to quote, which may increase liquidity in their appointed classes.

[21] As discussed above, this obligation will change upon implementation of a recent rule change. *See supra* note 4.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the "Act") and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[22] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[23] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitation transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[24] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the Exchange believes the proposed rule change to exclude Intra-day Adds during the day which such series are added for trading from Market-Makers' quoting obligations promotes just and equitable principles of trade because it promotes liquidity and continuity in the marketplace and would prevent interruptions in quoting or reduced liquidity that may otherwise result. The Exchange also believes that the proposed rule change supports the quality of the Exchange's markets because it does not significantly change the current quoting obligations of Market-Makers. Market-Makers must still provide continuous electronic quotes for a significant part of the trading day in a substantial number of series of each appointed class. Even if a Market-Maker does not quote Intra-day Adds on the trading day during which they are added, this would be offset by the Market-Maker's continued obligation to quote in these series when requested by a floor broker, TPH, or PAR Official. The proposed relief is further offset by a Market-Maker's obligation to quote in these series beginning the next trading day. Accordingly, the proposed rule change supports the quality of the Exchange's trading markets by helping to ensure that Market-Makers will continue to be obligated to quote in Intra-day Adds if, and when, the need arises and on an ongoing basis following the trading day during which the series are added. The Exchange believes this proposed change is reasonable and is offset by Market-Makers' continued responsibilities to provide significant liquidity to the market to the benefit of market participants.

The Exchange believes this proposed rule change, on balance, is a minor change and should not impact the quality of the Exchange's trading markets. Among other things, Intra-day Adds represent an insignificant percentage of series listed on the Exchange each day. The Exchange further believes that the potential small reduction in liquidity in Intra-day Adds that may result from the proposed relief would be far outweighed by the significant reduction in liquidity in appointed classes that the Exchange believes could occur from withdrawals from and reductions in applications for Market-Maker appointments without the proposed relief. The proposed rule change also removes impediments to and allows for a free and open market, while protecting investors, by promoting additional transparency regarding Market-Makers' obligations and benefits in the Exchange Rules. In addition, the Exchange believes that the proposed rule change is designed to not permit unfair discrimination among Market-Makers, as the proposed rule change provides the proposed relief for all Market-Makers.

The proposed rule change to clarify that Market-Makers may receive participation entitlements in Intra-day Adds in their appointed classes in which they are quoting, even though they are not required to quote, if the other requirements set forth in the Rules are satisfied, further supports the quality of the Exchange's trading markets because it encourages Market-Makers to quote in as many series as possible, which ultimately benefits all investors. This benefit is offset by the Market-Makers' continued quoting obligations and the fact that their quotes in these "non-required" series must still satisfy all of the Market-Makers' other obligations under the Rules. The Exchange also believes that this proposed change is consistent with its current practice, pursuant to which Market-Makers receive participation entitlements in additional series in which they elect to quote above the minimum percentage of series in which they are required to continuously quote under the Rules.

For the foregoing reasons, the Exchange believes that the proposed

[22] 15 U.S.C. 78f(b).

[23] 15 U.S.C. 78f(b)(5).

[24] *Id.*

rule change is appropriate and consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe the proposed rule change to exclude Intra-day Adds during the day which such series are added for trading from Market-Makers' quoting obligations will cause any unnecessary burden on intramarket competition because it provides the same relief to a group of similarly situated market participants—Market-Makers. The Exchange does not believe the proposed change will cause any unnecessary burden on intermarket competition because Intra-day Adds are a very small portion of series on the Exchange. Exchange further believes that the potential small reduction in liquidity in Intra-day Adds that may result from the proposed relief would be far outweighed by the significant reduction in liquidity in appointed classes that the Exchange believes could occur from withdrawals from and reductions in applications for Market-Maker appointments without the proposed relief. In addition, the Exchange believes that the proposed rule change will in fact relieve any burden on, or otherwise promote, competition. The Exchange believes that excluding Intra-day Adds on the day during which they are added for trading from Market-Maker obligations will promote trading activity on the Exchange to the benefit of the Exchange, its TPHs, and market participants.

The Exchange does not believe the proposed rule change to clarify that Market-Makers may receive participation entitlements in Intra-day Adds in their appointed classes in which they are quoting, even though they are not required to quote, if the other requirements set forth in the Rules are satisfied, will cause any unnecessary burden on intramarket competition because it too provides the same relief to a group of similarly situated market participants—Market-Makers. The Exchange does not believe the proposed change will cause any unnecessary burden on intermarket competition because Market-Makers are currently entitled to receive participation entitlements on series they are not obligated to quote in under the Rules. In addition, the Exchange believes that the proposed rule change will in fact relieve any burden on, or otherwise promote, competition. The Exchange believes allowing Market-Makers to receive a participation entitlements in Intra-day Adds will promote trading activity on the Exchange because it will incentivize Market-Makers to quote in such series though not obligated to do so to the benefit of the Exchange, its TPHs, and market participants.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

A. By order approve or disapprove such proposed rule change, or

B. Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–CBOE–2013–019 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2013–019. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2013–019, and should be submitted on or before March 15, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[25]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–04133 Filed 2–21–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68936; File No. SR–NYSE–2013–07]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change Amending NYSE Rules 451 and 465, and the Related Provisions of Section 402.10 of the NYSE Listed Company Manual, Which Provide a Schedule for the Reimbursement of Expenses by Issuers to NYSE Member Organizations for the Processing of Proxy Materials and Other Issuer Communications Provided to Investors Holding Securities in Street Name and to Establish a Five-Year Fee for the Development of an Enhanced Brokers Internet Platform

February 15, 2013.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the

[25] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C.78s(b)(1).

"Act")[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on February 1, 2013, New York Stock Exchange LLC ("NYSE" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission" or "SEC") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend NYSE Rules 451 and 465, and the related provisions of Section 402.10 of the NYSE Listed Company Manual, which provide a schedule for the reimbursement of expenses by issuers to NYSE member organizations for the processing of proxy materials and other issuer communications provided to investors holding securities in street name. The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.com*, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Proxy distribution fees have been part of the New York Stock Exchange's rules for many years, and have been reviewed and changed periodically over that time. The Exchange has long operated under the assumption that these fees should represent a consensus view of the issuers and the broker-dealers involved. In September 2010 the Exchange formed the Proxy Fee Advisory Committee ("PFAC" or the "Committee") to review the existing fee structure and make such recommendations for change as the PFAC believed appropriate.

BACKGROUND

The Exchange has been mindful for several years that a further review of the proxy fee rules would be useful. The Exchange's Proxy Working Group in 2007 noted a variety of fee-related issues, and the Exchange was aware of concerns expressed by various parties with an interest in the proxy distribution process. However, when the Exchange became aware that the Securities and Exchange Commission ("SEC") was preparing a study of proxy-related issues, it judged it advisable to await the SEC's publication prior to initiating a formal review of the fees.

On July 14, 2010 the Securities and Exchange Commission issued its Concept Release on the U.S. Proxy System, which has come to be known as the "Proxy Plumbing Release". Among the many issues discussed in that Release were proxy distribution fees, and the SEC stated that "it appears to be an appropriate time for SROs to review their existing fee schedules to determine whether they continue to be reasonably related to the actual costs of proxy solicitation."[4]

As the SEC explained in the Proxy Plumbing Release,

> "There are two types of security holders in the U.S.—registered owners and beneficial owners.
>
> * * * * *
>
> Registered owners (also known as 'record holders') have a direct relationship with the issuer because their ownership of shares is listed on the records maintained by the issuer or its transfer agent.
>
> * * * * *
>
> The vast majority of investors in shares issued by U.S. companies today are beneficial owners, which means that they hold their securities in book-entry form through a securities intermediary, such as a broker-dealer or bank. This is often referred to as owning in 'street name.' A beneficial owner does not own the securities directly. Instead, as a customer of the securities intermediary, the beneficial owner has an entitlement to the rights associated with ownership of the securities."[5]

As further noted in the Proxy Plumbing Release, SEC rules require broker-dealers and banks to distribute proxy material to beneficial owners, but the obligation is conditioned on their being asured [sic] of reimbursement of their reasonable expenses. The SEC has relied on stock exchange rules to specify the reimbursement rates,[6] and it has been the rules of the NYSE that have established the standard used in the industry.

Since the 1980's, street name shareholding has proliferated, with estimates today that over 80% of publicly held securities are in street name.[7] Over this time, banks and brokers have increasingly turned to third party service providers to coordinate most aspects of this process, from coordinating the beneficial owner search to arranging the delivery of proxy materials to the beneficial owners. In the lexicon of proxy distribution, the banks and brokers are referred to as "nominees", and the third party service providers that coordinate the distributions for multiple nominees are referred to as "intermediaries". At the present time, almost all proxy processing in the U.S. is handled by a single intermediary, Broadridge Financial Solutions, Inc. ("Broadridge").[8] Broadridge reported that during the year ended April 30, 2012 it processed over 12,000 proxy distribution jobs involving over 638 billion shares.[9] Broadridge has estimated that in recent years it handles distributions to some 90 million beneficial owners with accounts at over 900 custodian banks and brokers.[10]

Based on information from Broadridge, the PFAC estimated that

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[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] SEC Release No. 34–62495; File No. S7–14–10, 75 Fed. Reg. 42982 (July 22, 2010) at text following note 138.

[5] *Id.* at text accompanying notes 23 to 31; footnotes omitted.

[6] *Id.* at text accompanying notes 104–105. Note that although the rules of NYSE or any other exchange or FINRA apply only to members, who are all broker-dealers, the SEC has indicted [sic] that the fees provided in these self-regulatory organization rules should also be considered as appropriate reimbursement to banks for their distribution of proxy materials to their customers who are beneficial owners. *See* SEC Rule 14b-2(c)(3), and discussion in the SEC's 1986 adopting release, No. 33–15435 [sic], at text accompanying note 52. For this reason, when discussing proxy fees herein, we will at times refer to both banks and brokers, notwithstanding that NYSE rules do not apply to any entity not a member of the NYSE.

[7] *See, e.g.*, Briefing Paper for 2007 SEC Roundtable on Proxy Voting Mechanics, available at *www.sec.gov/spotlight/proxyprocess/proxyvoting brief.htm*.

[8] Other intermediaries competing with Broadridge are Proxy Trust (focuses on nominees that are trust companies), Mediant Communications and Inveshare, but their market share is relatively small. The Exchange is aware of one broker-dealer, FOLIOfn Investments, Inc., that provides proxy distribution to its accounts itself, without using the services of an intermediary.

[9] Broadridge 2012 Proxy Season Key Statistics & Performance Rating, available at *www.broadridge.com/Content.aspx?DocID=1498*. The Commission notes the link is *http://media.broadridge.com/documents/Broadridge 2012 Proxy Season Stats Presentation.pdf*.

[10] Comment letter on Proxy Plumbing Release from Charles V. Callan, Broadridge, October 14, 2010.

issuers spend approximately $200 million in aggregate on fees for proxy distribution to street name shareholders during a year. This does not count the amounts spent on printing and postage for those street name distributions that are not made electronically—the PFAC observed that those costs are typically estimated to be more than double the amount spent on proxy fees, demonstrating why efforts to suppress physical mailings are so important from a cost perspective. The cost incurred by any given issuer varies widely depending on how broadly its stock is held, and the extent to which physical mailings to its shareholders have been eliminated. Again based on information from Broadridge, among the issuers represented on the PFAC, the smallest spent some $8,500 on proxy fees in the most recent (2012) proxy season, while the largest spent approximately $1.1 million. Among another representative group of issuers used by the PFAC for study purposes, the smallest paid approximately $10,000 in proxy fees this year, while the largest spent approximately $2 million. Overall Broadridge estimated that in its most recent fiscal year issuers owned by 100,000 or fewer street name accounts paid approximately 38% of all street name fees, issuers owned by 100,001 to 500,000 accounts paid approximately 30% of such fees, with 32% paid by issuers owned by more than 500,000 street name accounts.

Since 1937 the NYSE has specified the level of reimbursement which, if provided to the member broker-dealers, would obligate them to effect the distribution of proxy materials to street name holders, and those rates have been revised periodically since then. The last, and most far-reaching, revision was finalized in 2002. It was the culmination of a multi-year, multi-task force effort that began in 1995, and attempted to both recognize and encourage significant changes in computer technology that permitted more efficient, and increasingly paperless, distribution of proxy material.

The proxy distribution fees that emerged from that effort and remain in effect include:

- A basic processing fee of 40 cents for each account beneficially owning shares in the issuer that is distributing proxy material.
- A flat nominee fee of $20 per nominee served by an intermediary.[11]
- An additional fee to compensate the intermediary based on the number of accounts at nominees served by the intermediary that beneficially own shares in the issuer.
  - 5 cents per account for issuers owned by 200,000 or more street name accounts.
  - 10 cents per account for issuers owned by fewer than 200,000 street name accounts.
- An incentive fee that applies whenever the need to mail materials in paper format to an account has been eliminated.
  - 25 cents per account for issuers owned by 200,000 or more street name accounts.
  - 50 cents per account for issuers owned by fewer than 200,000 street name accounts.[12]

The creation of a nominee fee, of an incentive fee for mailing suppression, and of fee differentiation between large and small issuers to recognize the economies of scale available in serving the former, are all elements that emerged from the review process that began in 1995 and culminated in 2002.[13]

The proxy fees were also the subject of a partial review in the middle of this last decade, although no change was made at that time. A Proxy Working Group ("PWG") was created by the NYSE in 2005, composed of a diverse group of individuals from issuers, broker-dealers, the legal community and investors. It focused on several different aspects of the proxy process, particularly the NYSE rules on when brokers may vote shares for which no voting instructions were received from the beneficial owner. However, the PWG also looked at whether the NYSE rules on proxy distribution fees should be made applicable to the SEC's then new "e-proxy" system (today referred to as "notice and access"), and concluded that as an initial matter, they should not. In part, the PWG believed it was appropriate to allow some time during which market forces might create a consensus regarding the appropriate kind and level of fees under the new e-proxy rules.

The PWG Reports are referenced in the Concept Release, and the general concerns over proxy distribution fees that were voiced to the PWG are similar to those outlined in the Concept Release.[14]

The Exchange brought together the Proxy Fee Advisory Committee composed of representatives of issuers, broker dealers and investors to review the current rules and how they are applied, and the Committee met with a wide variety of participants in the proxy process to gather information on what is necessary to efficiently and effectively distribute proxy material to street name shareholders and collect their votes. The Committee began its work in October, 2010, and provided its Report and recommendations to the NYSE on May 16, 2012. The Committee's Report may be found at *https://usequities.nyx.com/sites/usequities.nyx.com/files/final_pfac_report.pdf*.[15]

Analysis and Recommendations

As noted above, the obligation of brokers and banks to distribute proxy material to beneficial owners is conditioned on their being assured of reimbursement of their reasonable expenses, and the SEC relies on exchange rules to specify those reimbursement rates. NYSE Rule 451 states that "The Exchange has approved the following as fair and reasonable rates of reimbursement of member organizations for all out-of-pocket expenses, including reasonable clerical expenses, incurred in connection with proxy solicitations pursuant to Rule 451 and in mailing interim reports or other

[11] As noted above, a "nominee" is a bank or broker in which a beneficial owner has an account, and an "intermediary" is a third party that coordinates proxy distributions for multiple nominees.

[12] The incentive fee is in addition to the other fees, so that even if a paper mailing is suppressed, the basic processing fee and all the intermediary fees still apply. This is explained in the SEC's Proxy Plumbing Release (see note 4, *supra*) at footnote 120. Suppression of mailing eliminates the postage costs for the issuer, but not these processing-related fees. The rules proposed in this filing will rename "incentive fees" as "preference management fees," but the concept remains the same as today and the preference management fees are in addition to, and not in lieu of, the other processing and intermediary fees.

[13] For many years the NYSE proxy fee rules subjected all issuers to the same rates. However, when the last changes were approved in 2002, the rules began to differentiate between "Large Issuers" and "Small Issuers." This was because it was determined that economies of scale existed for many of the tasks of processing material for distribution, and for collecting voting instructions. Those analyzing the situation at that time found that the actual cost of proxy distribution incurred with respect to large issuers was lower than the specified fees, whereas the actual cost for handling small issuers far exceeded the fees provided in the NYSE rules. SEC Release 34–45644 (SR–NYSE–2001–53, March 25, 2002).

[14] It is important to understand that some of the concerns expressed about the proxy distribution process are not within the purview of the Exchange to address. Issues have been raised as to whether beneficial owners should continue to be able to be Objecting Beneficial Owners, or OBOs, and whether there should be a central data aggregator for beneficial owner information that would enable issuers to distribute proxy materials directly to beneficial owners rather than through the bank and broker nominees. However, today's distribution regimen is established by the securities laws and the SEC, and the Exchange does not have the power to alter it.

The Exchange notes also that, in its comment letter on the Proxy Plumbing Release, the Exchange stated that it would welcome a movement away from utilizing SRO rules to set the default proxy distribution fees. While NYSE has had a long history as an innovator and important source of rules for the U.S. proxy process, the SEC has long since taken over the field as the source of regulation for that process. The Exchange believes that the much reduced role of exchanges in proxy regulation means that they may no longer be the best source of rulemaking in the proxy fee area.

[15] The members of the Committee are listed in its Report.

material pursuant to Rule 465." As the Committee noted in its report, for at least the last 30 years, the NYSE has dealt with this issue by convening advisory panels of industry participants—brokers, issuers and investors—to advise on what should be considered "fair and reasonable rates of reimbursement," and then subjecting the proposals to review and approval by the SEC.[16]

Although the NYSE rules speak in terms of reimbursing brokers for their reasonable expenses, it appears self-evident that this was never feasible on an individual brokerage firm basis given that the rules provided one price to be used by a multiplicity of firms providing services, each with presumably different costs. That issue continued even after services were almost all centralized in one outsourced service provider, Broadridge. This is so because each firm continued to have some workload of its own, and each firm negotiated its own, arms-length agreement with Broadridge, and so had outsourcing costs that differed from firm to firm. In addition, the introduction of incentive fees in the late 1990s established that "fair and reasonable rates of reimbursement" encompassed rates that were not associated with a specified level of costs, but rather were considered adequate to encourage the development of systems that would lead to the elimination of physical delivery.

Given this state of facts, the Committee took the view that the NYSE proxy fee rules do not lend themselves to "utility rate-making," where the specific costs of a process are analyzed and rates revised periodically to permit a specified "rate of return."

However, the Committee did what it could to engage in a review that would in certain ways approximate such a process. It looked first at publicly available financial information on Broadridge, which is a public SEC-reporting company. Unfortunately for this analytical purpose, Broadridge has several business lines other than street name proxy distribution, and it does not isolate costs and revenues from the street name proxy distribution business in any of its publicly reported numbers. There were several analyst reports available on Broadridge that discussed the segment in which Broadridge includes this activity, which Broadridge refers to as its Investor Communications Solutions segment, or ICS.[17] Broadridge has reported flat to declining margin in this segment over the last four years, from 16% in fiscal 2008 to 14.9% for fiscal 2012.

The Committee also took note of the fact that since the fees were last changed in 2002, there has been an effective decline in the fees of approximately 20%, given the impact of inflation. Indeed, the nominee coordination fee dates from 1997, and so has been eroded approximately 29% by inflation since that time.[18] Broadridge pointed out to the PFAC that while the fees paid to nominees for proxy distribution have remained unchanged, other costs incurred by various entities in activities related to proxy distribution have increased by various amounts over approximately the same period—bulk rate postage by an estimated 38%, printing costs 12%, electricity 60%, and overall IT expenditures by financial services entities, 59%.[19]

After fact gathering and analysis, the Committee focused on a set of recommendations intended to serve several basic goals:

- To support the current proxy distribution system, given that it provides a reliable, accurate and secure process for distributing proxy materials to street name stockholders. It is also important that the fee structure continues to encourage cost savings through reducing printing, postage and physical handling of proxy materials.
- To encourage and facilitate active voting participation by retail street name shareholders.
- To improve the transparency of the fee structure, so that it is not only clearer to issuers what services they are paying for, but also that fees are consistent with the type and amount of work involved. Updating the terminology used in the rule will be a part of this effort. For example, "incentive fees" will be called "preference management fees," to better describe the work involved. It is also important for transparency that the rules be structured to avoid undue complexity.
- To ensure the fees are as fair as possible, reflecting to the extent possible both economies of scale in processing, and sensitivity to who (issuer or broker) benefits from the processing being paid for. In the course of its review the Committee addressed several of the issues that were singled out in the SEC's Proxy Plumbing Concept Release, notably the fees charged in connection with managed accounts, and the fees charged for utilizing notice and access.

The changes proposed herein reduce some fees and increase others, and Broadridge estimated for the PFAC that overall fees paid by issuers will decrease by approximately four percent. The Committee also focused on whether the new recommended fees appear to be aligned with the work effort to which the fees relate. At the Committee's request, Broadridge analyzed the work effort across the several tasks involved in proxy distribution. The Committee observed that this analysis confirmed that fees and work effort appeared to be roughly in line.

The following is an outline description of the various recommendations and the rationale for the changes proposed.

Basic Fees

This category includes both a per-nominee fee and two separate per-account fees.

Nominee Fee: The nominee fee is currently $20 per nominee (bank or broker) served by an intermediary (e.g., Broadridge). As noted earlier, this $20 fee has not changed since its implementation in 1997, and has been eroded by some 29% by inflation since that time. In addition, while not required under the current rule, it has been Broadridge's longstanding practice to only charge this amount for a nominee that responds to a search request with an indication that it does have at least one account holding the issuer's stock. This is so notwithstanding that for each meeting or distribution Broadridge makes inquiry of all nominees whether they hold any of the particular security involved. Broadridge notes that while they serve some 900 nominees, the average issuer is held by approximately 100 nominees.

In order to compensate for the impact of inflation and to better align this fee with what the PFAC understood to be the work involved, it is recommended that the basic per-nominee fee be increased to $22, but that the rule

[16] *See*, for example, SEC Release No. 34–45644, March 25, 2002 (SR–NYSE–2001–53); SEC Release No. 34–38406, March 24, 1997 (SR–NYSE–96–36); and SEC Release No. 34–21900, March 28, 1985 (SR–NYSE–85–2).

[17] Broadridge's ICS revenues combine the street name and registered proxy businesses. This also includes both U.S. and non-U.S. public companies, but we assume that the non-U.S. company income is a relatively small part of the whole. Broadridge separately reports its fee revenue from mutual fund proxy statement and report distribution.

[18] Based on the Bureau of Labor Statistics Consumer Price Index All Urban Consumers (CPI–U), U.S. city average, all items, 1982–84=100, annual average figures for 2011 (224.939), 2002 (179.9) and 1997 (160.5). Available at *ftp://ftp.bls.gov/pub/special.requests/cpi/cpiai.txt*.

[19] Data cited by Broadridge in support of these figures are: For postage—Effective 6/30/02: standard A "bulk" flat @$0.552; first class letter @$0.37. Effective 4/17/11: standard A "bulk" flat @$0.761 and first class letter @$0.44. For printing—NIRI biennial surveys; median cost @$4.32 (2004) and $4.82 (2010). For electricity—Bureau of Labor Statistics, Consumer Price Index—Average Price Data, New York-Northern New Jersey-Long Island, NY–NJ–CT–PA, Electricity per KWH, 2002 to 2011. For overall IT expenditures—Gartner Group, "Financial Services Market Regains Momentum: Forecast Through 2006", February 2003, Gartner Group, "Forecast: Enterprise IT Spending for the Banking and Securities Market, Worldwide, 2009–2015, 3Q11 Update, October 2011.

specify that it applies only to nominees with at least one account holding the issuer's stock.

The PFAC Report had recommended that the rule also provide for a charge of 50 cents per nominee for those solicited who indicated no holdings of the stock involved, with a cap of $100 for the smallest issuers. Subsequent to publication of the PFAC Report, figures from the 2012 proxy season became available from Broadridge. Given changes to the issuer population between 2011 and 2012 seasons it became necessary to reduce certain of the PFAC-proposed fees to keep the overall financial impact of the proposed changes at approximately the same level as proposed in the PFAC Report. Accordingly, the additional 50 cents charge for each nominee reporting zero positions has been eliminated. In addition, the basic processing fees are reduced somewhat from those proposed in the PFAC Report.

Per-account Fees: The two separate per-account fees are the basic processing fee, and the "intermediary unit fee", which is, in addition to the nominee fee described above, intended as compensation to the intermediary for its work in coordinating among multiple nominees.

As did its predecessor Committee in the 1990's, the PFAC believed that economies of scale exist when handling distributions for more widely held issuers. While the current fees attempt to reflect this in the intermediary unit fee, they do not in the basic processing fee, and the PFAC believed both fees should be structured to recognize the existence of economies of scale.

However, the PFAC was also concerned with the way the current fees approach this issue, with a simple binary distinction between Large and Small Issuers, where the Large Issuer pays a reduced rate on all accounts holding its securities, not just those over a specified number. This "cliff" pricing schedule means that there can be a significant difference in the overall price paid by issuers held by 199,000 street name accounts versus those held by 201,000 accounts. Furthermore, companies that are close to this line may find themselves on different sides of it from one year to the next, creating undesirable volatility in the prices paid for proxy distribution from year to year.

It is primarily for this reason that the Committee recommended moving away from the binary Large/Small Issuer distinction, and utilizing a group of five true tiers for the basic per-account fees. In this way, every issuer will pay the tier one rate for the first 10,000 accounts, for example, with decreasing rates calculated only on additional accounts in the additional tiers. Modest changes in shareholder population will no longer have the possibility of producing material changes in overall costs, and the sliding scale of rates will better approximate the sliding impact of economies of scale. The creation of true tiers in the pricing schedule will continue to recognize the existence of economies of scale in processing distributions for issuers with numerous accounts holding their securities in street name, but do it in a way that is more nuanced and thus fairer to all than the current approach.[20]

The tiers and the pricing for each tier were organized in a way that is intended to spread the fees as fairly as possible across the spectrum of issuers, and to spread the fees among issuers in three size ranges similar to that which pertains under the current fee rule, which is described above. In determining the fees applicable to each tier, however, the Committee was sensitive to the fact that an attempt to fully reflect the economies of scale would result in excessive increases in the rates paid by the smallest issuers, and the Committee considered such an outcome inappropriate. Indeed, it was an operating principle for the Committee that it wished to avoid recommendations that would generate large and potentially dislocating changes in the fees or in the impact of the fees on broad categories of brokers or issuers.

In addition to being tiered to better reflect economies of scale in processing issuers with a larger number of accounts, both the basic processing fee and the intermediary unit fee would be increased slightly to better align fees and work effort, to reflect increased sophistication in proxy distribution processing, and to reflect the impact of inflation since the fees were last adjusted. Especially relevant to the intermediary unit fee, the work of the intermediary has been enhanced over time, responding to the needs of all participants—issuers, banks and brokers, and investors—in addition to responding to changing regulatory requests.[21]

While the rules will continue to differentiate between these two types of per-account processing fees, the Committee recommended that issuers be invoiced in a way that combines these two per-account processing fees for ease of understanding. The increases to these processing fees are estimated to add approximately $9–10 million to overall proxy distribution fees, although that should be considered in connection with the estimated $15 million reduction in fees associated with the proposal to charge preference management fees related to managed accounts at half the regular rate, which is discussed below.

The new proposed basic processing and intermediary unit fees are as follows:

(a) Definitions: For purposes of this rule

(i) The term "nominee" shall mean a broker or bank subject to SEC Rule 14b–1 or 14b–2, respectively.

(ii) The term "intermediary" shall mean a proxy service provider that coordinates the distribution of proxy or other materials for multiple nominees.

(b) (i) For each set of proxy material, i.e., proxy statement, form of proxy and annual report when processed as a unit, a Processing Unit Fee based on the following schedule according to the number of nominee accounts through

[20] We note that even under the current "Large/Small issuer" distinction, a question has been raised whether brokers that do not use an intermediary, or that use an intermediary other than Broadridge, are entitled to bill at the "Small issuer" rate when they serve fewer than 200,000 accounts holding the issuer's stock, even though the issuer is held by far more than 200,000 accounts when all street name accounts at all nominees are considered. Given that the rates are based on the cost effectiveness of serving large numbers of accounts, logically the rate applied should be based on the number of accounts served by the particular intermediary (or nominee, if it does not use an intermediary). Because Broadridge serves such a large portion of the whole, the impact of allowing the smaller providers to bill at the higher rates is minimal, both overall and for any given issuer. For this reason the Committee was content to have the rules interpreted in this fashion. The Committee noted that this would bear re-examination if the processing task should come to be spread more evenly among a number of intermediaries.

Accordingly, the fee charged a particular issuer by an intermediary (or a nominee not using an intermediary) will depend on the number of accounts holding shares in that issuer that are served by the intermediary (or nominee) involved. For example, an issuer with a large number of beneficial shareholders might pay charges to Broadridge that reflect the progressive application of the rates in all five tiers, while its invoice from another intermediary serving a comparatively small number of accounts might charge for all those accounts at the tier one rate.

[21] An example is the work required to accommodate the four voting choices necessitated by the Dodd-Frank requirements for say-when-on-pay votes. *See* SEC Release No. 33–9178, January 25, 2011, at text accompanying note 127, and Broadridge's November 19, 2010 comment letter on the related proposing release, available at *http://www.sec.gov/comments/s7-31-10/s73110-55.pdf*. Another example is the significant work already done on end-to-end vote confirmation. *See* descriptions in Report of Roundtable on Proxy Governance: Recommendations for Providing End-to-End Vote Confirmation, available at *http://www.sec.gov/comments/s7-14-10/s71410-300.pdf*. *See also* description in Broadridge's October 6, 2010 comment letter on the Proxy Plumbing Release, available at *http://www.sec.gov/comments/s7-14-10/s71410-62.pdf*.

which the issuer's securities are beneficially owned:

50 cents for each account up to 10,000 accounts;

47 cents for each account above 10,000 accounts, up to 100,000 accounts;

39 cents for each account above 100,000 accounts, up to 300,000 accounts;

34 cents for each account above 300,000 accounts, up to 500,000 accounts;

32 cents for each account above 500,000 accounts.

To clarify, under this schedule, every issuer will pay the tier one rate for the first 10,000 accounts, or portion thereof, with decreasing rates applicable only on additional accounts in the additional tiers. References in this Rule 451 to the number of accounts means the number of accounts in the issuer at any nominee that is providing distribution services without the services of an intermediary, or when an intermediary is involved, the aggregate number of nominee accounts with beneficial ownership in the issuer served by the intermediary.

(ii) In the case of a meeting for which an opposition proxy has been furnished to security holders, the Processing Unit Fee shall be $1.00 per account, in lieu of the fees in the above schedule.

(c) The following are supplemental fees for intermediaries:

(i) $22.00 for each nominee served by the intermediary that has at least one account beneficially owning shares in the issuer;

(ii) an Intermediary Unit Fee for each set of proxy material, based on the following schedule according to the number of nominee accounts through which the issuer's securities are beneficially owned:

14 cents for each account up to 10,000 accounts;

13 cents for each account above 10,000 accounts, up to 100,000 accounts;

11 cents for each account above 100,000 accounts, up to 300,000 accounts;

9 cents for each account above 300,000 accounts, up to 500,000 accounts;

7 cents for each account above 500,000 accounts.

To clarify, under this schedule, every issuer will pay the tier one rate for the first 10,000 accounts, or portion thereof, with decreasing rates applicable only on additional accounts in the additional tiers.

(iii) For special meetings, the Intermediary Unit Fee shall be based on the following schedule, in lieu of the fees described in (ii) above:

19 cents for each account up to 10,000 accounts;

18 cents for each account above 10,000 accounts, up to 100,000 accounts;

16 cents for each account above 100,000 accounts, up to 300,000 accounts;

14 cents for each account above 300,000 accounts, up to 500,000 accounts;

12 cents for each account above 500,000 accounts.

To clarify, under this schedule, every issuer will pay the tier one rate for the first 10,000 accounts, or portion thereof, with decreasing rates applicable only on additional accounts in the additional tiers. For purposes of this subsection (iii), a special meeting is a meeting other than the issuer's meeting for the election of directors.

(iv) In the case of a meeting for which an opposition proxy has been furnished to security holders, the Intermediary Unit Fee shall be 25 cents per account, with a minimum fee of $5,000.00 per soliciting entity, in lieu of the fees described in (ii) or (iii) above, as the case may be. Where there are separate solicitations by management and an opponent, the opponent is to be separately billed for the costs of its solicitation.

Incentive (Preference Management) Fees

The incentive fees generally appear to have been quite worthwhile for the issuers who pay the proxy distribution fees.[22] Broadridge reports that the percent of mailings eliminated has grown steadily since incentive fees were first instituted in 1998, reaching 60% of all accounts processed in the 2012 proxy season.[23] In contrast, only 8% of mailings were eliminated in 1998, growing to 27% for the 2002 season.[24] Broadridge estimates that corporate issuers saved over $522 million in postage and printing costs in the 2012 season.[25]

In addition to considering what the amount of this fee should be, the Committee examined two specific issues that have engendered comment regarding how the incentive fee has been applied.

The first is the "evergreen" nature of the fee. As noted in the SEC's Proxy Plumbing Release, questions have been raised as to whether it is appropriate to charge an incentive fee not only in the year when electronic delivery is first elected, but also in each year thereafter. In its Proxy Plumbing Release the SEC posits that "the continuing role of the securities intermediary, or its agent, in eliminating these paper mailings is limited to keeping track of the shareholder's election."[26]

In discussing this issue with brokerage firms and with Broadridge, the Committee was persuaded that there was in fact significant processing work involved in "keeping track of the shareholder's election," especially given that the shareholder is entitled to change that election from time to time. Although few do change their election, data processing has to look at each position relative to each meeting or distribution event to determine how the "switch" should be set. Data management requires ongoing technology support, services and maintenance, and is a significant part of the total cost of eliminating paper proxy materials. Even if there is some additional effort involved in the year an election is actually made (or changed), the Committee did not find a simple, rational way to construct different prices for "change" versus "maintenance" of elections.[27]

The Committee found that a significant part of the work involved was in "maintaining" or "managing" the preferences attached to each account position regarding distribution, both for householding and eliminating paper delivery entirely. Thus the name used for the fee under the current rules—"incentive fee"—was part of the problem, since it implied that the work was finished once an election had been made. This is why the Committee believes that transparency and understanding will be served by identifying this kind of fee as a "preference management" fee.

The other issue to which the Committee devoted considerable time is how this fee is applied to positions that are part of managed accounts. At least

[22] As noted in footnote 12 above, these fees, both currently and as proposed to be amended, are in addition to, and not in lieu of, the other proxy distribution fees.

[23] Broadridge 2012 Proxy Season Key Statistics & Performance Rating, available at *www.broadridge.com/ContentAspx?DocID=1498*. The Commission notes the link is *http://media.broadridge.com/documents/Broadridge_2012_Proxy_Season_Stats_Presentation.pdf*.

[24] Estimates provided by Broadridge to the Committee.

[25] See report cited in note 23, *supra*.

[26] Proxy Plumbing Release at text accompanying note 134.

[27] For example, a choice to eliminate mailings is often made by an investor for a number of different holdings in the account. How to fairly apportion a front-loaded fee among different issuers, who may have different numbers or types of distributions in the year the election is made, was one of the challenges presented. And clearly, a change to a one-time fee would radically impact the overall revenue produced by the proxy fees, presumably requiring at least some compensating increases to the "one-time" fee or to other proxy fees.

in recent years this appears to be the most contentious of all the issues raised by those critical of the current fees.[28]

While, as noted above, mailing eliminations have steadily increased since the incentive fees were implemented, eliminations resulting from elections made by investors holding an issuer's securities through managed accounts have consistently represented a significant portion of the whole. Figures supplied by Broadridge indicate that managed accounts have accounted for about 60% of eliminations for most years since 2002, falling a bit after 2008 to be some 49% of all eliminations in 2012.[29]

Eliminations in the managed account context occur not because an investor has consented to have distributions come to him or her electronically, but because the investor has elected to delegate the voting of shares (and typically, the receipt of materials) to a broker or investment manager, and the broker or manager quite naturally prefers to manage the process electronically rather than by receiving multiple paper proxy statements and voting instructions. That the investor makes this election is often described as a rational result of the fact that in a managed account the investments are selected by the manager rather than the investor, and the investor looks to the manager not only to know whether or when to buy or sell a stock, but how to vote the shares as well.[30]

Here the fact that the fee has been described as an "incentive" fee has probably impacted the view on whether application of the fee in this context is appropriate. Once the investor determines to open a managed account, the incentive to delegate voting flows naturally from the nature of the account, rather than from any specific effort made by an intermediary or its agent.

However, the maintenance of the preference is as necessary here as it is in any other election, such as consent to e-delivery. SEC rules applicable to managed accounts require that each beneficial owner be treated as the individual owner of the shares attributed to his or her account, and that includes having the ability to elect to vote those shares and receive proxy materials.[31] Accordingly, each beneficial owner's election must be tracked—just as is the case with an investor in a non-managed account.

As a general matter then, the elimination of preference management fees for all managed accounts appeared unreasonable. However, the Committee did conclude that making some distinctions between managed accounts and non-managed accounts for fee purposes was appropriate.

Literature on managed accounts indicates they are intended to offer professional portfolio management services with more investment, tax management and fee customization than is available in comingled products such as mutual funds. They have existed since at least the 1970s, and have been growing significantly as an investment style since at least the early 1990s.[32] They are a product class that is followed, studied, analyzed broadly and popularized by many different brokerage firms and investment advisors.[33]

Their increasing popularity demonstrates that the managed account is a product that offers significant advantages both to investors, and to the brokerage firms offering this kind of account.

At the same time, it seems clear that issuers also reap some benefit from inclusion in managed account portfolios. Most obviously, of course, the issuer benefits from the added investment in the company's stock. In addition, the fact that almost all managed account investors delegate voting to the investment manager results in those stocks being voted at a rate far higher than is stock that is held in ordinary retail accounts. This simplifies obtaining a quorum for stockholder meetings, reducing proxy solicitation expenses.

Interestingly, then, this is the one source of mailing eliminations that is a benefit to both the issuer and the brokerage firm—in contrast to ordinary consents to e-delivery or householding, which appear to benefit only the issuer.

It is this unique attribute of the managed account that suggested to the Committee that it would be most fair, and most reasonable, for issuers and brokers to share the cost of the admittedly real processing work that is done to track and maintain the voting and distribution elections made by the beneficial owners of the stock positions in the managed account. It is for this reason that the Committee recommended and the Exchange is proposing that preference management fees for managed accounts be charged to issuers at a rate that is half that of other preference management fees.

Beyond this, however, there is another phenomenon that has emerged from the trend towards managed accounts that the Committee believed must be addressed—and this is the proliferation of accounts containing a very small number of an issuer's shares that can be found when a managed account is offered with a relatively low investment minimum.

Most managed accounts are targeted to wealthy investors, with minimum investment requirements of at least $100,000, up to $1 million or more for certain of these accounts. However, as managed accounts became increasingly popular, and data processing became more sophisticated, some firms have found it feasible, and presumably profitable, to offer a managed account product to a class of investor with a more modest amount of money to invest. Obviously, if you spread, say, $25,000 over a large portfolio of investments, some of those positions, especially holdings in the companies with modest weightings in the portfolio, will contain relatively few shares, or even fractional share positions. In recent years firms with offerings of this nature have become more popular, with the result that some issuers have noted significant increases in the incentive fees attributable to firms with very small aggregate holdings of their shares.

The Exchange understands that this kind of issue had in fact been considered in the mid-1990s when the incentive fees were being formulated. While the managed account product was not as widespread as it is today, one firm did market a managed account product with a relatively low minimum investment which the firm called a "Wrap Account". It was the tendency of these accounts to have many very small, even fractional share positions that led to the practice followed by Broadridge to process "Wrap Account" positions without any charge—either for basic processing or incentive fees. However, Broadridge relied on its client firms to specify whether or not an account should be treated as a "Wrap Account" for this purpose, and positions in small minimum investment managed accounts which were not marketed with that

[28] Proxy Plumbing Release at text accompanying note 135. *See also* STA/SSA Petition to the SEC re Managed Account Fees, March 12, 2012, *www.stai.org/pdfs/2012-03-12-sta-ssa-joint-letter.pdf*.

[29] Based on information supplied by Broadridge, the most steadily growing category of eliminations over the years has been consents to electronic delivery.

[30] *See*, for example, discussion in SEC Release No. 34–34596, August 31, 1994, approving NYSE rule change allowing delivery of proxy material to investment advisers that have been delegated the authority to vote securities in the account.

[31] Investment Company Act Rule 3a–4(a)(5)(ii).

[32] *See* "The History of Separately Managed Accounts," www.nminst.org/archive/multimedia/Timeline.pdf. The Commission notes the link is *http://www.moneyinstitute.com/downloads/2008/02/connections-nmi_5-01-07-1.pdf*.

[33] *See*, for example, "Understanding Separately Managed Accounts," Madison Investment Advisors, Inc., *www.concordinvestment.com/docs/SMA.pdf*.

appellation were subjected to ordinary fees, including incentive fees. This has produced the anomalous results, and issuer concerns, described above.

In the view of the Committee, the question was what is fair and reasonable in this context. The Committee noted one issuer that reportedly found its total number of investor accounts more than doubled when it was included in the portfolios managed by one of these firms offering low-minimum investment accounts. This was despite the fact that these additional accounts held in the aggregate only .017% of the issuer's outstanding stock—an amount of stock that was in the aggregate less than one share for each account at the firm. Nonetheless, because of the incentive fees charged for these tiny stock positions, the issuer's total bill for street name proxy distribution more than doubled.

Clearly in such a situation the benefits of increased stock ownership and increased voting participation were as a practical matter nonexistent for the issuer, while the added expense on a relative basis was extraordinary.

Accordingly, the Committee considered it most appropriate to preclude the charging of proxy processing fees for managed accounts holding very small numbers of shares in the issuer involved.

To determine where to set the limit, the Committee first looked at information supplied by Broadridge showing that among managed account positions between 1 and 500 shares (89% of all managed account positions), the average position size was 91 shares, and the median position size was approximately 50 shares.

While the benefit to an issuer is obviously on a continuum—more for larger holders, less for smaller holders—the Committee looked for an appropriate break point. Because one of its goals was to avoid severe impacts on proxy distribution in the U.S., the Committee looked at the estimated financial impact of eliminating proxy fees for managed accounts holding less than a certain number of shares. Based on information supplied by Broadridge from the 2011 proxy season, the overall impact varied from approximately $2.6 million at the fractional (less than one) share level, up to approximately $16 million if the proscription applied to accounts holding 25 shares or less.

After due consideration, the Committee determined that managed account holdings of five shares or less was an appropriate level at which to draw the line. The overall impact on proxy revenue was modest (approximately $4.2 million), and the benefit to issuers of holdings of five or fewer shares in a managed account is limited.[34] Put another way, the Committee was comfortable with the position that, given the relative benefit/burden on issuers and brokerage firms, it is not reasonable to make issuers reimburse the cost of proxy distribution to managed accounts holding five shares or less.[35]

As a natural corollary to the proscription against fees relative to very small holdings in managed accounts, no fee distinction will be based on whether or not a managed account is referred to as a "wrap account."

The Exchange appreciates that it will be necessary to provide a definition of "managed account" in the rules so that the fees can be applied appropriately. Unfortunately, the term is not comprehensively defined for any other purpose in SEC rules. The Exchange believes that for purposes of the fee provisions, it would be appropriate to define a "managed account" as an account at a nominee which is invested in a portfolio of securities selected by a professional advisor, and for which the account holder is charged a separate asset-based fee for a range of services which may include ongoing advice, custody and execution services. The advisor can be either employed by or affiliated with the nominee, or a separate investment advisor contracted for the purpose of selecting investment portfolios for the managed account. Requiring that investments or changes to the account be approved by the client would not preclude an account from being a "managed account" for this purpose, nor would the fact that commissions or transaction-based charges are imposed in addition to the asset-based fee.

Having addressed the "evergreen" and managed account issues, the Committee focused on the amount of the preference management fee, and whether it should be tiered among issuers based on their size.

The current incentive fee differentiates between Large Issuers and Small Issuers. As described above in the discussion of the basic per-account fees, the Committee did not favor this "cliff" differentiation. In the case of the preference management fee, the Committee determined not to tier the fee according to the size of the issuer. This conclusion was based on two other core principles that the Committee used to guide its work. One is a desire to improve transparency and understanding by avoiding unnecessary complexity. Having tiered the basic processing/intermediary fees, it appeared overly complex to have additional tiers for the preference management fee. Another principle was the desire to align the fees with the work done. The Committee was of the view that the processing involved in managing preferences was less susceptible to economies of scale by size of issuer because it is, of necessity, an account by account task, requiring the tracking of the different (and sometimes changing) preferences of street name shareholders across all their company holdings.

The new preference management fee recommended by the Committee is 32 cents per position affected (16 cents for positions in managed accounts). The 32 cents rate would be a reduction for companies that have been characterized under current rules as Small Issuers, and an increase for those that have been categorized as Large Issuers, but the fee as applied would result in an overall savings to issuers taken as a whole.

As discussed earlier, inflation has effectively eroded the existing proxy fees over the last decade and more since they were implemented or last changed. However, the Committee observed that the impact of inflation on Broadridge's overall proxy distribution revenue has been mitigated by the increased revenue it has obtained from incentive fees. Issuers have saved money on a net basis since the elimination of mailings has reduced postage and printing costs by far more than it has increased incentive fees, but this increased revenue stream to Broadridge has countered to some extent the impact of inflation on the basic processing fee. This is why the Committee saw fit to offset its recommended reduction in managed account preference management fees by increases to the basic processing and intermediary fees.

The Exchange notes that there is also a small incentive (preference management) fee (10 cents per account) for "interim" distributions. The PFAC did not propose to alter this fee as it is applied to managed accounts, except, of course, for the fact that it will not apply to managed accounts holding five shares or less.

[34] Five shares or less will also represent a very modest monetary investment in almost any public company, with the exception of a stock with an extraordinarily high price, such as Berkshire Hathaway A.

[35] Estimates supplied by Broadridge also demonstrated that a model that included this proscription would reduce by some 42% the fees paid by the issuer whose fees had doubled when it entered the portfolios of the low minimum investment managed account provider described above. This suggests that this level is appropriate to address the unacceptable impact produced by low minimum investment managed accounts.

Notice and Access Fees

As described above, based on the recommendations of its Proxy Working Group in 2007, the NYSE initially elected to leave fees for notice and access unregulated.[36]

The PFAC found that from an overall financial point of view, the notice and access system has been a great success. (Concerns have been expressed that there may be a decrease in retail voting participation when issuers use notice and access,[37] but that is unrelated to the fees involved.) Broadridge estimates that in the most recent proxy season issuers in the aggregate saved $241 million, net of fees, through the use of notice and access, an amount that is actually more than the total fees paid annually by all issuers for annual meeting street name proxy processing. The Committee understood that issuers of all sizes have adopted notice and access, and that the re-use of notice and access by adopting issuers is close to 100%.

The first decision for the Committee was whether notice and access fees should remain unregulated as they are today. It was noted that an unregulated system is more flexible and can respond quickly to changes in technology and investor behavior, whereas change and new investment could be delayed when fees are regulated and more difficult to change. However, issuers were concerned about leaving notice and access vulnerable to fee increases without regulatory oversight, especially in a context where other fees were changing, and in some cases being reduced. Accordingly the Committee concluded that notice and access fees should now be regulated. More difficult was the question of what those regulated fees should be.

The present charges imposed by Broadridge for use of notice and access were not the subject of the formal rule-setting process, but they were the product of market forces, as intended by the Proxy Working Group. Broadridge indicates that when the notice and access alternative was introduced, they had to build and maintain the necessary functionality regardless of issuer adoption, but also realized that they had to put forth a fee schedule that would provide issuers with predictable costs that were at a level that would encourage them to use (or at least not dissuade them from using) notice and access. Based on the most recent statistics from Broadridge, 69% of all account positions are in issuers using notice and access, notice and access is used by issuers of all sizes, and issuers realize substantial savings through the use of notice and access, with an aggregate $282 million in savings estimated for the most recent fiscal year.[38]

In fact, among issuers represented on the Committee there was general satisfaction with the overall cost of notice and access. At the same time there was concern with the way Broadridge has structured its notice and access fees. Broadridge charges notice and access fees for *all* accounts holding an issuer's shares, even though mailings to some of those accounts are already suppressed by e-delivery, householding, etc. Indeed, when an issuer stratifies its approach, electing to utilize notice and access only for account holdings below a certain size, for example, Broadridge still applies its notice and access fees to all accounts beneficially holding that issuer's stock. Broadridge explains that from a processing point of view they have to identify each account as subject to notice and access or not, justifying the application of a fee to all accounts once an issuer determines to use notice and access. Nonetheless, some issuers have a concern that under this approach they are being charged for something they are not receiving.

Given the general satisfaction with the overall level of notice and access fees, Broadridge was asked to suggest an alternative approach that would net Broadridge a similar amount of fee revenue from notice and access but avoid the application of a fee to all accounts. In response, Broadridge suggested that it could apply a preference management fee to each account that was in fact subjected to notice and access, but no fee to those accounts that were not. In this way, notice and access would be treated as simply another mailing elimination factor, like e-delivery or householding.

This was attractive to the Committee from a design point of view, and at the Committee's request Broadridge prepared estimates of how such a notice and access fee would impact issuers. Two models were prepared, one utilizing a flat preference management fee, and the other using a tiered model, but in each case applied only to those accounts receiving a notice.

The impact analysis showed that either of those options had a disproportionate impact on certain issuers (doubling notice and access fees in some cases), and the Committee was concerned this could discourage issuers from using notice and access, or incent them to stratify rather than applying notice and access to all holders.

Accordingly, the majority of Committee members decided that, while perhaps not ideal, simply bringing notice and access under the regulatory tent with the current rate schedule would be the better approach, and would be consistent with the principle of avoiding large and unanticipated consequences from a fee change.[39]

The Committee noted that if future developments in proxy regulation or use of notice and access suggested that further change in the fees was appropriate, the issue of notice and access fees could be reconsidered by the industry.

The Exchange notes that one aspect of the current Broadridge fees merits some adjustment. For issuers held by up to 10,000 accounts there is a minimum fee of $1500. If a small issuer using notice and access were billed by several intermediaries on this basis, the aggregate minimum charge would be unfairly high, in the Exchange's view. Accordingly, in the notice and access fee as proposed, the first tier of incremental notice and access fees will be 25 cents/account, without a minimum charge.

A note on terminology. In its current price list for notice and access, Broadridge uses the term "position" to refer to an account beneficially owning shares in an issuer. The PFAC, in its Report and in the fee proposals contained therein, used the same terminology throughout the proposed amendments. In subsequent discussions, however, the SEC staff expressed a preference for the term "account" rather than "position." Accordingly, the Exchange has adjusted the terminology used in this proposal. The intent and meaning, however, is the same as in the PFAC Report.

[36] The PWG's Report states: "The majority of the Proxy Working Group came to this conclusion after considering several factors. First, the Working Group decided that in light of the novelty of the [e-proxy] system, as well as the fact that the system was still optional and had not been implemented by many issuers, that market forces should be allowed to determine the appropriate pricing structure for this system. The Working Group was also aware of the role of Broadridge in this system, but concluded that at this stage it was reasonable to allow the participants in the current system, including Broadridge, the brokers and issuers, to negotiate a fee structure for mailings and other matters associated with the new e-proxy rules." August 27, 2007 Addendum to the Report and Recommendations of the Proxy Working Group to the New York Stock Exchange dated June 5, 2006, at 8.

[37] *See* Proxy Plumbing Release at text accompanying notes 196–197.

[38] *See http://www.broadridge.com/Content.aspx?DocID=1441*, at slide 3. The Commission notes the link is *http://media.broadridge.com/documents/Broadridge+Notice+Access+Statistical+Overview+Presentation+2012.pdf*.

[39] The Committee also understood that fewer users of notice and access are now electing to stratify.

The notice and access fees, as proposed to be codified, would be as follows:

When an issuer elects to utilize Notice and Access for a proxy distribution, there is an incremental fee based on all nominee accounts through which the issuer's securities are beneficially owned as follows:

25 cents for each account up to 10,000 accounts;

20 cents for each account over 10,000 accounts, up to 100,000 accounts;

15 cents for each account over 100,000 accounts, up to 200,000 accounts;

10 cents for each account over 200,000 accounts, up to 500,000 accounts;

5 cents for each account over 500,000 accounts.

To clarify, under this schedule, every issuer will pay the tier one rate for the first 10,000 accounts, or portion thereof, with decreasing rates applicable only on additional accounts in the additional tiers.

Follow up notices will not incur an incremental fee for Notice and Access.

No incremental fee will be imposed for fulfillment transactions (i.e., a full package sent to a notice recipient at the recipient's request), although out of pocket costs such as postage will be passed on as in ordinary distributions.

Other Fees

Reminder mailings: The reminder mailing fee for annual equity meetings is recommended to be reduced by half. Issuers have a choice whether or not to use reminder mailings, and their choice might in some cases be influenced by cost considerations. The reduced fee may induce more issuers to use reminder mailings, which could increase investor participation, particularly among retail investors.

Special meetings: The intermediary fee for special equity meetings would be increased by 5 cents per account in each tier. This acknowledges the additional work required of the intermediary for these meetings. Special meetings occur in an unpredictable pattern, yet the capacity and ability to respond to these meetings must be maintained. Issuers conducting special meetings can be characterized as using the capacity of the system maintained for annual meetings without incurring any additional fee. Special meetings often require faster turnaround and more frequent vote tabulation, analytics and reporting because of the need for approval and concerns about quorum. The PFAC believed that it is only fair for issuers to pay for any unique services that they require. A special meeting will be defined as a meeting other than one for the election of directors.

Contested meetings: In the 1990s a higher processing fee was created for contested meetings, reflecting the additional work involved in those events. It is now proposed that for contests the intermediary fee be increased as well, to a flat 25 cents per account, with a minimum fee of $5,000 per soliciting entity. Contests present similar issues to those described above for specials meetings, although generally at a more intense level. Parties are provided with enhanced turnaround time between receipt of materials and distribution to shareholders, and requirements of ballot customization, vote tabulations and reporting are more demanding, involving more stringent audit controls, more voting analytics, multiple daily reporting and the need to deal with a generally higher level of votes returned by fax.

Accounts containing only fractional shares

Subsequent to the PFAC Report, in conversation with Broadridge it was determined that it would be desirable to eliminate both processing and preference management fees for all accounts containing less than one share of an issuer's stock. Making this change for accounts outside the managed account context (charges for holdings of less than one share in managed accounts are already eliminated by the rule regarding managed account positions of five shares or less) would have a very modest impact on overall annual proxy fees (approximately $500,000), and would eliminate a charge that has been a source of issuer complaints to Broadridge.

Methodology used in formulating the amended rule text

The following is an explanation of the approach the Exchange has taken to the presentation of the amended rules set forth in Exhibit 5. The amendment eliminates duplication found in the existing rules (for example, multiple references to the fee for delivery of annual reports separately from proxy material, now contained in the section regarding charges for interim reports and other distributions, and multiple references to the reimbursement for postage, envelopes, and communications expenses relative to voting returns, now contained in the first paragraph of section .90). It also eliminates the now unnecessary references to the effective dates of various changes made in the past, as well as obsolete rule language describing the amount of a surcharge that was temporarily applicable in the mid 1980's. In addition, the same proxy fees were presented multiple times in different rules (Rule 451, Rule 465 and Section 402.01 of the NYSE Listed Company Manual). To clarify matters, Rule 465 will now simply cross-reference to Rule 451, and the Listed Company Manual will now use the same text as Rule 451.

In addition, in the rules several references to "mailings" have been eliminated, given that the processing fees apply even where physical mailings are suppressed. In addition, several very minor minimum fees of $5 or less were simply eliminated as irrelevant to the overall fees imposed or collected.

Additional Matters Addressed in these Proposals

NOBO fees: Since 1986 NYSE rules have provided for fees which issuers must pay to brokers and their intermediaries for obtaining a list of the non-objecting beneficial owners holding the issuer's stock. Such a list is commonly referred to as a NOBO list, and the fees are charged per name in the NOBO list.

Interestingly, while the rule has always specified the amount of the basic fee—6.5 cents per name—it states that where there is an agent processing this data for the broker, the issuer will also be expected to pay the reasonable expenses of the agent, but without specifying what that amount would be. It is our understanding that Broadridge has long charged a tiered amount per name in the NOBO list, namely 10 cents per name for the first 10,000 names in the NOBO list, 5 cents per name from 10,001 to 100,000 names, and 4 cents per name above that. There is also a $100 minimum per requested list.

The Proxy Plumbing Release contains a discussion of the concern that existing proxy regulations—particularly the fact that beneficial owners can hide their identity from an issuer in which they own stock—impedes an issuer's ability to effectively communicate with its shareholders. As noted in the PFAC Report, these issues are generally beyond the purview of NYSE rules.

There is one respect in which the PFAC thought that it might have a modest beneficial effect on the costs of communicating with shareholders, and this involves the way that the NYSE rule on NOBO list fees has been applied in practice.

Although the NYSE rule is silent on this issue, it has been customary for brokers, through their intermediary, to require that issuers desiring a NOBO list take (and pay for) a list of *all* holders who are NOBOs, even in circumstances where an issuer would consider it more cost-effective to limit its communication

to NOBOs having more than a certain number of shares, or to those that have not yet voted on a solicitation.

In an attempt to provide some modest cost relief to issuers seeking to communicate with NOBOs, the PFAC recommended that the NYSE rules should specify that issuers be allowed to request a stratified NOBO list when the request is made in connection with an annual or special meeting of shareholders. The PFAC also considered it appropriate to limit such stratification to requests based on the number of shares held or whether the investor has or has not already voted a proxy, rather than some other characteristic or affiliation (such as geographic location or brokerage firm holding the account, etc.).

The PFAC noted that it limited its recommendation to record date lists because such lists are more likely to be used by issuers for communications with shareholders about voting at the meeting, a type of shareholder communication which the PFAC said was most deserving of facilitation. The NYSE notes that there is also a cost-related reason to so limit the proposal.

In connection with every shareholder action for which a record date is established, brokers and their intermediaries must engage in the work necessary to create the list of record date beneficial shareholders, and it is the NYSE's understanding that in such process it is also determined which holders are NOBOs and which holders are OBOs. Accordingly, if an issuer later asks for a NOBO list as of that record date, the compilation work has effectively already been done. It is true that some additional processing would be required to eliminate the names that hold more or less than a specified number of shares, or who have already voted, but the NYSE assumes that this additional processing is relatively minimal compared with the cost of maintaining and constructing the original list.

Broadridge estimated that issuers spent some $6.7 million in calendar 2011 on NOBO lists, with some $4.7 million of that related to record date requests. These amounts are inclusive of both the broker fee of 6.5 cents per name specified in the NYSE rule, and the intermediary fee authorized but not specified in the rule. What is more difficult to estimate is the impact of specifying in the rule that issuers can stratify their NOBO list requests and avoid paying for those names eliminated in the stratification. We cannot know how many issuers would in fact stratify NOBO lists, and at what level, nor do we know the extent to which the cost reduction would increase the number of record date NOBO lists requested. Broadridge has estimated that if permitted to stratify, issuers would typically eliminate all names below the 1000 share level, and that doing so would eliminate some 85% of the names in the lists, and hence overall some 85% of the revenue from these NOBO list fees. However, this is speculation at this point, and is not offset by any estimation (admittedly also speculative) that use of NOBO lists would increase. In addition, Broadridge's argument suggests that they believe that issuers are currently having to pay for a list that they consider to be 85% irrelevant, which itself would seem to call into question whether the current approach is reasonable.

Accordingly, the NYSE proposes to revise the rule to specify that issuers can stratify record date requests to eliminate positions above or below a certain level, or those that have already voted. It recognizes, however, that should this change reduce proxy fee revenues significantly, it may be appropriate, for the health of the overall system, to promptly revisit the amount of this fee or how it is applied. This codification will also confirm that for all other requested lists, the issuers will be required to take and pay for complete lists, consistent with the practice that has been historically followed for all requested lists. This will provide transparency that has previously been lacking in this rule.

The fact that the rule does not currently specify the amount of the intermediary fee makes it difficult to apply this approach to stratification effectively, since the intermediary could simply raise the per-name amount charged for stratified lists to compensate. This is similar to the concern which the PFAC had with respect to the Notice and Access fees, which led to the PFAC recommendation to codify those fees at the level currently charged by Broadridge. Accordingly, the NYSE proposes to codify in the rule the intermediary fee which has historically been charged by Broadridge for NOBO lists, with the understanding that these per-name amounts also may not be charged for names eliminated in permitted stratifications.

Enhanced Broker's Internet Platform

In its Proxy Plumbing Release the SEC discussed whether retail investors might be encouraged to vote if they received notices of upcoming corporate votes, and had the ability to access proxy materials and vote, through their own broker's web site—something the Release referred to as enhanced brokers' internet platforms ("EBIP").

In the course of the review of proxy fees by the PFAC, Broadridge discussed with PFAC representatives a service of this type that they call "Investor Mailbox". Broadridge maintained that while some brokerage firms have already implemented such "mailboxes", it appeared likely that some financial incentive would be necessary to achieve widespread adoption, given the competing demands at firms for development resources.

The PFAC was supportive in concept of a program that would enhance retail shareholder participation in proxy voting while being structured to impose a fee only on issuers that actually benefit from the program. Broadridge brought forward a proposal to the PFAC that was developed in consultation with Broadridge's Independent Steering Committee, which established for the purpose a Subcommittee consisting of issuers, brokers and outside experts. It is a "success fee" approach, payable only out of actual savings realized by an issuer. Specifically, issuers would pay each broker who has beneficial owner each broker who has beneficial owner accounts with shares in that issuer a one-time 99-cent fee for each full package recipient among those accounts that converts to e-delivery while having access to an investor mailbox. The arrangement was proposed to be limited to a three-year pilot period. The rationale is that the savings to the typical issuer from the elimination of even one full-package mailing would be significantly greater than the one-time 99-cent fee paid.[40]

The PFAC was supportive of the EBIP fee proposal; however the detailed proposal was brought forward after the PFAC had largely concluded its deliberations, and the PFAC did not have an opportunity to carefully consider whether 99 cents was the appropriate level at which to set the fee. Accordingly, the PFAC recommended that the NYSE discuss the proposal with additional industry representatives, and propose to the SEC an EBIP fee in an amount that it determined most appropriate.

Following the issuance of the PFAC Report, the Exchange engaged in discussions with a variety of industry participants regarding EBIPs and the "success fee" proposal. Although no one had firm data or support for definitive conclusions, there appeared to be a consensus view that an EBIP

[40] Although the proposal was brought forward by Broadridge, an EBIP may be implemented by a firm either with or without the assistance of any third party.

could help to generate greater proxy voting participation by retail holders.

SIFMA stated its view that "streamlining the investor voting process and providing easy access to proxy materials would encourage a greater percentage of retail customers to exercise their right to vote . . . ." SIFMA added that this "is a logical means to reverse declining retail shareholder participation in proxy voting over the past five years."[41]

The Society of Corporate Secretaries & Governance Professionals has also written the NYSE to express its strong support for the EBIP success fee proposal. "We believe that broker's Web sites, which individual shareholders increasingly look to as 'one-stop shopping' portals for their investment needs, offer the best and most readily available hope for re-engaging individual shareholders in the voting process."[42] The Society cited an analysis by Broadridge of a brokerage firm's experience during the past proxy season. The firm's clients made 317,669 unique visits to the online investor mailbox and cast 247,067 votes. This is contrasted with Broadridge's observations that among all retail holders in the 12 months ended June 30, 2012, the voting rate was 4.7% for mailed notices and 10.2% for e-deliveries.

The National Association of Corporate Directors has similarly expressed its support, noting that "broker's Web sites seemingly offer an efficient and effective way for re-engaging individual shareholders."[43] In addition, the National Investor Relations Institute has expressed its support for EBIP in conversation with NYSE staff, and we understand that the American Business Conference and the Center for Capital Markets Competitiveness have expressed their support as well in letters to the SEC.

Representatives from brokerage firms generally thought that having an EBIP fee may help persuade their firm to move ahead with an EBIP, with the caveat that firm administrators are faced with difficult decisions regarding the allocation of limited resources. Several noted that there does not seem to be an actual demand for this from investors, and that resources are often consumed by developments that are required by regulation. It was also noted, however, that a success fee might persuade brokers not only to implement an EBIP where none was previously available, but also to promote use of the EBIP among its customer population. In its letter to the NYSE, SIFMA said that while they have no statistical data to support it, their members "strongly believe that by providing a success fee incentive, broker dealers will have a meaningful impetus to invest in techniques to allow their customers to vote on proxy matters directly from their brokerage account." SIFMA described information from one of its members with an EBIP that the e-delivery adoption rate among its account holders increased from under 10% to over 39% in just a few years, and that along with creating a positive client experience the firm has seen real cost savings while continuing its efforts to promote an eco-friendly business environment.

The NYSE was not provided any specific cost analysis regarding the amount of the proposed EBIP fee. It is impossible to know at this point what it would cost a firm to implement an EBIP—it appears self-evident that it would differ from firm to firm. The NYSE does understand that the Broadridge committee that developed the proposal did vet both higher and lower amounts than 99 cents, finding that issuer representatives were not comfortable with a fee much higher than 99 cents, while brokers felt that a lower fee would not provide a real incentive.

Discussions with industry participants also surfaced some issues that had not been previously addressed. It was noted that the proposed length of the program—three years—might not give sufficient time for brokerage firms to plan for and implement a program in time to take advantage of the new fee. By the latter part of 2012 the development program for 2013 is often set, so that firms without existing facilities might not be able to implement an EBIP before late 2014 at best, leaving perhaps only one proxy season during which the fee would be applicable. Given that this would dilute the value of the fee to the brokerage firms, the firms preferred a five-year rather than a three-year term.

Issuer representatives understood and agreed that a five-year program was sensible, but were concerned that characterizing the program as a "pilot" suggested that it was something that was contemplated to be made permanent, which was not their view. Accordingly, the fee will be proposed for a five-year period, but will not be described as a "pilot".

There was discussion of whether the fee could be earned by firms that already had EBIP facilities, or who made EBIPs available only to a segment of their account population (such as private clients, for example). The consensus appeared to be that there was value in making the fee available in all these circumstances, as even a firm that already has an EBIP can be incented to engage in marketing efforts to persuade its account holders to utilize the EBIP. It was recognized, however, that a firm making an EBIP available to only a limited segment of its account holders could not earn the success fee from an e-delivery election by an account that was not within the segment having access to the EBIP.

Notwithstanding the consensus to implement the fee for a five-year period, it was considered useful to study the impact of the program after three years, to determine how many firms had implemented an EBIP or were in the process of doing so, and what firms had experienced in terms of conversions to e-delivery and retail voting participation among account populations with access to an EBIP. SIFMA indicated a willingness to assist the NYSE is [sic] coordinating the effort to obtain such information from its member firms. Issuers felt strongly that brokers should keep track of conversions and be prepared to report on the success of the EBIP program as well as any marketing efforts undertaken by the brokers to encourage utilization of an EBIP by investors.

It was also clarified that accounts receiving a notice pursuant to the use of notice and access by the issuer, and accounts to which mailing is suppressed by householding, will not trigger the EBIP fee.

There was also discussion of whether the fee should be triggered when a new account elects e-delivery immediately, since this does not involve a "conversion" to e-delivery. Given that it is impossible to know whether the availability of an EBIP influenced the decision, and that absent the election the alternative would be full package delivery, it appeared appropriate to apply the fee, except for accounts subject to notice and access or householding as described above.

Finally, there was discussion of when the fee should be assessed. There appeared to be consensus that the one-time fee should be invoiced in connection with the next proxy or consent solicitation by the particular issuer following the triggering of the fee. It was noted that a mere report

[41] Letter dated November 29, 2012 from Thomas Price, Managing Director, SIFMA, to Scott Cutler, EVP & Head of Global Listings, NYSE Euronext.

[42] Letter dated October 9, 2012 from Kenneth Bertsch, President and CEO, Society of Corporate Secretaries & Governance Professionals, to Scott, [sic] Cutler, EVP & Head of Global Listings, NYSE Euronext.

[43] Letter dated November 15, 2012 from Ken Daly, President & CEO, National Association of Corporate Directors, to Scott Cutler, EVP & Head of Global Listings, NYSE Euronext.

distribution without a meeting would not be an appropriate time for such an invoice.

The NYSE notes that in its discussions with interested parties regarding an EBIP fee, representatives of mutual funds did not value the proposal to the extent that other issuer representatives did. They doubted that fund investors would be as actively involved with a broker's EBIP as would an investor in individual equities, and thus doubted they would see a meaningful increase in retail proxy voting as a result of a broker's offering of an EBIP to account holders. Of course, the relative utility of the EBIP to different holders is difficult to quantify at this stage, and differentiating among issuers for imposition of the fee would add complexity to the proposal.

The Exchange has drafted rule text that would implement a one-time "success fee" for a limited five-year period. As noted in the PFAC Report, this fee would not apply to certain conversions to e-delivery that can be attributed to factors other than implementation of an EBIP. Specifically, it would not apply to electronic delivery consents captured by issuers (for example, through an open-enrollment program), nor to positions held in managed accounts[44] nor to accounts voted by investment managers using electronic voting platforms, such as Proxy Edge. For the avoidance of doubt, the NYSE notes that this one-time success fee is in addition to, and not in lieu of, the preference management fee that applies when a mailing is suppressed by, inter alia, an account's consent to receive electronic delivery.

To qualify for the "success fee", an EBIP must provide notices of upcoming corporate votes, including record and meeting dates for shareholder meetings, and the ability to access proxy materials and a voting instruction form, and cast the vote, through the investor's account page on the firm's Web site without an additional log-in. Any brokerage firm that has or implements a qualifying EBIP must provide notice thereof to the Exchange, including the date such EBIP became operational, and if limited in availability to only certain of the firms accounts, the details thereof.

As discussed above, some firms already provide account holders with notices of upcoming votes and the ability to view proxy-related material and to vote their proxies on-line. The Exchange believes that this is an important element of improving the account holder's experience, and it applauds those firms that have taken this step in the absence of any kind of specific EBIP fee. While this EBIP success fee proposal was brought forward in the course of the PFAC examination of proxy fees generally, it is functionally different from the existing fees that are intended to reimburse banks and brokers for the reasonable costs of delivering proxy materials to beneficial owners, and its proposal by the NYSE is not a suggestion that all firms are entitled to reimbursement for the costs of providing an EBIP facility. Rather, it is an additional, limited duration, one-time fee that is intended to persuade firms to develop and encourage the use of EBIPs by their customers, providing a benefit to investors and to corporate governance generally, while being funded by only a small portion of the amounts a typical issuer will save from one account holder switching from full-package physical to electronic delivery of proxy materials.

Other Issues

Cost Recovery Payments

The Committee was mindful of the questions that have been raised about the "cost recovery payments" that are made by Broadridge to certain of its broker-dealer customers. The Committee was persuaded that the existence of these payments is not any indicator of unfairness or impropriety. Firms have to maintain internal data systems that are involved in the proxy distribution process, but firms differ in the make-up and size of their beneficial owner populations, and consequently in the size of the proxy distribution effort they are required to undertake beyond that which is outsourced to Broadridge. By the same token, differences in economies of scale mean that Broadridge's cost to provide service differs from firm to firm. Again, the fact that the fees are fixed at "one size" that has to "fit all," means that even if on an overall basis the fee revenue is appropriate given overall distribution expenses, there will be "winners and losers" along the spectrum. And since Broadridge and the various firms negotiate at arm's length over the price to be paid by the firm to Broadridge, it is rational that the set prices may leave some room for the largest firms to negotiate a better rate from Broadridge, and therefore find themselves in a situation where they are able to obtain a payment from Broadridge out of the proxy fees collected by Broadridge from issuers at the specified rate. At the other end of the spectrum, of course, the amount charged to the brokerage firm by Broadridge would exceed the proxy fees collected from the issuers.

To supplement the Committee's analysis, at the Exchange's request SIFMA sought to obtain from its members additional information relating to the costs of proxy processing.

In reporting to the Exchange on its efforts, SIFMA noted the difficulties in obtaining data on this subject: "Broker-dealer proxy economics vary greatly among firms, by size, client mix, product mix, service level, degree of automated services and/or personal service, and geographic location. Each firm, moreover, must develop an objective means to collect and organize the data, insofar as firms typically do not have cost accounting systems that separately report the costs of proxy activity. This activity often involves estimates and allocations from a number of departments and functions within a firm, including operations, information technology, finance, audit, legal and client services."[45]

Given these issues, as well as the logistics of attempting to obtain information from large numbers of firms, SIFMA conducted a representative survey. While recognizing the limitations of the approach, SIFMA was able to say that the findings from the survey "support our view that proxy fees are reasonably in line with costs" incurred by nominees.[46]

SIFMA's approach was to obtain cost information from a sample of 15 firms, covering six size tiers based on number of equity (i.e., account) positions processed.[47] Based on cost data collected from the surveyed firms, as well as information from Broadridge on the aggregate amount invoiced to its client firms for proxy processing services, SIFMA projected a figure for aggregate costs over a total of 855 banks and brokers, in a range from $136 million to $153 million annually. By comparison, Broadridge reported that total proxy processing fees collected from issuers for the fiscal year ending June 30, 2011 were approximately $143 million, not including proxy fees (nominee fee and intermediary unit fee) specifically intended to compensate intermediaries such as Broadridge. SIFMA believes that this result is

[44] The term "managed account" will be used as defined in the rule regarding preference management fees. *See* discussion above.

[45] Letter dated May 30, 2012 from Thomas Price, Managing Director, SIFMA, to Judy McLevey, Vice President, NYSE Euronext, p. 2–3.

[46] *Id.* at p. 3.

[47] Data was requested from ten SIFMA member firms of varying sizes, and through Broadridge SIFMA obtained data from five additional non-SIFMA firms for the two lowest tiers, so that each tier would include two or three firms.

evidence that proxy fees are reasonably in line with costs incurred by brokers and other nominees.

SIFMA observed that the range of costs reported by firms in each tier varied significantly, with the greatest variation in the lowest tiers, noting that the differences may be due to different business models and cost structures, as well as to different methodologies of estimating or allocating costs associated with proxy processing. SIFMA also observed that the survey indicated that most firms report costs which exceed proxy reimbursement payments, although overall industry-wide costs appeared to be generally in line with overall payments by issuers.

Additional Matters Which May Be Addressed in Subsequent Rule Filings

There were two other PFAC recommendations which required additional work by the Exchange.

Mutual Funds: Proxy fees tend to be discussed with respect to business corporations—those that have annual meetings and thus deal with proxy solicitations at least once each year. The PFAC was formed with this kind of issuer in mind, and that is reflected in the backgrounds of the members who served on the Committee.

However, the NYSE proxy fees are used in the context of distributions to street name holders of mutual fund shares as well. But the fee picture for mutual funds is somewhat different. Mutual funds typically do not have to elect directors every year, and for this reason tend not to have shareholder meetings every year. While mutual funds can be found in managed accounts, their inclusion is not necessarily as widespread as with operating companies. While some mutual funds may utilize notice and access for the meetings they do have, it is less common among mutual funds than operating companies. But every mutual fund is required to distribute each year both an annual and a semi-annual report to its shareholders, and so mutual funds pay the interim report fee (15 cents basic processing; 10 cents incentive fee) much more frequently than operating companies do.

Representatives of the Committee spoke to representatives of selected mutual funds for their views on the current proxy fees, and these informal conversations suggested that there are fee issues that mutual funds would like to discuss. The PFAC's recommended changes should have a relatively modest impact on mutual funds, and the PFAC did not recommend changes to the interim report fees, which are the ones most applicable to mutual funds.

As recommended by the Committee, the Exchange, with industry participation, is reviewing the fees provided in the NYSE rules as they impact mutual funds, to determine whether additional changes are appropriate. Any recommendations for rule changes that emerge from this examination would be the subject of a separate rule filing by the Exchange.

Future Review of Proxy Fees: While the NYSE rules do not prescribe how frequently the fees should be reviewed, the Committee believed that it would be wise for the NYSE to involve a participant group similar to the PFAC in an essentially ongoing vetting of process developments and associated costs. The Committee suggested that this group could also undertake a more comprehensive review periodically, perhaps every three years, thereby ensuring that fees are evaluated in step with new regulations and/or process innovations in the proxy area.

The Exchange will evaluate this issue in the light of future discussions on how proxy fees should be regulated, and will bring forward any necessary rule changes in a separate rule filing.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the "Act") generally,[48] Section 6(b)(4)[49] requires that exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using the facilities of an exchange. Section 6(b)(5)[50] requires, among other things, that exchange rules promote just and equitable principles of trade and that they are not designed to permit unfair discrimination between issuers, brokers or dealers. Section 6(b)(8)[51] prohibits any exchange rule from imposing any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

The Exchange believes the proposed rule change is consistent with Section 6(b)(4) because it represents an equitable allocation of the reasonable costs of proxy solicitation and similar expenses between and among issuers and brokers.[52] The PFAC included among its members a cross-section of both the issuer and broker communities and its mandate was to determine how to equitably address the standard that calls for issuers to reimburse the reasonable costs incurred by banks and brokers in distributing public company proxies and related material. The Committee agreed unanimously that the proposed fees were reasonable in light of the information the Committee had gathered about the costs incurred by brokers. The Exchange notes that, given the different sizes and cost structures of the various brokers, it is impossible to set fees that are tied directly to the individual broker's costs.[53] Accordingly, the Committee sought to achieve the best possible understanding of the overall costs of today's proxy processing and propose updated fees on that basis. Most banks and brokers have elected to outsource many of the related proxy distribution functions to a third-party intermediary, and they have negotiated individual contracts with the intermediary to do so. However, banks and brokers have processes and costs beyond those covered under the agreements with the intermediary, and the Committee became comfortable with the reasonableness of the overall fees when considered in light of the overall costs involved. The Exchange notes that where, in the case of managed accounts, the fees paid by issuers appeared to be unreasonable, the Committee proposed and the Exchange included in its proposed amendment, limitations on fees payable in relation to shares held in managed accounts. For the foregoing reasons, the Exchange also believes that the proposal is consistent with the requirements of SEC Rule 14b–1(c)(2) concerning the reimbursement of a broker's reasonable expenses incurred in connection with forwarding proxy and other material to beneficial owners of an issuer's securities.

The proposal to codify the existing Broadridge charges for notice and access followed careful consideration by the Committee and reflected their view that the existing fees were shaped in part by market forces and were on an overall basis at an acceptable level. The Committee believed it important to codify these fees so that subsequent changes would be subject to the rule change process, and that codifying the current fees was a better approach than moving to any of the alternative pricing

[48] 15 U.S.C. 78f(b).

[49] 15 U.S.C. 78f(b)(4).

[50] 15 U.S.C. 78f(b)(5).

[51] 15 U.S.C. 78f(b)(8).

[52] The Exchange notes that the rules in this proposal do not involve dues, fees or other charges paid to the Exchange. Rather these Exchange rules are part of a statutory scheme in which self-regulatory organizations are used to facilitate a requirement under SEC Rules 14b–1 and 14b–2 that brokers and banks distribute proxy material so long as their reasonable costs are covered by the issuers whose material they are distributing. Nonetheless, to the extent a Section 6(b)(4) analysis is appropriate, the Exchange has included one herein.

[53] *See* discussion at text following note 16, *supra.*

models that the Committee considered.[54]

The Exchange notes that the proposal which will codify the charges imposed by intermediaries for NOBO lists, together with the specification that issuers shall not be charged for names eliminated in certain circumstances, is an attempt to balance the reasonable needs of issuers and nominees in this context. The utility and economic impact of this proposal is speculative at this point, which is why the Exchange has undertaken to monitor its impact and take remedial action if needed.

The "success fee" proposal related to EBIPs is different in character from other fees in this area, because it is temporary, it is a "one-time" fee, and most notably because it is intended not as a reimbursement of costs, but rather is put forward with the hope that it will encourage the implementation and use of EBIPs, which in turn are hoped to increase participation in corporate governance by non-institutional investors. However, in common with the other proposals here, the Exchange believes that it does represent an equitable allocation of costs between issuers and nominees, whereby issuers should pay a fee which is less than the expected economic benefit that will accrue to them from the additional suppression of a paper mailing, while brokers will obtain some additional revenue which will hopefully encourage them to provide this meaningful benefit to their account holders.

The Exchange believes that the proposed amendment represents a reasonable allocation of fees among issuers as required by Section 6(b)(4) and is not designed to permit unfair discrimination within the meaning of Section 6(b)(5), as all issuers are subject to the same fee schedule and the Committee thoroughly examined the impact of the current fee structure on different categories of issuers. As a consequence, the Exchange's proposal: (i) Limits the disparate impact of fees on issuers whose shares are held in managed accounts; and (ii) modifies the approach of charging 5 cents per account for issuers beneficially owned by 200,000 or more accounts and 10 cents per account for issuers beneficially owned by fewer than 200,000 accounts, by putting in place a tiering approach that will avoid the anomalous effects of the current "cliff" pricing on issuers whose numbers of street name accounts are slightly higher or lower than 200,000.

[54] *See* discussion at text accompanying notes 36–39, *supra.*

As described above,[55] the tiers and the pricing for each tier were intended to spread the fees as fairly as possible across the spectrum of issuers. However, the Committee also avoided fully reflecting economies of scale in the tier prices, to avoid what it believed would be an excessive increase in the fees paid by the smallest issuers.

The Exchange believes that the proposed amendment does not impose any unnecessary burden on competition within the meaning of Section 6(b)(8). Under the SEC's proxy rules, issuers are unable to make distributions themselves to "street name" account holders, but must instead rely on the brokers that are record holders to make those distributions. In considering revisions to the fees, the PFAC and the Exchange, working within current SEC rules, were careful not to create either any barriers to brokers being able to make their own distributions without an intermediary or any impediments to other intermediaries being able enter the market. For some time now a single intermediary has come to have a predominant role in the distribution of proxy material. Nonetheless, the Committee believed that the current structure has produced a proxy distribution system which is generally viewed as reliable and effective, as well as being a system which has reduced costs to issuers through technological advances made possible by economies of scale and, particularly, by the elimination of a large number of mailings. For the foregoing reasons, the Exchange believes that its proposed fee schedule does not place any unnecessary burden on competition.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange believes that Rules 451 and 465 as amended by the proposed amendments do not impose any burdens on competition. Under the SEC's proxy rules, issuers are unable to make distributions themselves to "street name" account holders, but must instead rely on the brokers that are record holders to make those distributions. SEC Rule 14b–1(c)(2) provides that a broker is required to forward proxy and other material to beneficial owners of an issuer's securities only if the issuer reimburses it for its reasonable expenses incurred in connection with these distributions. Consequently, in revising the fees set forth in Rules 451 and 465, the PFAC and the Exchange intended to establish fees which represented a reasonable level of reimbursement and the Exchange believes that the proposed amendments are successful in this regard. As the Exchange was limited to establishing fees that reflected a reasonable expense reimbursement level, it would not have been possible for the Exchange to propose amended fees with the intention or the effect of providing a competitive advantage to any particular broker or existing intermediary or creating any barriers to entry for potential new intermediaries. For some time now a single intermediary has come to have a predominant role in the distribution of proxy material. Nonetheless, the Committee believed that the current structure has produced a proxy distribution system which is generally viewed as reliable and effective, as well as being a system which has reduced costs to issuers through technological advances made possible by economies of scale and, particularly, by the elimination of a large number of mailings. The Exchange does not believe that the predominance of this existing single intermediary results from the level of the existing fees or that the proposed amended fees will change its competitive position or create any additional barriers to entry for potential new intermediaries. Moreover, brokers have the ultimate choice to use an intermediary of their choice, or perform the work the work [sic] themselves. Competitors are also free to establish relationships with brokers, and the proposed fees would not operate as a barrier to entry.

[55] *See* discussion above.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change. The Exchange has neither solicited nor received written comments on the proposed rule change. The Exchange did receive a letter from SIFMA, dated May 30, 2012, in response to the publication of the PFAC Report on May 16, 2012. The letter noted the Committee proposal to eliminate proxy fees with respect to positions of five shares or less in managed accounts. It stated that because there are proxy processing costs associated with such accounts, SIFMA did not support the establishment of a threshold that would eliminate reimbursement for such costs.

The Securities Transfer Association ("STA") provided the Exchange with a copy of an analysis it did of the proposed proxy fee schedule contained in the PFAC Report. This analysis was publicized by the STA on July 11, 2012,

and may be found on the STA's Web site at *www.stai.org*.

The STA states that it analyzed 33 public company invoices for proxy distribution services, applying the PFAC proposed fee schedule. The STA claims that the 33 issuers would experience, on average, a 7.43% increase in proxy distribution costs under the proposed schedule. The STA also claims that membership of the PFAC was over-representative of financial services companies, notes disappointment that the PFAC did not use an independent third party to analyze data provided by Broadridge and conduct an independent cost analysis, and also notes disappointment that the PFAC did not recommend the elimination of all proxy fees for positions held in managed accounts.

The STA analysis does not explain how STA arrived at the 7.43% number. The STA also does not identify the 33 issuers surveyed. The Exchange has noted that the experience of any individual issuer under the proposed fee schedule will vary depending on its circumstances. Furthermore, the estimate contained in both the PFAC Report and in this rule filing that there would be an approximate 4% overall decrease in fees paid by issuers under the proposed schedule is one that looks at fees paid by a universe of some 8,000 issuers whose proxy material distributions to street name holders are processed by Broadridge. We can only assume that the STA group of 33 issuers is not adequately representative of all the issuers in the proxy distribution universe. We do note that the three size tiers represented in the STA sample are not in fact representative of the overall population.[56]

The STA's analysis of the make-up of the PFAC is flawed. The Committee was created to represent the views of issuers, brokers and investors, given their disparate interests in the fees, which are paid by the issuers to the banks and brokers. The Committee members affiliated with REITs, for example, while classified by the STA as in the financial services sector, represent the issuer side in this dichotomy. The mutual fund company on the PFAC was intended to represent the interest of investors in the proxy process. Only two of the PFAC representatives were with companies containing broker-dealers with a public customer business.

The Committee and the Exchange have explained that the proxy fees do not lend themselves to "utility rate making" in which costs are accounted for in a uniform and specified way and subject to audit regarding whether the provider is obtaining a permitted rate of return. The costs involved are incurred by a large number of brokerage firms, who record their costs in different ways. The Committee and the Exchange judged that it would likely be impossible and certainly not cost effective, to engage an auditing firm to review industry data for purposes of the Committee's work. Both believe that the result produced by the diligent work of the multi-constituent Committee is an appropriate way to update the schedule of fees which serves the SEC mandate that the reasonable costs of brokers in distributing proxy materials be reimbursed by the issuers involved.

As noted earlier, the proper treatment of managed accounts in the proxy fee context has been a focus of STA comments. The PFAC view was that there should be a sharing of costs in this area, given that managed accounts, at least those above 5 shares or less, benefitted both issuers and brokers. The Exchange notes that the PFAC proposal regarding managed accounts has not satisfied either SIFMA or the STA, which may be an indication that it is a suitable compromise.

As also noted earlier, the PFAC wished to avoid recommendations that would generate large and potentially dislocating changes in the fees. It was also important to the PFAC that the fees continue to support reliable, accurate and secure proxy distribution process. Eliminating virtually all charges for managed account positions, as urged by the STA, would have a very significant impact on proxy fees, and presumably would require additional very significant increases in the basic processing fees to continue to support the proxy distribution process. That was not an approach favored by the PFAC.

The Exchange also received several letters expressing support for the EBIP success fee. Those letters are described in the EBIP discussion above.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove the proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NYSE–2013–07 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2013–07. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of 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

[56] The STA notes that one-third of their sample are issuers with between 110 and 10,000 street name positions, 42% of their sample issuers have between 10,000 and 200,000 positions, and 24% have between 200,000 and 2.4 million positions. In contrast, among the 8,000 issuers processed by Broadridge, the numbers falling in each of those size categories are 75% (with only 5% of the aggregate positions), 22% (with 38% of the aggregate positions) and 2% (with 57% of the aggregate positions).

available publicly. All submissions should refer to File Number SR–NYSE–2013–07 and should be submitted on or before March 15, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–04092 Filed 2–21–13; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68937; File No. SR–NASDAQ–2012–129]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Granting Approval to Proposed Rule Change, as Modified by Amendment No. 1, To Establish the Retail Price Improvement Program on a Pilot Basis until 12 Months From the Date of Implementation

February 15, 2013.

I. Introduction

On November 19, 2012, The NASDAQ Stock Market LLC (the "Exchange" or "NASDAQ") filed with the Securities and Exchange Commission ("Commission") pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] a proposed rule change to establish a Retail Price Improvement Program ("Program") on a pilot basis for a period of 12 months from the date of implementation, if approved. The proposed rule change was published for comment in the **Federal Register** on December 7, 2012.[3] The Commission did not receive any comments on the proposed rule change. On February 13, 2013, the Exchange filed Amendment No. 1 to its proposal.[4]

In connection with the proposal, the Exchange requested exemptive relief from Rule 612 of Regulation NMS,[5] which, among other things, prohibits a national securities exchange from accepting or ranking orders priced greater than $1.00 per share in an increment smaller than $0.01.[6] On January 14, 2013, the Exchange submitted a letter requesting that the staff of the Division of Trading and Markets not recommend any enforcement action under Rule 602 of Regulation NMS ("Quote Rule") based on the Exchange's and its Members' participation in the Program.[7]

This order approves the proposed rule change and grants the exemption from the Sub-Penny Rule sought by the Exchange in relation to the proposed rule change.

II. Description of the Proposal

The Exchange is proposing a 12-month pilot program to attract additional retail order flow to the Exchange, while also providing the potential for price improvement to such retail order flow. The Program would be limited to trades occurring at prices equal to or greater than $1.00 per share.[8] All Regulation NMS securities traded on the Exchange would be eligible for inclusion in the Program.

Under the Program, a new class of market participants called Retail Member Organizations ("RMOs")[9] would be eligible to submit certain retail order flow ("Retail Orders") to the Exchange. All Exchange Members would be permitted to provide potential price improvement for Retail Orders in the form of designated non-displayed interest, called a Retail Price Improvement Order ("RPI Order" or "RPI interest"), that is priced more aggressively than the Protected National Best Bid or Offer ("Protected NBBO")[10] by at least $0.001 per share. When RPI interest priced at least $0.001 per share better than the Protected Bid or Protected Offer for a particular security is available in the system, the Exchange would disseminate an identifier, known as the Retail Liquidity Identifier, indicating that such interest exists. A Retail Order would interact, to the extent possible, with available contra-side RPI Orders.[11]

The Exchange represents that its proposed rule change is based on rules recently adopted by other exchanges. The NASDAQ proposal is virtually identical to BATS Y-Exchange Rule 11.24, which sets forth the BATS Y-Exchange's Retail Price Improvement Program.[12] It is also highly similar to New York Stock Exchange LLC's ("NYSE") Rule 107C, which governs NYSE's Retail Liquidity Program,[13] with three distinctions. First, the NYSE's Retail Liquidity Program creates a category of members, Retail Liquidity Providers, who are required to maintain a retail price-improving order that betters the protected best bid or offer at least 5% of the trading day in each assigned security and who receive lower execution fees as a result. Under the NASDAQ proposal, the Exchange would not create such a category of Members. Second, NASDAQ's proposal would permit executions in all cases against resting RPI Orders and, additionally, other non-displayed liquidity resting on the Exchange's System.[14] In contrast,

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[17] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 68336 (December 3, 2012), 77 FR 73097 (SR–NASDAQ–2012–129) ("Notice").

[4] In Amendment No. 1, the Exchange proposes to clarify that, to qualify as a "Retail Order," a "riskless principal" order must satisfy the criteria for riskless principal orders set forth in FINRA Rule 5320.03. Because the changes made in Amendment No. 1 do not materially alter the substance of the proposed rule change or raise any novel regulatory issues, Amendment No. 1 is not subject to notice and comment.

[5] 17 CFR 242.612 ("Sub-Penny Rule").

[6] *See* Letter from Jeffrey Davis, Deputy General Counsel, The NASDAQ Stock Market LLC, to Elizabeth M. Murphy, Secretary, Commission, dated November 19, 2012 ("Request for Sub-Penny Rule Exemption").

[7] *See* Letter from Jeffrey Davis, Deputy General Counsel, The NASDAQ Stock Market LLC, to John Ramsay, Division of Trading and Markets, Commission, dated January 14, 2013.

[8] The Exchange notes that certain orders submitted to the Program designated as eligible to interact with liquidity outside of the Program—Type 2 Retail Orders, discussed below—could execute at prices below $1.00 if they do in fact execute against liquidity outside of the Program.

[9] A RMO would be a Member (or a division thereof) that has been approved by the Exchange to submit Retail Orders. *See* Nasdaq Rule 4780. A "Member" is any registered broker or dealer that has been admitted to membership in the Exchange. *See* Nasdaq Rule 0120(i).

[10] The terms Protected Bid and Protected Offer are defined in Rule 600(b)(57) of Regulation NMS, 17 CFR 242.600(b)(57). The Exchange represents that, generally, the Protected Bid and Protected Offer, and the national best bid ("NBB") and national best offer ("NBO," together with the NBB, the "NBBO"), will be the same. However, it further represents that a market center is not required to route to the NBB or NBO if that market center is subject to an exception under Regulation NMS Rule 611(b)(1) or if such NBB or NBO is otherwise not available for an automatic execution. In such case, the Exchange states that the Protected NBBO would be the best-priced protected bid or offer to which a market center must route interest pursuant to Rule 611 of Regulation NMS.

[11] As explained further below, the Exchange has proposed two types of Retail Orders, one of which could execute against other interest if it was not completely filled by contra-side RPI Interest or other price-improving liquidity. All Retail Orders would first execute against available contra-side RPI Orders or other price-improving liquidity. Any remaining portion of the Retail Order would then either cancel, be executed as an immediate-or-cancel order, or be routed to another market for execution, depending on the type of Retail Order.

[12] *See* Securities Exchange Act Release No. 68303 (November 27, 2012), 77 FR 71652 (December 3, 2012) (SR–BYX–2012–019) ("BATS RPI Approval Order").

[13] *See* Securities Exchange Act Release No. 67347 (July 3, 2012), 77 FR 40673 (July 10, 2012) (SR–NYSE–2011–55; SR–NYSEAmex–2011–84) ("NYSE RLP Approval Order"). In the RLP Approval Order, the Commission also approved a Retail Liquidity Program for NYSE Amex LLC (now known as NYSE MKT LLC) ("NYSE MKT").

[14] The Exchange notes that other price improving liquidity may include, but is not limited to: booked non-displayed orders with a limit price that is more aggressive than the then-current NBBO; midpoint-pegged orders (which are by definition non-displayed and priced more aggressively than the

Continued

pursuant to NYSE Rule 107C(k)(1), a Type 1-designated Retail Order, "will interact only with available contra-side Retail Price Improvement Orders and will not interact with other available contra-side interest in Exchange systems."[15] Finally, under the NYSE'S Retail Liquidity Program, Retail Orders execute at the single price at which the order will be fully executed. Pursuant to NASDAQ's proposal, Retail Orders execute at multiple price levels rather than a single price level.[16]

Types of Orders and Identifier

A Retail Order would be an agency or riskless principal[17] order that originates from a natural person and is submitted to the Exchange by a RMO, provided that no change is made to the terms of the order with respect to price (except in the case of a market order being changed to a marketable limit order) or side of market and the order does not originate from a trading algorithm or any other computerized methodology. As discussed in greater detail below, Retail Orders may be designated as Type 1 or Type 2. Retail Orders, regardless of Type, may be entered in sizes that are odd lots, rounds lots, or mixed lots.

An RPI Order would be non-displayed liquidity on the Exchange that is priced more aggressively than the Protected NBBO by at least $0.001 per share and that is identified as an RPI Order in a manner prescribed by the Exchange. RPI interest can be priced either as an explicitly priced limit order or implicitly priced as relative to the NBBO with an offset of at least $0.001. The price of an RPI Order with an offset would be determined by a Member's entry of the following into the Exchange: (1) RPI buy or sell interest; (2) an offset from the Protected NBBO, if any; and (3) a ceiling or floor price. RPI Orders submitted with an offset would be similar to other peg orders available to Members in that the order is tied or "pegged" to a certain price, and would have its price automatically set and adjusted upon changes in the Protected NBBO, both upon entry and any time thereafter.

RPI Orders in their entirety (the buy or sell interest, the offset, and the ceiling or floor) will remain non-displayed. The Exchange will also allow Members to enter RPI Orders which establish the exact limit price, which is similar to a non-displayed limit order currently accepted by the Exchange today, except the Exchange will accept sub-penny limit prices on RPI Orders in increments of $0.001.[18] The Exchange will monitor whether RPI buy or sell interest, adjusted by any offset and subject to the ceiling or floor price, is eligible to interact with incoming Retail Orders.

When RPI interest priced at least $0.001 better than the Exchange's Protected Bid or Protected Offer for a particular security is available in the System, the Exchange would disseminate an identifier, known as the Retail Liquidity Identifier, indicating that such interest exists. The Exchange would implement the Program in a manner that allowed the dissemination of the identifier through consolidated data streams (*i.e.*, pursuant to the Consolidated Tape Association Plan/Consolidated Quotation Plan ("CTA/CQ Plan") for Tape A and Tape B securities, and the Nasdaq UTP Plan for Tape C securities as well as through proprietary Exchange data feeds). The Retail Liquidity Identifier would reflect the symbol and the side (buy or sell) of the RPI Order, but it would not include the price or size. In particular, the consolidated quoting outputs would include a field for codes related to the Retail Liquidity Identifier. The codes will indicate RPI interest that is priced better than the Protected Bid or Protected Offer by at least the minimum level of price improvement as required by the Program.

Retail Member Organizations

In order to become a RMO, a Member must conduct a retail business or handle retail orders on behalf of another broker-dealer. Any Member that wishes to obtain RMO status would be required to submit: (1) An application form; (2) an attestation, in a form prescribed by the Exchange, that any order submitted by the Member as a Retail Order would meet the qualifications for such orders under proposed Nasdaq Rule 4780(b); and (3) supporting documentation sufficient to demonstrate the retail nature and characteristics of the applicant's order flow.[19] If the Exchange disapproves the application, it would provide a written notice to the Member. The disapproved applicant could appeal the disapproval as provided below and/or re-apply 90 days after the disapproval notice is issued by the Exchange. An RMO also could voluntarily withdraw from such status at any time by giving written notice to the Exchange.

The Exchange would require an RMO to have written policies and procedures reasonably designed to assure that it will only designate orders as Retail Orders if all the requirements of a Retail Order are met. Such written policies and procedures would have to require the Member to exercise due diligence before entering a Retail Order to assure that entry as a Retail Order is in compliance with the proposed rule, and monitor whether orders entered as Retail Orders meet the applicable requirements. If the RMO represents Retail Orders from another broker-dealer customer, the RMO's supervisory procedures must be reasonably designed to assure that the orders it receives from such broker-dealer customer that it designates as Retail Orders meet the definition of a Retail Order. The RMO must obtain an annual written representation, in a form acceptable to the Exchange, from each broker-dealer customer that sends it orders to be designated as Retail Orders that entry of such orders as Retail Orders will be in compliance with the requirements of this rule, and monitor whether its broker-dealer customer's Retail Order flow continues to meet the applicable requirements.[20]

Retail Order Designations

Under proposed Nasdaq Rule 4780(f), a RMO submitting a Retail Order could choose one of two designations dictating how it would interact with available

NBBO); non-displayed orders pegged to the NBBO with an aggressive offset. Orders that do not constitute other price improving liquidity include, but are not limited to: orders with a time-in-force instruction of IOC; displayed orders; limit orders priced less aggressively than the NBBO.

[15] Additionally, pursuant to NYSE Rules 107C(k)(2) and 107C(k)(3), a Type 2-designated Retail Order and a Type 3-designated Retail Order can interact with other non-RPI interest in the NYSE systems; however, such interaction only occurs after a Retail Order first executes against RPI Orders.

[16] *See* Notice, *supra* note 3, 77 FR at 73100–01 (explaining the three distinctions in detail).

[17] In order to qualify as a "Retail Order," a "riskless principal" order must satisfy the criteria set forth in FINRA Rule 5320.03. RMOs that submit riskless principal orders as Retail Orders must maintain supervisory systems to reconstruct such orders in a time-sequenced manner, and the RMOs must submit reports contemporaneous with the execution of the facilitated orders that identify such trades as riskless principal.

[18] As noted above, *supra* note 6 and accompanying text, in connection with the Program, the Exchange requested exemptive relief from the Sub-Penny Rule of Regulation NMS, which, among other things, prohibits a national securities exchange from accepting or ranking orders priced greater than $1.00 per share in an increment smaller than $0.01.

[19] For example, a prospective RMO could be required to provide sample marketing literature, Web site screenshots, other publicly disclosed materials describing the retail nature of their order flow, and such other documentation and information as the Exchange may require to obtain reasonable assurance that the applicant's order flow would meet the requirements of the Retail Order definition.

[20] The Exchange represents that it or another self-regulatory organization on behalf of the Exchange will review a RMO's compliance with these requirements through an exam-based review of the RMO's internal controls. *See* Notice, *supra* note 3, 77 FR at 73099 n.7.

contra-side interest. First, a Retail Order could interact only with available contra-side RPI interest and other price-improving liquidity. The Exchange would label this a Type 1 Retail Order and such orders would not interact with available non-price-improving, contra-side interest in Exchange systems or route to other markets. Portions of a Type 1 Retail Order that are not executed would be cancelled immediately and automatically.

Second, a Retail Order could interact first with available contra-side RPI Orders and other price-improving liquidity, and any remaining portion would be eligible to interact with other interest in the System and, if designated as eligible for routing, would route to other markets in compliance with Regulation NMS and pursuant to Nasdaq Rule 4758. The shares remaining from a Type 2-designated Retail Order that do not fully execute against contra-side RPI Orders or other price improving liquidity, if any, would execute against other liquidity available on the Exchange or be routed to other market centers for execution. The remaining unexecuted portion would then be cancelled.

Priority and Allocation

Under proposed Nasdaq Rule 4780(g), the Exchange would follow price-time priority, ranking RPI interest in the same security according to price and then time of entry into the System.[21] Any remaining unexecuted RPI Orders would remain available to interact with other incoming Retail Orders if such interest is at an eligible price. Any remaining unexecuted portion of a Retail Order would cancel or execute in accordance with proposed Nasdaq Rule 4780(f).[22]

Failure of RMO To Abide by Retail Order Requirements

Proposed Nasdaq Rule 4780(c) addresses an RMO's failure to abide by Retail Order requirements. If an RMO were to designate orders submitted to the Exchange as Retail Orders and the Exchange determined, in its sole discretion, that those orders failed to meet any of the requirements of Retail Orders, the Exchange could disqualify a Member from its status as a RMO. When disqualification determinations are made, the Exchange would provide a written disqualification notice to the Member. A disqualified RMO could appeal the disqualification as provided below and/or re-apply 90 days after the disqualification notice is issued by the Exchange.

Appeal of Disapproval or Disqualification

Under Proposed Rule 4780(d), the Exchange would establish a Retail Price Improvement Program Panel ("RPI Panel") to review disapproval or disqualification decisions. If a Member disputes the Exchange's decision to disapprove or disqualify it as a RMO, such Member could request, within five business days after notice of the decision is issued by the Exchange, that the RPI Panel review the decision to determine if it was correct. The RPI Panel would consist of the Exchange's Chief Regulatory Officer or his or her designee, and two officers of the Exchange designated by the Exchange's Chief Operating Officer, and it would review the facts and render a decision within the timeframe prescribed by the Exchange. The RPI Panel could overturn or modify an action taken by the Exchange and all determinations by the RPI Panel would constitute final action by the Exchange on the matter at issue.

III. Discussion and Commission Findings

After careful review of the proposal, the Commission finds 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. In particular, the Commission finds that the proposed rule change, subject to its term as a pilot, is consistent with Section 6(b)(5) of the Act,[23] which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and 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; and not be designed to permit unfair discrimination between customers, issuers, brokers or dealers.

The Commission finds that the Program, as it is proposed on a pilot basis, is consistent with the requirements of the Act because the Program is reasonably designed to benefit retail investors by providing price improvement to retail order flow.[24] The Commission also believes that the Program could promote competition for retail order flow among execution venues, and that this could benefit retail investors by creating additional price improvement opportunities for their order flow. Currently, most marketable retail order flow is executed in the over-the-counter ("OTC") markets, pursuant to bilateral agreements, without ever reaching a public exchange. The Commission has noted that "a very large percentage of marketable (immediately executable) order flow of individual investors" is executed, or "internalized," by broker-dealers in the OTC markets.[25] A review of the order flow of eight retail brokers revealed that nearly 100% of their customer market orders were routed to OTC market makers.[26] The same review found that such routing is often done pursuant to arrangements under which retail brokers route their order flow to certain OTC market makers in exchange for payment for such order flow.[27] To the extent that the Program may provide price improvement to retail orders that equals what would be provided under such OTC internalization arrangements, the Program could benefit retail investors. To better understand the Program's potential impact, the Exchange represents that it "will produce data throughout the pilot, which will include statistics about participation, the frequency and level of price improvement provided by the Program, and any effects on the broader market structure, and would be reviewed by the Commission prior to any extension of the Program beyond the proposed one-year pilot term, or permanent approval of the Program."[28]

The Program proposes to create additional price improvement opportunities for retail investors by segmenting retail order flow on the Exchange and requiring liquidity providers that want to interact with such retail order flow to do so at a price at least $0.001 per share better than the Protected Best Bid or Offer. The Commission finds that, while the Program would treat retail order flow differently from order flow submitted by other market participants, such segmentation would not be inconsistent

[21] *See also* Nasdaq Rule 4757 (setting forth the Exchange's price-time priority methodology).

[22] The Exchange provides three examples of how the priority and ranking of RPI Orders would operate. *See* Notice, *supra* note 3, 77 FR at 73100.

[23] 15 U.S.C. 78f(b)(5).

[24] The Commission recently approved similar Programs for BATS–Y Exchange, NYSE and NYSE MKT. *See* BATS RPI Approval Order, *supra* note 12, and NYSE RLP Approval Order, *supra* note 13.

[25] *See* Securities Exchange Act Release No. 61358 (Jan. 14, 2010), 75 FR 3594, 3600 (Jan. 21, 2010) ("Concept Release on Equity Market Structure").

[26] *See id.*

[27] *See id.*

[28] *See* Notice, *supra* note 3, 77 FR at 73100.

with Section 6(b)(5) of the Act, which requires that the rules of an exchange are not designed to permit unfair discrimination. The Commission previously has recognized that the markets generally distinguish between individual retail investors, whose orders are considered desirable by liquidity providers because such retail investors are presumed on average to be less informed about short-term price movements, and professional traders, whose orders are presumed on average to be more informed.[29] The Commission has further recognized that, because of this distinction, liquidity providers are generally more inclined to offer price improvement to less informed retail orders than to more informed professional orders.[30] Absent opportunities for price improvement, retail investors may encounter wider spreads that are a consequence of liquidity providers interacting with informed order flow. By creating additional competition for retail order flow, the Program is reasonably designed to attract retail order flow to the exchange environment, while helping to ensure that retail investors benefit from the better price that liquidity providers are willing to give their orders.

The Commission notes that the Program might also create a desirable opportunity for institutional investors to interact with retail order flow that they are not able to reach currently. Today, institutional investors often do not have the chance to interact with marketable retail orders that are executed pursuant to internalization arrangements. Thus, by submitting RPI Orders, institutional investors may be able to reduce their possible adverse selection costs by interacting with retail order flow.

When the Commission is engaged in rulemaking or the review of a rule filed by a self-regulatory organization, and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.[31] As discussed above, the Commission believes this Program will promote competition for retail order flow by allowing Exchange Members to submit RPI Orders to interact with Retail Orders. Such competition may promote efficiency by facilitating the price discovery process. Moreover, the Commission does not believe that the Program will have a significant effect on market structure, or will create any new inefficiencies in current market structure. Finally, to the extent the Program is successful in attracting retail order flow, it may generate additional investor interest in trading securities, thereby promoting capital formation.

The Commission also believes that the Program is sufficiently tailored to provide the benefits of potential price improvement only to bona fide retail order flow originating from natural persons.[32] The Commission finds that the Program provides an objective process by which a Member organization could become a RMO, and for appropriate oversight by the Exchange to monitor for continued compliance with the terms of these provisions. The Exchange has limited the definition of Retail Order to an agency or riskless principal order that originates from a natural person and not a trading algorithm or any other computerized methodology. Furthermore, a Retail Order must be submitted by a RMO that is approved by the Exchange. In addition, RMOs would be required to maintain written policies and procedures to help ensure that they designate as Retail Orders only those orders which qualify under the Program. If a Member's application to become a RMO is denied by the Exchange, that Member may appeal the determination or re-apply. The Commission believes that these standards should help ensure that only retail order flow is submitted into the Program and thereby promote just and equitable principles of trade and protect investors and the public interest, while also providing an objective process through which Members may become RMOs.

In addition, the Commission finds that the Program's proposed dissemination of a Retail Liquidity Identifier would increase the amount of pricing information available to the marketplace and is consistent with the Act. The identifier would be disseminated through the consolidated public market data stream to advertise the presence of a RPI Order with which Retail Orders could interact. The identifier would reflect the symbol for a particular security and the side of the RPI Order interest, but it would not include the price or size of such interest. The identifier would alert market participants to the existence of a RPI Order and should provide market participants with more information about the availability of price improvement opportunities for retail orders than is currently available.[33]

The Exchange believes that the proposed Program, which will operate virtually the same as the BATS RPI Program, and similar to, but with distinctions from, the NYSE RLP Program, should both enhance competition among market participants and encourage competition among exchange venues.[34] Specifically, the Exchange believes that: allowing all Members to enter RPI Orders, as opposed to adopting a special category of retail liquidity provider, as NYSE did with its RLP Program, could result in a higher level of competition and could maximize price improvement to incoming Retail Orders; the Program will provide the maximum price improvement available to incoming Retail Orders because they will always interact with available contra-side RPI Orders and any other price-improving contra-side interest; and the Program will provide all of the price improvement available to incoming Retail Orders by allowing executions at multiple price levels, as opposed to a

[29] *See* BATS RPI Approval Order, *supra* note 12 and NYSE RLP Approval Order, *supra* note 13. *See also* Concept Release on Equity Market Structure, *supra* note 25; Securities Exchange Act Release No. 64781 (June 30, 2011), 76 FR 39953 (July 7, 2011) (approving a program proposed by an options exchange that would provide price improvement opportunities to retail orders based, in part, on questions about execution quality of retail orders under payment for order flow arrangements in the options markets).

[30] *See* BATS RPI Approval Order, *supra* note 12, and NYSE RLP Approval Order, *supra* note 1313. *See also* Securities Exchange Act Release No. 64781 (June 30, 2011), 76 FR 39953 (July 7, 2011) (noting that "it is well known in academic literature and industry practice that prices tend to move against market makers after trades with informed traders, often resulting in losses for market makers," and that such losses are often borne by uninformed retail investors through wider spreads (citing H.R. Stoll, "The supply of dealer services in securities markets," *Journal of Finance* 33 (1978), at 1133–51; L. Glosten & P. Milgrom, "Bid ask and transaction prices in a specialist market with heterogeneously informed agents," *Journal of Financial Economics* 14 (1985), at 71–100; and T. Copeland & D. Galai, "Information effects on the bid-ask spread," *Journal of Finance* 38 (1983), at 1457–69)).

[31] *See* 15 U.S.C. 78c(f).

[32] In addition, the Commission believes that the Program's provisions concerning the approval and potential disqualification of RMOs are not inconsistent with the Act. *See, e.g.*, NYSE RLP Approval Order, *supra* note 13, 77 FR at 40680 & n.77.

[33] As the Commission noted when approving the comparable BATS and NYSE programs, the Commission believes that the Program will not create any best execution challenges for brokers that are not already present in today's markets. A broker's best execution obligations are determined by a number of facts and circumstances, including: (1) The character of the market for the security (e.g., price, volatility, relative liquidity, and pressure on available communications); (2) the size and type of transaction; (3) the number of markets checked; (4) accessibility of the quotation; and (5) the terms and conditions of the order which result in the transaction. *See* BATS RPI Approval Order, *supra* note 12, 77 FR at 71657, and NYSE RLP Approval Order, *supra* note 13, 77 FR at 40680 n.75 (both citing FINRA Rule 5310).

[34] *See* Notice, *supra* note 3, 77 FR at 73102.

single clearing price level.[35] The Commission finds that the Program is reasonably designed to enhance competition among market participants and encourage competition among exchange venues. The Commission also finds that the distinctions between the Exchange's Program and the approved NYSE and NYSE MKT programs are reasonably designed to enhance the Program's price-improvement benefits to retail investors and, therefore, are consistent with the Act.

The Commission notes that it is approving the Program on a pilot basis. Approving the Program on a pilot basis will allow the Exchange and market participants to gain valuable practical experience with the Program during the pilot period. This experience should allow the Exchange and the Commission to determine whether modifications to the Program are necessary or appropriate prior to any Commission decision to approve the Program on a permanent basis. The Exchange also has agreed to provide the Commission with a significant amount of data that should assist the Commission in its evaluation of the Program. Specifically, the Exchange has represented that it "will produce data throughout the pilot, which will include statistics about participation, the frequency and level of price improvement provided by the Program, and any effects on the broader market structure."[36] The Commission expects that the Exchange will monitor the scope and operation of the Program and study the data produced during that time with respect to such issues, and will propose any modifications to the Program that may be necessary or appropriate.

The Commission also welcomes comments, and empirical evidence, on the Program during the pilot period to further assist the Commission in its evaluation of the Program. The Commission notes that any permanent approval of the Program would require a proposed rule change by the Exchange, and such rule change will provide an opportunity for public comment prior to further Commission action.

IV. Exemption From the Sub-Penny Rule

Pursuant to its authority under Rule 612(c) of Regulation NMS,[37] the Commission hereby grants the Exchange a limited exemption from the Sub-Penny Rule to operate the Program. For the reasons discussed below, the Commission determines that such action is necessary or appropriate in the public interest, and is consistent with the protection of investors. The exemption shall operate for a period of 12 months, coterminous with the effectiveness of the proposed rule change approved today.

When the Commission adopted the Sub-Penny Rule in 2005, it identified a variety of problems caused by sub-pennies that the Sub-Penny Rule was designed to address:

- If investors' limit orders lose execution priority for a nominal amount, investors may over time decline to use them, thus depriving the markets of liquidity.
- When market participants can gain execution priority for a nominal amount, important customer protection rules such as exchange priority rules and the Manning Rule could be undermined.
- Flickering quotations that can result from widespread sub-penny pricing could make it more difficult for broker-dealers to satisfy their best execution obligations and other regulatory responsibilities.
- Widespread sub-penny quoting could decrease market depth and lead to higher transaction costs.
- Decreasing depth at the inside could cause institutions to rely more on execution alternatives away from the exchanges, potentially increasing fragmentation in the securities markets.[38]

At the same time, the Commission "acknowledge[d] the possibility that the balance of costs and benefits could shift in a limited number of cases or as the markets continue to evolve."[39] Therefore, the Commission also adopted Rule 612(c), which provides that the Commission may grant exemptions from the Sub-Penny Rule, either unconditionally or on specified terms and conditions, if it determined that such an exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.

The Commission believes that the Exchange's proposal raises such a case. As described above, under the current market structure, few marketable retail orders in equity securities are routed to exchanges. The vast majority of marketable retail orders are internalized by OTC market makers, who typically pay retail brokers for their order flow. Retail investors can benefit from such arrangements to the extent that OTC market makers offer them price improvement over the NBBO. Price improvement is typically offered in sub-penny amounts.[40] An internalizing broker-dealer can offer sub-penny executions, provided that such executions do not result from impermissible sub-penny orders or quotations. Accordingly, OTC market makers typically select a sub-penny price for a trade without quoting at that exact amount or accepting orders from retail customers seeking that exact price. Exchanges—and exchange member firms that submit orders and quotations to exchanges—cannot compete for marketable retail order flow on the same basis, because it would be impractical for exchange electronic systems to generate sub-penny executions without exchange liquidity providers or retail brokerage firms having first submitted sub-penny orders or quotations, which the Sub-Penny Rule expressly prohibits.

The limited exemption granted today should promote competition between exchanges and OTC market makers in a manner that is reasonably designed to minimize the problems that the Commission identified when adopting the Sub-Penny Rule. Under the Program, sub-penny prices will not be disseminated through the consolidated quotation data stream, which should avoid quote flickering and its reduced depth at the inside quotation. Furthermore, while the Commission remains concerned about providing enough incentives for market participants to display limit orders, the Commission does not believe that granting this exemption (and approving the accompanying proposed rule change) will reduce such incentives. Market participants that display limit orders currently are not able to interact with marketable retail order flow because it is almost entirely routed to internalizing OTC market makers that offer sub-penny executions. Consequently, enabling the Exchanges to compete for this retail order flow through the Program should not materially detract from the current incentives to display limit orders, while potentially resulting in greater order interaction and price improvement for

[35] *See supra* notes 14 to 16 and accompanying text.

[36] *See supra* note 28 and accompanying text.

[37] 17 CFR 242.612(c).

[38] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37551–52 (June 29, 2005).

[39] *Id.* at 37553.

[40] When adopting the Sub-Penny Rule, the Commission considered certain comments that asked the Commission to prohibit broker-dealers from offering sub-penny price improvement to their customers, but declined to do so. The Commission stated that "trading in sub-penny increments does not raise the same concerns as sub-penny quoting" and that "sub-penny executions due to price improvement are generally beneficial to retail investors." *Id.* at 37556.

marketable retail orders. To the extent that the Program may raise Manning and best execution issues for broker-dealers, these issues are already presented by the existing practices of OTC market makers.

The exemption being granted today is limited to a one-year pilot. The Exchange has stated that "sub-penny trading and pricing could potentially result in undesirable market behavior," and, therefore, it will "monitor the Program in an effort to identify and address any such behavior."[41] Furthermore, the Exchange has represented that it "will produce data throughout the pilot, which will include statistics about participation, the frequency and level of price improvement provided by the Program, and any effects on the broader market structure."[42] The Commission expects to review the data and observations of the Exchange before determining whether and, if so, how to extend the exemption from the Sub-Penny Rule.[43]

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[44] that the proposed rule change (SR–NASDAQ–2012–129) be, and hereby is, approved on a one-year pilot basis.

It is also hereby ordered that, pursuant to Rule 612(c) of Regulation NMS, the Exchange is given a limited exemption from Rule 612 of Regulation NMS allowing it to accept and rank orders priced equal to or greater than $1.00 per share in increments of $0.001, in the manner described in the proposed rule change above, on a one-year pilot basis coterminous with the effectiveness of the proposed rule change.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[45]

Kevin O'Neill,

Deputy Secretary.

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[41] *See* Request for Sub-Penny Rule Exemption, *supra* note 6, at 3, n.6.

[42] *See supra* note 28 and accompanying text.

[43] In particular, the Commission expects the Exchange to observe how maker/taker transaction charges, whether imposed by the Exchange or by other markets, might impact the use of the Program. Market distortions could arise where the size of a transaction rebate, whether for providing or taking liquidity, is greater than the size of the minimum increment permitted by the Program ($0.001 per share).

[44] 15 U.S.C. 78s(b)(2).

[45] 17 CFR 200.30–3(a)(12); 17 CFR 200.30–3(a)(83).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68941; File No. SR–CBOE–2013–022]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the CBOE Stock Exchange Fees Schedule

February 15, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on February 12, 2013, Chicago Board Options Exchange, Incorporated (the "Exchange" or "CBOE") 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 the Substance of the Proposed Rule Change

The Exchange proposes to amend the Fees Schedule of its CBOE Stock Exchange ("CBSX"). The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx*), at the Exchange's Office of the Secretary, and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to make a number of changes to the CBSX Fees Schedule. First, the Exchange proposes to amend the reference in Section 10 of the CBSX Fees Schedule to CBOE*direct* to refer to CBOE Command, as the manner through which CBSX Traders connect to the CBSX System is now called CBOE Command.

Second, CBSX proposes eliminate the distinction between Sponsored Users and non-Sponsored Users as they relate to CBOE Command Connectivity Charges. Currently, Sponsored Users are charged twice the regular monthly fees for such charges, with the types and amounts of such fees described in the chart below:

Description	Regular monthly fee	Sponsored user monthly fee
Network Access Port (1 Gbps)	$250	$500
Network Access Port (10 Gbps)	1,000	2,000
Network Access Port (Disaster Recovery)	250	500
CMI Login ID	100	200
FIX Login ID	100	200

Going forward, the Exchange proposes to assess to Sponsored Users and all other non-Trading Permit Holders the same CBOE Command Connectivity Charges as are assessed to Trading Permit Holders ("TPHs"), and to state that all such fees apply to non-TPHs as well as TPHs. The purpose of the proposed change is to simplify the Exchange's fees structure for connectivity to the Exchange and have a standard set of connectivity fees that apply to both TPHs and non-TPHs.

CBSX also proposes to amend the manner in which it determines which fee tiers apply for Maker transactions in securities priced $1 or greater. Currently, fees for such transactions are assessed depending on the amount of shares of liquidity that a Maker adds in one day, with the fee amount lowering based on a Maker adding higher levels of liquidity in one day. The current tiers

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

and fees for such transactions are as follows:

Execution type	Rate
Maker (adds 4,999,999 shares or less of liquidity in one day)	$0.0018 per share.
Maker (adds 5,000,000–9,999,999 shares of liquidity in one day)	$0.0017 per share.
Maker (adds 10,000,000–14,999,999 shares of liquidity in one day)	$0.0016 per share.
Maker (adds 15,000,000–24,999,999 shares of liquidity in one day)	$0.0015 per share.
Maker (adds 25 million shares or more of liquidity in one day)	$0.0014 per share.

CBSX proposes to cease determining such rates using nominal volume thresholds. Instead, CBSX proposes to use relative thresholds by calculating a CBSX Trader's per-share Maker fees, using the Maker's percentage of total consolidated volume (calculated as the volume reported by all exchanges and trade reporting facilities to a consolidated transaction reporting plan) ("TCV"). As such, the proposed tiers and fees are as follows:

Execution type	Rate
Maker (adds less than 0.08% of TCV of liquidity in one day)	$0.0018 per share.
Maker (adds at least 0.08% but less than 0.16% of TCV of liquidity in one day)	$0.0017 per share.
Maker (adds at least 0.16% but less than 0.24% of TCV of liquidity in one day)	$0.0016 per share.
Maker (adds at least 0.24% but less than 0.42% of TCV of liquidity in one day)	$0.0015 per share.
Maker (adds 0.42% or more of TCV of liquidity in one day)	$0.0014 per share.

The current nominal "amount of shares" thresholds and proposed "percentage of TCV" thresholds are intended to correspond (i.e. 4,999,999 shares or less of liquidity generally corresponds with .08% of TCV, etc., based on current TCV levels), and CBSX does not propose to change the amounts of the per-share rates at each tier. The purpose of the change to move away from basing the fee tiers on nominal shares per day to a relative percentage of TCV is to control and account for changes in national industry-wide volume.

To correspond with this proposed change, CBSX proposes to adopt the definition of "TCV" (as defined above) as Footnote 5 to Section 2 of the CBSX Fees Schedule. CBSX also proposes to amend Footnote 1 to Section 2 to account for the use of percentage of TCV to determine per-share fees for Maker transactions in securities priced $1 or greater. The proposed new Footnote 1 will read: "These rates apply to all transactions in securities priced $1 or greater made by the same market participant in any day in which such participant adds (for Makers) or removes (for Takers) the established amount of shares (or percentage of TCV, as applicable) or more of liquidity that is determined in the chart above for each tier. Market participants who share a trading acronym or MPID may aggregate their trading activity for purposes of these rates. Qualification for these rates will require that a market participant appropriately indicate his trading acronym and/or MPID in the appropriate field on the order."

CBSX also proposes to make two other changes to its Fees Schedule. First, in the "Execution Type" column of the first Maker fee tier listed in Section 2, CBSX proposes to move an end-parentheses so that footnotes referenced in that area are all outside of the parentheses, as such footnotes are in all other boxes in the "Execution Type" column.

Second, CBSX proposes to delete Section 3 ("Market Data") from its Fees Schedule. Section 3 currently states: "Market Data Infrastructure Fee: This fee is charged monthly to participants who receive market data from a third party market data vendor through CBSX's market data infrastructure. The Exchange will pass-through to participants receiving the data the total costs incurred by the Exchange to provide the market data infrastructure. The amount of the fee is equal to the Exchange's total costs divided by the number of participants receiving the data. Due to certain fixed costs incurred by the Exchange, each participant receiving the data as of February 15, 2010 will be obligated to pay the fee through June 30, 2010, even if such participant terminates its receipt of the data prior to June 30, 2010."

CBSX no longer provides the service being described in Section 3, meaning that CBSX market participants can no longer receive CBSX-related market data from a third party market data vendor through CBSX's market data infrastructure. As such, CBSX proposes to delete Section 3 from its Fees Schedule. In conjunction with this deletion, each of Sections 4–8 will now be renumbered as Sections 3–7, respectively.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[3] Specifically, the Exchange believes the proposed rule change is consistent with Section 6(b)(4) of the Act,[4] which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Trading Permit Holders and other persons using its facilities. Eliminating, for the purpose of CBOE Command Connectivity Charges, the distinction between Sponsored Users and stating that these fees apply to both TPHs and non-TPHs is reasonable because it will allow Sponsored Users and other non-TPHs to pay half the amount that Sponsored Users are currently assessed for such fees and ensure that TPHs and non-TPHs pay the same amounts in connectivity fees. The proposed change is equitable and not unfairly discriminatory because it will allow Sponsored Users and non-TPHs to be assessed the same amounts as TPHs.

The Exchange believes that converting the qualification for the different fee tiers for Maker transactions in securities priced $1 or greater from measuring by nominal amount of shares to measuring by relative percentage of TCV is reasonable because it allows CBSX to control and account for changes in

[3] 15 U.S.C. 78f(b).

[4] 15 U.S.C. 78f(b)(4).

national industry-wide volume. The Exchange believes that the change is equitable and not unfairly discriminatory because it will be applied to all CBSX Traders. The change merely switches out the measuring stick to use one that accounts for changes in industry-wide volume. Further, other exchanges also measure volume using percentage of TCV.[5]

The Exchange believes that (1) Amending the reference in Section 10 of the CBSX Fees Schedule to CBOE*direct* to accurately refer to CBOE Command, (2) moving the end-parentheses in the first Maker row of the "Execution Type" column of Section 2 of the CBSX Fees Schedule, (3) deleting Section 3 from the CBSX Fees Schedule, and correspondingly (4) re-numbering each of Sections 4–8 as Sections 3–7, respectively, are all consistent with the Section 6(b)(5)[6] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and 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. Providing the correct reference to the manner through which CBSX Traders connect to the CBSX System, placing the footnotes in consistent places in Section 2, deleting a Section that refers to a service which is no longer provided by CBSX, and re-numbering the following sections on the CBSX Fees Schedule due to that deletion, will all serve to eliminate any potential confusion, thereby removing impediments to and perfecting the mechanism of a free and open market and a national market system, and, in general, protecting investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBSX does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Eliminating, for the purpose of CBOE Command Connectivity Charges, the distinction between Sponsored Users and stating that these fees apply to both TPHs and non-TPHs will relieve any possible burden on intramarket competition because it will ensure that TPHs and non-TPHs will be paying the same fee amounts. The Exchange believes that the proposed change will not impose any burden on intermarket competition, or have an impact on intermarket competition, because the proposed changes apply merely to connections to CBSX, and each exchange has different manners and structures for connectivity. Further, to the extent that the elimination of separate higher fees for Sponsored Users and the statement that the regular fees apply to both TPHs and non-TPHs could attract market participants connecting to other exchanges to connect to CBSX, market participants trading on other exchanges can always elect to do so.

The Exchange believes that converting the qualification for the different fee tiers for Maker transactions in securities priced $1 or greater from measuring by nominal amount of shares to measuring by relative percentage of TCV will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe this change imposes a significant burden on intramarket competition, as it applies to all CBSX Traders. The Exchange does not believe this change impose [sic] a significant burden on intermarket competition because it will put CBSX on an more even competitive footing with other exchanges that already use percentage of TCV to determine fees.[7]

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

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) of the Act[8] and paragraph (f) of Rule 19b–4[9] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–CBOE–2013–022 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2013–022. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549–1090 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal offices of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2013–022, and should be submitted on or before March 15, 2013.

[5] *See* BATS Exchange, Inc. ("BATS") Fee Schedule, section on Equities Pricing.

[6] 15 U.S.C. 78f(b)(5).

[7] *See* BATS Fee Schedule, section on Equities Pricing.

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–04100 Filed 2–21–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68942; File No. SR–FINRA–2013–015]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Section 4 of Schedule A to the FINRA By-Laws To Adopt a Waiver Process for the Continuing Membership Application Fee and Amend NASD Rules 1013 and 1017 To Provide for a Refund of the Application Fee for the Withdrawal of a New Member or Continuing Membership Application

February 15, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on February 5, 2013, Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by FINRA. FINRA has designated the proposed rule change as constituting a "non-controversial" rule change under paragraph (f)(6) of Rule 19b–4 under the Act,[3] which renders the proposal effective upon receipt of this filing by the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to amend Section 4 of Schedule A to the FINRA By-Laws to adopt a waiver process for the continuing membership application fee where FINRA determines that the application is proposing less significant changes that do not require substantial staff review. The proposed rule change also would amend NASD Rules 1013 (New Member Application and Interview) and 1017 (Application for Approval of Change in Ownership, Control, or Business Operations) to provide for a refund of the application fee (less a $500 processing fee) if a new member applicant or continuing membership applicant withdraws an application within 30 days after filing the application.

The text of the proposed rule change is available on FINRA's Web site at *http://www.finra.org*, at the principal office of FINRA 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, FINRA 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. FINRA 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

Effective July 23, 2012, FINRA amended Section 4 of Schedule A to its By-Laws to, among other things, assess a new fee for continuing membership applications ("CMAs").[4] In light of comments raised on the CMA fee, FINRA proposes to amend Section 4 of Schedule A to the FINRA By-Laws to adopt a waiver process for the CMA fee where FINRA determines that the CMA is proposing less significant changes that do not require substantial staff review.[5] The proposed rule change also would amend NASD Rules 1013 (New Member Application and Interview) and 1017 (Application for Approval of Change in Ownership, Control, or Business Operations) to refund the requisite application fee (less $500, which shall be retained by FINRA as a processing fee) if an applicant withdraws a new membership application ("NMA") or CMA within 30 days after filing the application.

CMA Fee Waiver

NASD Rule 1017 provides parameters for changes in a member's ownership, control, or business operations that would require a CMA,[6] and NASD Rule 1012 (General Provisions) requires an applicant filing a CMA to submit an application fee pursuant to Schedule A to the FINRA By-Laws. Section 4(i) of Schedule A to the FINRA By-Laws assesses applicants a CMA fee ranging from $5,000 to $100,000 depending on the number of registered persons associated (or to be associated) with the applicant and the type of change in ownership, control, or business operations being contemplated (merger, material change, ownership change, transfer of assets, or acquisition). For instance, the fee structure assesses a member with only one to ten registered persons a fee ranging between $5,000 and $7,500, depending on the type of CMA, whereas a member with 301 to 500 registered persons is assessed a fee ranging between $10,000 and $30,000 depending on the type of CMA. This tiered fee structure recognizes that more complex changes and larger applicants generally require additional staff resources.

The proposed rule change would provide FINRA with flexibility to grant a waiver of the CMA fee for those applications that propose less significant changes to a member firm's

[10] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

[4] *See* Securities Exchange Act Release No. 67240 (June 22, 2012), 77 FR 38694 (June 28, 2012) (Notice of Filing and Immediate Effectiveness of File No. SR–FINRA–2012–031). On July 23, 2012, FINRA also made available a new Form CMA for optional use by continuing membership applicants; applicants were required to use Form CMA effective August 27, 2012. *See* Securities Exchange Act Release No. 67484 (July 23, 2012), 77 FR 44298 (July 27, 2012) (Notice of Filing and Immediate Effectiveness of SR–FINRA–2012–036).

[5] *See also* Letter from Philip Shaikun, Associate Vice President and Associate General Counsel, FINRA, to Elizabeth M. Murphy, Secretary, SEC, dated August 3, 2012, in response to comments on SR–FINRA–2012–031 (indicating FINRA's intent to consider a waiver program for the CMA fee).

[6] NASD Rule 1017(a) (Events Requiring an Application) requires a member to file an application for approval of any of the following changes to its ownership, control, or business operations: (1) A merger of the member with another member, unless both are members of the NYSE or the surviving entity will continue to be a member of the NYSE; (2) a direct or indirect acquisition by the member of another member, unless the acquiring member is a member of the NYSE; (3) direct or indirect acquisitions or transfers of 25 percent or more in the aggregate of the member's assets, or any asset, business, or line of operation that generates revenues comprising 25 percent or more in the aggregate of the member's earnings measured on a rolling 36-month basis, unless both the seller and the acquirer are members of the NYSE; (4) a change in the equity ownership or partnership capital of the member that results in one person or entity directly or indirectly owning or controlling 25 percent or more of the equity or partnership capital; or (5) a material change in business operations as defined in NASD Rule 1011(k) (Material Change in Business Operations). NASD Rule 1011(k) defines a "material change in business operations" as including, but not limited to: (1) Removing or modifying a membership agreement restriction; (2) market making, underwriting, or acting as a dealer for the first time; and (3) adding business activities that require a higher minimum net capital under SEA [sic] Rule 15c3–1.

structure or operations. Specifically, FINRA proposes to amend Section 4(i) of Schedule A to the FINRA By-Laws to provide that FINRA shall waive the CMA fee when FINRA determines that the CMA is proposing less significant changes that do not require substantial staff review.

A CMA qualifying for a fee waiver under this proposed rule change may include, for example, a CMA where the proposed change does not make any day-to-day changes in the applicant's business activities, management, supervision, assets, or liabilities, and the applicant is only proposing a change in the: (1) Applicant's legal structure (e.g., changing from a corporation to an LLC); (2) equity ownership, partnership capital, or other ownership interest in an applicant held by a corporate legal structure that is due solely to a reorganization of ownership or control of the applicant within the corporate legal structure (e.g., reorganizing only to add a holding company to the corporate legal structure's ownership or control chain of the applicant); or (3) percentage of ownership interest or partnership capital of an applicant's existing owners or partners resulting in an owner or partner owning or controlling 25 percent or more of the ownership interest or partnership and that owner or partner has no disclosure or disciplinary issues in the preceding five years.

In addition, a CMA may qualify for a fee waiver pursuant to the proposed rule change if it is filed by an applicant in connection with a direct or indirect acquisition or transfer of 25 percent or more in the aggregate of the applicant's assets or any asset, business, or line of operation that generates revenues composing 25 percent or more in the aggregate of the applicant's earnings measured on a rolling 36-month basis where the applicant also is ceasing operations as a broker or dealer (including filing a Form BDW with the SEC). There also must be either: (1) No pending or unpaid settled customer related claims (including, but not limited to, pending or unpaid settled arbitration or litigation actions) against the applicant or any of its associated persons; or (2) pending or unpaid settled customer related claims (including, but not limited to, pending or unpaid settled arbitration or litigation actions) against the applicant or its associated persons, but the applicant demonstrates in the CMA its ability to satisfy in full any unpaid customer related claim (e.g., sufficient capital or escrow funds, proof of adequate insurance for customer related claims).

The proposed changes in business operations outlined above are examples of changes that may qualify for a CMA fee waiver pursuant to the proposed rule change.[7] Other proposed changes in business operations also may qualify for a fee waiver pursuant to the proposed rule change. FINRA's determination to waive a fee for a particular CMA will depend on the individual facts and circumstances.

An applicant seeking a waiver of the CMA fee would submit its request to FINRA's Department of Member Regulation in writing as part of the supporting documentation submitted with the applicant's Form CMA. Form CMA's Standard 1 (Overview of the Applicants) instructs the applicant to attach enumerated types of supporting documents. A waiver request would most appropriately be attached in response to the request for "[a]ny other documentation that would be pertinent to FINRA's review of this Standard."

NMA and CMA Fee Refund

FINRA also proposes to amend NASD Rules 1013 and 1017 to provide that if an applicant withdraws a NMA or CMA within 30 days after filing the application, FINRA shall refund the application fee, less $500 which shall be retained by FINRA as a processing fee. The proposed rule change also clarifies that, if the applicant determines to again seek membership or apply for approval of a change in ownership, control, or business operations, the applicant must submit a new NMA or CMA (under NASD Rule 1013 or NASD Rule 1017, as applicable) and requisite application fee pursuant to Schedule A to the FINRA By-Laws.

FINRA has filed the proposed rule change for immediate effectiveness and has requested that the SEC waive the requirement that the proposed rule change not become operative for 30 days after the date of the filing, so FINRA can implement the proposed rule change immediately.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[8] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA believes that the proposed rule change is consistent with Section 15A(b)(6) of the Act in that it would establish a waiver process for the CMA fee for those applications that seek less significant changes. The proposed rule change also would provide a refund (subject to a processing fee) of the requisite application fee to an applicant withdrawing a NMA or CMA within 30 days after filing the application. Both the CMA fee waiver process and the NMA and CMA fee refunds provide relief for new member and continuing membership applicants where the demands on FINRA resources are less significant.

B. Self-Regulatory Organization's Statement on Burden on Competition

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. The CMA fee waiver process will provide FINRA with the flexibility to grant a waiver of the CMA fee for those applications that propose less significant changes to a member firm's structure or operations. The proposed rule change also would provide a refund (subject to a processing fee) of the requisite application fee to an applicant withdrawing a NMA or CMA within 30 days after filing the application. Accordingly, both the CMA fee waiver process and the NMA and CMA fee refunds reduce members' potential regulatory costs by providing relief for new member and continuing membership applicants where the demands on FINRA resources are less significant.

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

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

[7] FINRA expects that the proposed changes in business operations outlined above typically will not be significant and will not require substantial staff review. However, whether FINRA grants a fee waiver under the proposed rule change will depend on the individual facts and circumstances of each CMA.

[8] 15 U.S.C. 78o–3(b)(6).

19(b)(3)(A) of the Act[9] and Rule 19b–4(f)(6) thereunder.[10]

FINRA has requested that the Commission waive the 30-day operative delay to permit the proposed rule change to become operative immediately. The Commission finds that waiver of the operative delay is consistent with the protection of investors and the public interest because the waiver will enable members submitting applications that propose less significant changes to receive an immediate waiver of the CMA fees, and would also enable members withdrawing applications to receive an immediate refund of certain application fees. Therefore, the Commission designates the proposal operative effectively.[11]

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 email to *rule-comments@sec.gov*. Please include File Number SR–FINRA–2013–015 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–2013–015. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at 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–2013–015, and should be submitted on or before March 15, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–04101 Filed 2–21–13; 8:45 am]

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[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6).

[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).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68939; File No. SR–ICC–2012–24]

Self-Regulatory Organizations; ICE Clear Credit LLC; Order Approving Proposed Rule Change To Add Rules Related to the Clearing of European Corporate Single-Name CDS

February 15, 2013.

I. Introduction

On December 6, 2012, ICE Clear Credit LLC ("ICC") filed with the Securities and Exchange Commission ("Commission") the proposed rule change (SR–ICC–2012–24) pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder.[2] The proposed rule change was published for comment in the **Federal Register** on December 26, 2012.[3] On February 8, 2013, the Commission extended the time within which to take action of the proposed rule change to March 26, 2013.[4] The Commission received no comment letters regarding the proposal. For the reasons discussed below, the Commission is granting approval of the proposed rule change.

II. Description of the Proposed Rule Change

The purpose of the proposed rule change is to adopt new rules that will provide the basis for ICC to clear additional credit default swap contracts. As described in further detail below, ICC is proposing to amend Chapters 20 and 26 and Schedule 401 and Schedule 502 of its rules, as well as make corresponding changes to the applicable ICC Policies and Procedures to provide for the clearance of standard single-name CDS Contracts referencing European corporate reference entities ("European SN Contracts"). ICC has stated that European SN Contracts have similar terms to the North American Corporate Single Name CDS Contracts ("North American SN Contracts") currently cleared by ICC and governed by Section 26B of the Rules and the Latin American sovereign CDS contracts currently cleared by ICC and governed by Section 26D of the Rules. Accordingly, the proposed rules found in Section 26G largely mirror the ICC rules for North American SN Contracts in Section 26B, with certain modifications that reflect differences in terms and market conventions between European SN Contracts and North American SN Contracts. European SN Contracts will be denominated in Euro.

ICC proposes to amend Chapter 20 of its rules, concerning CDS generally, to remove definitions that are included in Chapter 26E of the rules. ICC proposes to amend Section 26E of its rules to include certain additional provisions relevant to the treatment of restructuring credit events under iTraxx Europe Index CDS ("iTraxx Contracts") and European SN Contracts. In addition, ICC proposes to make conforming changes in Section 26E of the Rules (the CDS Restructuring Rules), principally to address the particular restructuring terms that apply to iTraxx Contracts and European SN Contracts. Specifically, ICC proposes to modify the notice delivery procedures in Rule 26E–104 to include "notices to

[12] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 68482 (Dec. 19, 2012), 77 FR 76156 (Dec. 26, 2012).

[4] Securities Exchange Act Release No. 68881 (Feb. 8, 2013), 78 FR 10652 (Feb. 14, 2013).

exercise movement option" under the Modified Restructuring Maturity Limitation and Conditionally Transferable Obligation terms under the ISDA Credit Derivatives Definitions ("Mod Mod R terms"). In addition, the definition of "Triggered Restructuring CDS Contract" has been modified to reflect that under Mod Mod R terms a CDS contract may be triggered in part following a restructuring credit event.

ICC proposes to add new Section 26G to provide for the clearance of European SN Contracts. New Section 26G provides for the definitions and certain specific contracts terms for cleared European SN Contracts. Rule 26G–102 (Definitions) sets forth the definitions used for the European SN Contracts. An "Eligible SNEC Reference Entity" is defined as "each particular Reference Entity included from time to time in the List of Eligible Reference Entities," which is a list maintained, updated and published by the ICC Board of Managers or its designee, containing certain specified information with respect to each reference entity. The Eligible SNEC Reference Entities will initially consist of 121 European corporate reference entities specified in Schedule 502 to the ICC Rules. Certain substantive changes have also been made to the definition of "List of Eligible SNEC Reference Entities", due to the fact that certain terms and elections for North American SN Contracts are not applicable to European SN Contracts. These include (i) the need for an election as to whether "Restructuring" is an eligible "Credit Event" (it is by contract term and market convention applicable to all European SN Contracts, whereas it is generally not applicable to North American SN Contracts) and (ii) the applicability of certain ISDA supplements that may apply to North American SN Contracts but do not apply to European SN Contracts, including the 2005 Monoline Supplement, the ISDA Additional Provisions for a Secured Deliverable Obligation Characteristic and the ISDA Additional Provisions for Reference Entities with Delivery Restrictions. The remaining definitions are substantially the same as the definitions found in ICC Section 26B, other than certain conforming changes.

Rules 26G–203 (Restriction on Activity), 26G–206 (Notices Required of Participants with respect to SNEC Contracts), 26G–303 (SNEC Contract Adjustments), 26G–309 (Acceptance of SNEC Contracts by ICE Clear Credit), 26G–315 (Terms of the Cleared SNEC Contract), 26G–316 (Relevant Physical Settlement Matrix Updates), 26G–502 (Specified Actions), and 26G–616 (Contract Modification) reflect or incorporate the basic contract specifications for European SN Contracts and are substantially the same as under ICC Section 26B for North American SN Contracts, except as follows. In addition to various non-substantive conforming changes, the proposed rules differ from the existing North American SN Contracts in that the contract terms in Rule 26G–315 incorporate the relevant published ISDA physical settlement matrix terms for Standard European Corporate transactions, rather than Standard North American Corporate transactions, and, as noted in the preceding paragraph, certain elections and supplements used for North American SN Contracts are not applicable to European SN Contracts. In addition, the contracts reflect the fact that under the ISDA physical settlement matrix terms, the restructuring credit event and the related additional terms Mod Mod R terms apply to European SN Contracts.

ICC will update Schedule 401 of its Rules (Eligible Collateral & Thresholds), as applicable, with respect to Initial Margin and Guaranty Fund liquidity requirements for Non-Client and Client-Related positions for both US Dollar and Euro denominated products.

ICC will also update Schedule 502 of its Rules (Cleared Products List) to include the following European SN Contracts: Centrica Plc; E.ON AG; ENEL S.P.A.; EDISON S.P.A.; EDP—Energias de Portugal S.A.; ELECTRICITE DE FRANCE; EnBW Energie Baden-Wuerttemberg AG; Fortum Oyj; Adecco S.A.; Aktiebolaget Volvo; ALSTOM; BRITISH TELECOMMUNICATIONS public limited company; COMPAGNIE DE SAINT-GOBAIN; Deutsche Telekom AG; FRANCE TELECOM; GAS NATURAL SDG, S.A.; GDF SUEZ; HELLENIC TELECOMMUNICATIONS ORGANISATION SOCIETE ANONYME; IBERDROLA, S.A.; Koninklijke KPN N.V.; NATIONAL GRID PLC; Portugal Telecom International Finance B.V.; RWE Aktiengesellschaft; TELECOM ITALIA SPA; TELEFONICA, S.A.; Telekom Austria Aktiengesellschaft; TELENOR ASA; TeliaSonera Aktiebolag; UNITED UTILITIES PLC; Vattenfall Aktiebolag; VEOLIA ENVIRONNEMENT; VIVENDI; VODAFONE GROUP PUBLIC LIMITED COMPANY; Deutsche Post AG; European Aeronautic Defence and Space Company EADS N.V.; FINMECCANICA S.P.A.; Holcim Ltd; ROLLS-ROYCE plc; Siemens Aktiengesellschaft; PostNL N.V.; REPSOL, S.A.; Bayerische Motoren Werke Aktiengesellschaft; BRITISH AMERICAN TOBACCO p.l.c.; Daimler AG; DANONE; DIAGEO PLC; Koninklijke Philips Electronics N.V.; LVMH MOET HENNESSY LOUIS VUITTON; Nestle S.A.; Svenska Cellulosa Aktiebolaget SCA; Unilever N.V.; VOLKSWAGEN AKTIENGESELLSCHAFT; ACCOR; Bertelsmann AG; CARREFOUR; CASINO GUICHARD-PERRACHON; COMPASS GROUP PLC; EXPERIAN FINANCE PLC; GROUPE AUCHAN; J SAINSBURY plc; Koninklijke Ahold N.V.; MARKS AND SPENCER p.l.c.; METRO AG; NEXT PLC; PEARSON plc; PPR; PUBLICIS GROUPE SA; REED ELSEVIER PLC; SAFEWAY LIMITED; SODEXO; TESCO PLC; Wolters Kluwer N.V.; WPP 2005 LIMITED; AKZO Nobel N.V.; Anglo American plc; ArcelorMittal; BASF SE; Glencore International AG; Henkel AG & Co. KGaA; Koninklijke DSM N.V.; LANXESS Aktiengesellschaft; Linde Aktiengesellschaft; Solvay; XSTRATA PLC; STMicroelectronics N.V.; Bayer Aktiengesellschaft; SANOFI; Aegon N.V.; Allianz SE; ASSICURAZIONI GENERALI—SOCIETA PER AZIONI; AVIVA PLC; AXA; BANCA MONTE DEI PASCHI DI SIENA S.P.A.; BANCO BILBAO VIZCAYA ARGENTARIA, SOCIEDAD ANONIMA; Banco Espirito Santo, S.A.; BANCO SANTANDER, S.A.; Bank of Scotland plc; INTESA SANPAOLO SPA; JTI (UK) FINANCE PLC; Swiss Reinsurance Company Ltd; Zurich Insurance Company Ltd; Compagnie Financiere Michelin; L'AIR LIQUIDE SOCIETE ANONYME POUR L'ETUDE ET L'EXPLOITATION DES PROCEDES GEORGES CLAUDE; BAE SYSTEMS PLC; BOUYGUES; BP P.L.C.; IMPERIAL TOBACCO GROUP PLC; KINGFISHER PLC; Suedzucker Aktiengesellschaft Mannheim/Ochsenfurt; Swedish Match AB; TECHNIP; IMPERIAL CHEMICAL INDUSTRIES LIMITED; ALTADIS SA; BRITISH SKY BROADCASTING GROUP PLC; Aktiebolaget Electrolux; THALES; Metso Oyj; Muenchener Rueckversicherungs-Gesellschaft Aktiengesellschaft in Muenchen; Syngenta AG; TATE & LYLE PUBLIC LIMITED COMPANY; and TOTAL SA.

ICC also updated its Policies and Procedures to provide for the clearance of European SN Contracts, specifically the ICC Treasury Operations Policies & Procedures, ICC Risk Management Framework and ICC End-of-Day ("EOD") Price Discovery Policies and Procedures. Consistent with the changes to Schedule 401 of the ICC Rules, the ICC Treasury Operations Policies & Procedures have been updated to include Initial Margin and Guaranty Fund liquidity requirements for Non-Client and Client-Related positions for

both US Dollar and Euro denominated products. In order to accommodate the return of funds during London banking hours, the ICC Treasury Operations Policies & Procedures have been updated to require requests for Euro withdrawals to be submitted by 9:00 a.m. Eastern.

The ICC Risk Management Framework has been updated to account for Euro denominated portfolios. Specifically, updates have been made to the Guaranty Fund, Initial Margin and Mark-to-Market Methodologies to address: Foreign Exchange Risk, Liquidity Risk, Time Zone Risk, and Operational Risk. ICE Clear Credit will continue to review risk parameters with Clearing Participants through existing governance procedures and will notify Clearing Participants of any changes.[5]

The ICC EOD Price Discovery Policies and Procedures has been updated to provide that ICC will use ICE Clear Europe's EOD prices for European SN Contracts and rely on the ICE Clear Europe Firm Trade process to ensure the accuracy of price submissions. ICC will extend the risk time-horizon for European SN Contracts to account for the half-day difference, on average, between the EOD price discovery process timings. The extended risk horizon accounts for the fact that European markets close earlier and new financial information may be reflected only in the North American instrument prices and not reflected in the European SN Contracts, in general.

III. Discussion

Section 19(b)(2)(C) of the Act directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to such organization.[6] Section 17A(b)(3)(F) of the Act requires, among other things, that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions and, to the extent applicable, derivative agreements, contracts, and transactions, as well as to assure the safeguarding of securities and funds in the custody or control of the clearing agency or for which the clearing agency is responsible.[7]

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a registered clearing agency. The Commission carefully considered ICC's ability to clear European SN Contracts in a manner that assures the safeguarding of securities and funds which are in the custody and control of ICC or for which ICC is responsible. In addition, ICC's clearance of European SN Contracts will promote the prompt and accurate clearance and settlement of securities transactions and, to the extent applicable, derivative agreements, contracts, and transactions.

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposal is consistent with the requirements of the Act and in particular with the requirements of Section 17A of the Act[8] and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[9] that the proposed rule change (File No. SR–ICC–2012–24) be, and hereby is, approved.[10]

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[11]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–04098 Filed 2–21–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68938; File No. SR–ICC–2012–23]

Self-Regulatory Organizations; ICE Clear Credit LLC; Order Approving Proposed Rule Change To Add Rules Related to the Clearing of iTraxx Europe Index CDS

February 15, 2013.

I. Introduction

On December 6, 2012, ICE Clear Credit LLC ("ICC") filed with the Securities and Exchange Commission ("Commission") the proposed rule change (SR–ICC–2012–23) pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder.[2] The proposed rule change was published for comment in the **Federal Register** on December 26, 2012.[3] On February 8, 2013, the Commission extended the time within which to take action of the proposed rule change to March 26, 2013.[4] The Commission received no comment letters regarding the proposal. For the reasons discussed below, the Commission is granting approval of the proposed rule change.

II. Description of the Proposed Rule Change

The purpose of the proposed rule change is to adopt new rules that will provide the basis for ICC to clear additional credit default swap contracts. ICC is proposing, as described in further detail below, to amend Chapters 8, 20, and 26 and Schedule 401 and Schedule 502 of its rules, as well as make corresponding changes to the applicable ICC Policies and Procedures to provide for the clearance of iTraxx Europe Index CDS ("iTraxx Contracts"). The iTraxx Contracts reference the iTraxx Europe index, the current series of which consists of 125 European corporate reference entities. iTraxx Contracts, consistent with market convention and widely used standard terms documentation, can be triggered by credit events for failure to pay, bankruptcy and restructuring. iTraxx Contracts will be denominated in Euro.

ICC proposes to amend Chapter 8 of its rules to provide for an additional Guaranty Fund Contribution by those Clearing Participants that present Specific Wrong Way Risk (i.e., the risk that arises from the fact that iTraxx Contracts include, in part, the names of certain Clearing Participants or Clearing Participant affiliates). In a default scenario, if the defaulting Clearing Participant has funded a Specific Wrong Way Risk Contribution, the Specific Wrong Way Risk Contributions of all contributing Clearing Participants would be used immediately following the defaulting Clearing Participant's funds to cure deficits related to the default.

ICC proposes to amend Chapter 20 of its rules, concerning CDS generally, to remove definitions that are included in Chapter 26E of the rules, as well as to include the Specific Wrong Way Risk Guaranty Fund Contribution, as appropriate, as a portion of Clearing Participant funds.

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[5] Telephone conversation February 15, 2013 among Michelle Weiler, Assistant General Counsel, ICE Clear Credit; Marta Chaffee, Assistant Director, SEC; Gena Lai, Senior Special Counsel, SEC; Jennifer Ogasawara, Financial Economist, SEC; and Justin Byrne, Attorney-Advisor, SEC.

[6] 15 U.S.C. 78s(b)(2)(C).

[7] 15 U.S.C. 78q–1(b)(3)(F).

[8] 15 U.S.C. 78q–1.

[9] 15 U.S.C. 78s(b)(2).

[10] In approving this proposed rule change the Commission has considered the proposed rule's impact of efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[11] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 68481 (Dec. 19, 2012), 77 FR 76109 (Dec. 26, 2012).

[4] Securities Exchange Act Release No. 68882 (Feb. 8, 2013), 78 FR 10646 (Feb. 14, 2013).

ICC proposes to amend Section 26E of its rules to include certain additional provisions relevant to the treatment of restructuring credit events under iTraxx Contracts and standard single-name CDS Contracts referencing European corporate reference entities ("European SN Contracts"). In addition, ICC proposes to make conforming changes in Section 26E of the Rules (the CDS Restructuring Rules), principally to address the particular restructuring terms that apply to iTraxx Contracts and European SN Contracts. Specifically, ICC proposes to modify the notice delivery procedures in Rule 26E–104 to include "notices to exercise movement option" under the Modified Restructuring Maturity Limitation and Conditionally Transferable Obligation terms under the ISDA Credit Derivatives Definitions ("Mod Mod R terms"). In addition, the definition of "Triggered Restructuring CDS Contract" has been modified to reflect that under Mod Mod R terms a CDS contract may be triggered in part following a restructuring credit event.

ICC also proposes to add Section 26F to provide for the clearance of the iTraxx Contracts. Rule 26F–102 (Definitions) sets forth the definitions used for the iTraxx Contract Rules. An "Eligible iTraxx Europe Untranched Index" is defined as "each particular series and version of an iTraxx Europe index or sub-index, as published by the iTraxx Untranched Publisher, included from time to time in the List of Eligible iTraxx Untranched Indexes," which is a list maintained, updated and published by the ICC Board of Managers or its designee, containing certain specified information with respect to each index. "iTraxx Europe Untranched Terms Supplement" refers to the market standard form of documentation used for credit default swaps on the iTraxx Europe index, which is incorporated by reference into the contract specifications in Chapter 26F. ICEE has stated that the remaining definitions are substantially the same as the definitions found in ICC Section 26A and Section 26C, other than certain conforming changes.

Rules 26F–309 (Acceptance of iTraxx Europe Untranched Contracts by ICE Clear Credit), 26F–315 (Terms of the Cleared iTraxx Europe Untranched Contract), and 26F–316 (Updating Index Version of Fungible Contracts After a Credit Event or a Succession Event: Updating Relevant Untranched Standard Terms Supplement) reflect or incorporate the basic contract specifications for iTraxx Contracts. In addition to various non-substantive conforming changes, proposed Rule 26F–317 (Terms of iTraxx Europe Untranched Contracts) differs from the corresponding Rule 26A–317 for CDX.NA Contracts to reflect the fact that restructuring is a credit event for the iTraxx Contract.[5]

In connection with clearing iTraxx Contracts, ICC will update Schedule 401 of its Rules (Eligible Collateral & Thresholds), as applicable, with respect to Initial Margin and Guaranty Fund liquidity requirements for Non-Client and Client-Related positions for both US Dollar and Euro denominated products.

ICC will also update Schedule 502 of its Rules (Cleared Products List) to include the following iTraxx Contracts: Markit iTraxx Europe Main Series 18 with a 5-year maturity, maturing on December 20, 2017; Markit iTraxx Europe Main Series 18 with a 10-year maturity, maturing on December 20, 2022; Markit iTraxx Europe Main Series 17 with a 5-year maturity, maturing on June 20, 2017; Markit iTraxx Europe Main Series 17 with a 10-year maturity, maturing on June 20, 2022; Markit iTraxx Europe Main Series 16 with a 5-year maturity, maturing on December 20, 2016; Markit iTraxx Europe Main Series 16 with a 10-year maturity, maturing on December 20, 2021; Markit iTraxx Europe Main Series 15 with a 5-year maturity, maturing on June 20, 2016; Markit iTraxx Europe Main Series 15 with a 10-year maturity, maturing on June 20, 2021; Markit iTraxx Europe Main Series 14 with a 5-year maturity, maturing on December 20, 2015; Markit iTraxx Europe Main Series 14 with a 10-year maturity, maturing on December 20, 2020; Markit iTraxx Europe Main Series 13 with a 5-year maturity, maturing on June, 20, 2015; Markit iTraxx Europe Main Series 13 with a 10-year maturity, maturing on June, 20, 2020; Markit iTraxx Europe Main Series 12 with a 5-year maturity, maturing on December 20, 2014; Markit iTraxx Europe Main Series 12 with a 10-year maturity, maturing on December 20, 2019; Markit iTraxx Europe Main Series 11 with a 5-year maturity, maturing on June 20, 2014; Markit iTraxx Europe Main Series 11 with a 10-year maturity, maturing on June 20, 2019; Markit iTraxx Europe Main Series 10 with a 5-year maturity, maturing on December 20, 2013; Markit iTraxx Europe Main Series 10 with a 10-year maturity, maturing on December 20, 2018; Markit iTraxx Europe Main Series 9 with a 5-year maturity, maturing on June 20, 2013; Markit iTraxx Europe Main Series 9 with a 10-year maturity, maturing on June 20, 2018; Markit iTraxx Europe Main Series 8 with a 5-year maturity, maturing on December 20, 2012; Markit iTraxx Europe Main Series 8 with a 10-year maturity, maturing on December 20, 2017; Markit iTraxx Europe Main Series 7 with a 10-year maturity, maturing June 20, 2017; Markit iTraxx Crossover Series 18 with a 5-year maturity, maturing on December 20, 2017; Markit iTraxx Crossover Series 17 with a 5-year maturity, maturing on June 20, 2017; Markit iTraxx Crossover Series 16 with a 5-year maturity, maturing on December 20, 2016; Markit iTraxx Crossover Series 15 with a 5-year maturity, maturing on June 20, 2016; Markit iTraxx Crossover Series 14 with a 5-year maturity, maturing on December 20, 2015; Markit iTraxx Crossover Series 13 with a 5-year maturity, maturing on June, 20, 2015; Markit iTraxx Crossover Series 12 with a 5-year maturity, maturing on December 20, 2014; Markit iTraxx Crossover Series 11 with a 5-year maturity, maturing on June 20, 2014; Markit iTraxx Crossover Series 10 with a 5-year maturity, maturing on December 20, 2013; Markit iTraxx Crossover Series 9 with a 5-year maturity, maturing on June 20, 2013; Markit iTraxx HiVol Series 18 with a 5-year maturity, maturing on December 20, 2017; Markit iTraxx HiVol Series 17 with a 5-year maturity, maturing on June 20, 2017; Markit iTraxx HiVol Series 16 with a 5-year maturity, maturing on December 20, 2016; Markit iTraxx HiVol Series 15 with a 5-year maturity, maturing on June 20, 2016; Markit iTraxx HiVol Series 14 with a 5-year maturity, maturing on December 20, 2015; Markit iTraxx HiVol Series 13 with a 5-year maturity, maturing on June, 20, 2015; Markit iTraxx HiVol Series 12 with a 5-year maturity, maturing on December 20, 2014; Markit iTraxx HiVol Series 11 with a 5-year maturity, maturing on June 20, 2014; Markit iTraxx HiVol Series 10 with a 5-year maturity, maturing on December 20, 2013; Markit iTraxx HiVol Series 9 with a 5-year maturity, maturing on June 20, 2013; and Markit iTraxx HiVol

[5] The provisions dealing with the "spin-out" of a single name CDS following a restructuring credit event for a component of the iTraxx Europe index are part of the iTraxx Europe Untranched Standard Terms Supplement (Nov. 2009 edition), which is incorporated into the contract specifications for cleared iTraxx Europe contracts through proposed ICC Rule 26F–315(c). Specifically, Section 7.3(b) of the Supplement addresses the removal of the restructured reference entity from the index and continuation of that component as a separate contract. (Proposed ICC Rule 26F–317(h) clarifies the treatment of the reference obligation for that separate cleared contract.) This is part of the basic standard terms of the iTraxx Europe contract and operates the same way in both the cleared and uncleared contexts (much like other aspects of the market standard terms supplements and/or ISDA Credit Derivatives Definitions on which other cleared and uncleared CDS trade).

Series 8 with a 5-year maturity, maturing on December 20, 2012.

ICC also updated its Policies and Procedures to provide for the clearance of iTraxx Contracts, specifically the ICC Treasury Operations Policies & Procedures, ICC Risk Management Framework and ICC End-of-Day ("EOD") Price Discovery Policies and Procedures. Consistent with the changes to Schedule 401 of the ICC Rules, the ICC Treasury Operations Policies & Procedures have been updated to include Initial Margin and Guaranty Fund liquidity requirements for Non-Client and Client-Related positions for both US Dollar and Euro denominated products. In order to accommodate the return of funds during London banking hours, the ICC Treasury Operations Policies & Procedures have been updated to require requests for Euro withdrawals to be submitted by 9:00 a.m. Eastern.

The ICC Risk Management Framework has been updated to account for Euro denominated portfolios. Specifically, updates have been made to the Guaranty Fund, Initial Margin and Mark-to-Market Methodologies to address: Wrong Way Risk, Foreign Exchange Risk, Liquidity Risk, Time Zone Risk, and Operational Risk. Additionally, the Portfolio Approach was updated to include appropriate portfolio benefits between North American CDS Indices and iTraxx Contracts. ICE Clear Credit will continue to review risk parameters with Clearing Participants through existing governance procedures and will notify Clearing Participants of any changes.[6]

The ICC EOD Price Discovery Policies and Procedures has been updated to provide that ICC will use ICE Clear Europe's EOD prices for iTraxx Contracts and rely on the ICE Clear Europe Firm Trade process to ensure the accuracy of price submissions. ICC will extend the risk time-horizon for iTraxx Contracts to account for the half day difference, on average, between the EOD price discovery process timings. The extended risk horizon accounts for the fact that European markets close earlier and new financial information may be reflected only in the North American instrument prices and not reflected in the iTraxx Contracts, in general.

III. Discussion

Section 19(b)(2)(C) of the Act directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to such organization.[7] Section 17A(b)(3)(F) of the Act requires, among other things, that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions and, to the extent applicable, derivative agreements, contracts, and transactions, as well as to assure the safeguarding of securities and funds in the custody or control of the clearing agency or for which the clearing agency is responsible.[8]

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a registered clearing agency. The Commission carefully considered ICC's ability to clear the iTraxx Contracts in a manner that assures the safeguarding of securities and funds which are in the custody and control of ICC or for which ICC is responsible. In addition, the Commission notes that the Commodity Futures Trading Commission has determined that iTraxx Contracts are to be subject to mandatory clearing under Section 2(h) of the Commodity Exchange Act.[9] ICC's clearance of iTraxx Contracts therefore will promote the prompt and accurate clearance and settlement of securities transactions and, to the extent applicable, derivative agreements, contracts, and transactions.

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposal is consistent with the requirements of the Act and in particular with the requirements of Section 17A of the Act[10] and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[11] that the proposed rule change (File No. SR–ICC–2012–23) be, and hereby is, approved.[12]

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[13]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–04097 Filed 2–21–13; 8:45 am]

BILLING CODE 8011–01–P

[6] Telephone conversation February 15, 2013 among Michelle Weiler, Assistant General Counsel, ICE Clear Credit; Marta Chaffee, Assistant Director, SEC; Gena Lai, Senior Special Counsel, SEC; Jennifer Ogasawara, Financial Economist, SEC; and Justin Byrne, Attorney-Advisor, SEC.

[7] 15 U.S.C. 78s(b)(2)(C).

[8] 15 U.S.C. 78q–1(b)(3)(F).

[9] 7 U.S.C. 2(h); *see also* Clearing Requirement Determination Under Section 2(h) of the CEA, Final Rule, 77 FR 74283 (Dec. 13, 2012) at 74291, 74336–74337.

[10] 15 U.S.C. 78q–1.

[11] 15 U.S.C. 78s(b)(2).

[12] In approving this proposed rule change the Commission has considered the proposed rule's impact of efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[13] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice 8195]

Shipping Coordinating Committee Notice of Renewal of Charter

SUMMARY: The Department of State has renewed the Charter for the Shipping Coordinating Committee (SHC) without significant substantive change. Through this Committee, the Department of State will continue to obtain the views and advice of interested government agencies and bureaus and public members in the maritime and related fields, on issues related to maritime security, safety of life at sea, and protection of the marine environment considered by the International Maritime Organization (IMO), and other matters relating to international maritime shipping. The Under Secretary for Management has determined the Committee is necessary and in the public interest.

The Committee follows the procedures prescribed by the Federal Advisory Committee Act (FACA). Meetings will be open to the public unless a determination is made in accordance with section 10(d) of the FACA and 5 U.S.C. 552b(c) that a meeting or portion of the meeting should be closed to the public. Notice of each meeting will be published in the **Federal Register** at least 15 days prior to the meeting, unless there are extraordinary circumstances that require shorter notice.

For further information, please contact: Lieutenant Commander Brian W. Robinson, Executive Secretary, Shipping Coordinating Committee, U.S. Department of State, Office of Oceans Affairs, at *RobinsonBW@state.gov* or by telephone at 202–647–3946. A copy of the Committee charter may also be obtained by accessing the FACA database maintained by the General Services Administration: *http://fido.gov/facadatabase.*

Dated: January 22, 2013.

Brian W. Robinson,

Executive Secretary, Shipping Coordinating Committee, Department of State.

[FR Doc. 2013–04144 Filed 2–21–13; 8:45 am]

BILLING CODE 4710–09–P

SUSQUEHANNA RIVER BASIN COMMISSION

Commission Meeting

AGENCY: Susquehanna River Basin Commission.

ACTION: Notice.

SUMMARY: The Susquehanna River Basin Commission will hold its regular business meeting on March 21, 2013, in Harrisburg, Pennsylvania. Details concerning the matters to be addressed at the business meeting are contained in the Supplementary Information section of this notice.

DATES: March 21, 2013, at 8:30 a.m.

ADDRESSES: North Office Building, Hearing Room 1 (Ground Level), North Street (at Commonwealth Avenue), Harrisburg, PA 17120.

FOR FURTHER INFORMATION CONTACT: Richard A. Cairo, General Counsel, telephone: (717) 238–0423, ext. 306; fax: (717) 238–2436.

Opportunity To Appear and Comment

Interested parties are invited to attend the business meeting and encouraged to review the Commission's Public Meeting Rules of Conduct, which are posted on the Commission's web site, *www.srbc.net*. As identified in the public hearing notice referenced below, written comments on the Regulatory Program projects that were the subject of the public hearing, and are listed for action at the business meeting, are subject to a comment deadline of February 25, 2013. Written comments pertaining to any other matters listed for action at the business meeting may be mailed to the Susquehanna River Basin Commission, 1721 North Front Street, Harrisburg, Pennsylvania 17102–2391, or submitted electronically through *http://www.srbc.net/pubinfo/publicparticipation.htm*. Any such comments mailed or electronically submitted must be received by the Commission on or before March 15, 2013, to be considered.

SUPPLEMENTARY INFORMATION: The business meeting will include actions or presentations on the following items: (1) Presentation on the Commission's Harrisburg flood inundation mapping project; (2) the Maurice Goddard Award; (3) revision of FY–2014 budget; (4) investment policy statement; (5) ratification/approval of contracts and grants; (6) administrative appeal filed by Anadarko E&P Company LP; and (7) Regulatory Program projects. Projects listed for Commission action are those that were the subject of a public hearing conducted by the Commission on February 14, 2013, and identified in the notice for such hearing, which was published in 78 FR 5556, January 25, 2013.

Authority: Pub. L. 91–575, 84 Stat. 1509 et seq., 18 CFR Parts 806, 807, and 808.

Dated: February 15, 2013.

Thomas W. Beauduy,

Deputy Executive Director.

[FR Doc. 2013–04102 Filed 2–21–13; 8:45 am]

BILLING CODE 7040–01–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Generalized System of Preferences (GSP): Notice of Status of Certain Pending Country Practice Petitions; Notice of Schedule for Public Comments and a Hearing on Certain Country Practice Reviews

AGENCY: Office of the United States Trade Representative.

ACTION: Notice and request for submissions.

SUMMARY: This notice announces (1) the status of pending country practice petitions submitted as part of previous GSP Annual Reviews, and (2) the schedule for public comments and a public hearing on the ongoing GSP country practice reviews regarding worker rights and/or child labor in Bangladesh, Georgia, Niger, the Philippines, and Uzbekistan, and protection of intellectual property rights (IPR) in Russia and Uzbekistan.

FOR FURTHER INFORMATION CONTACT: Tameka Cooper, GSP Program, Office of the United States Trade Representative, 600 17th Street NW., Room 422, Washington, DC 20508. The telephone number is (202) 395–6971, the fax number is (202) 395–9674, and the email address is *Tameka_Cooper@ustr.eop.gov*.

DATES: The GSP regulations (15 CFR Part 2007) provide the schedule of dates for conducting an annual review unless otherwise specified in a **Federal Register** notice. The schedule for the review of the country practice petitions cited above follows.

March 14, 2013: Deadline for submission of pre-hearing briefs and requests to appear at the March 28, 2013 public hearing; submissions must be received by 5:00 p.m.

March 28, 2013: The GSP Subcommittee of the Trade Policy Staff Committee (TPSC) will convene a public hearing on the country practice petitions cited above at 1724 F Street NW., Washington, DC 20508, beginning at 9:30 a.m.

April 18, 2013: Deadline for submission of post-hearing briefs, which must be received by 5:00 p.m.

SUPPLEMENTARY INFORMATION: The GSP program provides for the duty-free treatment of designated articles when imported from beneficiary developing countries. The GSP program is authorized by Title V of the Trade Act of 1974 (19 U.S.C. 2461, *et seq.*), as amended.

Country Practice Petitions

The status of country practice petitions considered in the 2012 GSP Annual Review is described in the list of Active and Pending Country Practices Reviews, which is available on the USTR GSP Web site at *http://www.ustr.gov/trade-topics/trade-development/preference-programs/generalized-system-preference-gsp/gsp-program-inf*. This list includes petitions accepted as part of annual reviews from previous years.

The U.S. Trade Representative (USTR), drawing on the advice of the TPSC, has deferred a decision on acceptance of a country practice petition on Russia regarding expropriation. In addition, the USTR, drawing on the advice of the TPSC, has decided to close the country practice review of case 007–CP–08 regarding IPR protection in Lebanon in view of (1) progress made by the government of Lebanon in addressing IPR issues in that country and (2) a request by the petitioner, the International Intellectual Property Alliance, that the petition be withdrawn in view of progress in addressing the issues cited in the petition.

Notice of Public Hearing

A hearing will be held by the GSP Subcommittee of the TPSC on Thursday, March 28, 2013, beginning at 9:30 a.m., to receive information regarding recent developments pertinent to the ongoing country practice reviews regarding worker rights and/or child labor in Bangladesh, Georgia, Niger, the Philippines, and Uzbekistan, and protection of intellectual property rights (IPR) in Russia and Uzbekistan.

The hearing will be held at 1724 F Street NW., Washington, DC 20508 and will be open to the public. A transcript of the hearing will be made available on *http://www.regulations.gov* within approximately two weeks of the hearing.

All interested parties wishing to make an oral presentation at the hearing must submit, following the "Requirements for Submissions" set out below, the name, address, telephone number, and email address, if available, of the witness(es) representing their organization by 5 p.m., March 14, 2013. Requests to

present oral testimony must be accompanied by a written brief or summary statement, in English, and also must be received by 5 p.m., March 14, 2013. Oral testimony before the GSP Subcommittee will be limited to five-minute presentations that summarize or supplement information contained in briefs or statements submitted for the record. Post-hearing briefs or statements will be accepted if they conform with the regulations cited below and are submitted, in English, by 5 p.m., April 18, 2013. Parties not wishing to appear at the public hearing may submit pre-hearing and post-hearing briefs or comments by the aforementioned deadlines.

The GSP Subcommittee strongly encourages submission of all post-hearing briefs or statements by the April 18, 2013 deadline in order to receive timely consideration in the GSP Subcommittee's review of the subject petitions. However, if there are new developments or information that parties wish to share with the GSP Subcommittee after this date, the regulations.gov dockets will remain open. Comments, letters, or other submissions related to the subject country practice reviews must be posted to the *http://regulations.gov* docket in order to be considered by the GSP Subcommittee.

Requirements for Submissions

All submissions in response to this notice must be submitted in English by the applicable deadlines set forth in this notice and conform to the GSP regulations set forth at 15 CFR part 2007, except as modified below. These regulations are available on the USTR Web site at *http://www.ustr.gov/trade-topics/trade-development/preference-programs/generalized-system-preference-gsp/gsp-program-inf.*

To ensure their timely and expeditious receipt and consideration, submissions in response to this notice must be submitted electronically via *http://www.regulations.gov* using the appropriate country-specific docket number(s) listed below.

Bangladesh (worker rights): USTR–2012–0036;

Georgia (worker rights): USTR–2013–0009;

Niger (worker rights): USTR–2013–0005;

Philippines (worker rights): USTR–2013–0006;

Uzbekistan (worker rights): USTR–2013–0007;

Russia (IPR): USTR–2013–0008; and

Uzbekistan (IPR): USTR–2013–0014.

Hand-delivered submissions will not be accepted.

To make a submission using *http://www.regulations.gov*, enter the country-specific docket number in the "Search for" field on the home page and click "Search." The site will provide a search-results page listing all documents associated with this docket. Find a reference to this notice by selecting "Notice" under "Document Type" in the "Filter Results by" section on the left side of the screen and click on the link entitled "Comment Now." The *http://www.regulations.gov* Web site offers the option of providing comments by filling in a "Type Comment" field or by attaching a document using the "Upload file(s)" field. The GSP Subcommittee prefers that submissions be provided in an attached document. At the beginning of the submission, or on the first page (if an attachment), please note that the submission is in response to this **Federal Register** notice and provides comments on the GSP country practice review regarding [relevant country]. Submissions should not exceed 30 single-spaced, standard letter-size pages in 12-point type, including attachments. Any data attachments to the submission should be included in the same file as the submission itself, and not as separate files.

Each submitter will receive a submission tracking number upon completion of the submissions procedure at *http://www.regulations.gov*. The tracking number will be the submitter's confirmation that the submission was received into *http://www.regulations.gov*. The confirmation should be kept for the submitter's records. USTR is not able to provide technical assistance for the Web site. Documents not submitted in accordance with these instructions may not be considered in this review. If an interested party is unable to provide submissions as requested, please contact the GSP Program at USTR to arrange for an alternative method of transmission.

Business Confidential Submissions

An interested party requesting that information contained in a submission be treated as business confidential information must certify that such information is business confidential and would not customarily be released to the public by the submitter. Confidential business information must be clearly designated as such. The submission must be marked "BUSINESS CONFIDENTIAL" at the top and bottom of the cover page and each succeeding page, and the submission should indicate, via brackets, the specific information that is confidential. Additionally, "Business Confidential" must be included in the "Type Comment" field. For any submission containing business confidential information, a non-confidential version must be submitted separately (*i.e.*, not as part of the same submission with the confidential version), indicating where confidential information has been redacted. The non-confidential version will be placed in the docket and open to public inspection.

Public Viewing of Review Submissions

Submissions in response to this notice, except for information granted "business confidential" status under 15 CFR 2003.6, will be available for public viewing pursuant to 15 CFR 2007.6 at *http://www.regulations.gov* upon completion of processing, usually within two weeks of the relevant due date or date of the submission. Such submissions may be viewed by entering the country-specific docket number in the search field at: *http://www.regulations.gov*.

William D. Jackson,

Deputy Assistant U.S. Trade Representative for the Generalized System of Preferences, Office of the U.S. Trade Representative.

[FR Doc. 2013–04039 Filed 2–21–13; 8:45 am]

BILLING CODE 3290–F3–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Notice of Meeting of the Industry Trade Advisory Committee on Small and Minority Business (ITAC–11)

AGENCY: Office of the United States Trade Representative.

ACTION: Notice of a Partially Opened Meeting.

SUMMARY: The Industry Trade Advisory Committee on Small and Minority Business (ITAC–11) will hold a meeting on Monday, March 4, 2013. The meeting will be opened to the public from 2:00 p.m. to 3:30 p.m.

DATES: The meeting is scheduled for March 4, 2012 unless otherwise notified.

ADDRESSES: The meeting will be held at the Ronald Reagan International Trade Center 1300 Pennsylvania Avenue NW., Suite M800, Training Room A, Washington, DC 20004.

FOR FURTHER INFORMATION CONTACT: Laura Hellstern, DFO for ITAC–11 at (202) 482–3222, Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230.

SUPPLEMENTARY INFORMATION: The Agenda topics to be discussed are:

—Export.gov 2.0 Launch
—Doing Business in Africa Initiative
—Metropolitan Export Initiative

Tiffany Enoch,

Deputy Assistant U.S. Trade Representative, For Intergovernmental Affairs and Public Engagement.

[FR Doc. 2013-04155 Filed 2-21-13; 8:45 am]

BILLING CODE 3290-F3-P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

[Dispute No. WTO/DS447]

WTO Dispute Settlement Proceeding Regarding United States—Measures Affecting the Importation of Animals, Meat and Other Animal Products From Argentina

AGENCY: Office of the United States Trade Representative.

ACTION: Notice; request for comments.

SUMMARY: The Office of the United States Trade Representative (AUSTR@) is providing notice that Argentina has requested the establishment of a dispute settlement panel under the *Marrakesh Agreement Establishing the World Trade Organization* (AWTO Agreement@). That request may be found at *www.wto.org* contained in a document designated as WT/DS447/2. USTR invites written comments from the public concerning the issues raised in this dispute.

DATES: Although USTR will accept any comments received during the course of the dispute settlement proceedings, comments should be submitted on or before March 21, 2013, to be assured of timely consideration by USTR.

ADDRESSES: Public comments should be submitted electronically to *www.regulations.gov*, docket number USTR–2013–0003. If you are unable to provide submissions at *www.regulations.gov*, please contact Sandy McKinzy at (202) 395–9483 to arrange for an alternative method of transmission.

If (as explained below) the comment contains confidential information, then the comment should be submitted by fax only to Sandy McKinzy at (202) 395–3640.

FOR FURTHER INFORMATION CONTACT: Philip Chen, Assistant General Counsel, Office of the United States Trade Representative, 600 17th Street NW., Washington, DC 20508, (202) 395–3150.

SUPPLEMENTARY INFORMATION: Section 127(b) of the Uruguay Round Agreements Act ("URAA") (19 U.S.C. 3537(b)(1)) requires that notice and opportunity for comment be provided after the United States submits or receives a request for the establishment of a WTO dispute settlement panel. Consistent with this obligation, USTR is providing notice that a dispute settlement panel has been established pursuant to the WTO Dispute Settlement Understanding ("DSU"). The panel will hold its meetings in Geneva, Switzerland.

Major Issues Raised by Argentina

Due to the presence of foot-and-mouth disease (FMD) in Argentina, the United States Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) does not permit the import of fresh bovine meat (beef) from Argentina. In December 2002, Argentina submitted an application for authorization to import fresh beef that is either chilled or frozen from the sub-national region of Argentina north of the 42nd parallel. In September 2003, Argentina submitted an application for FMD disease-free status (which would include permission to import fresh beef that is either chilled or frozen) with respect to a sub-national region designated as Patagonia South. In December 2008, Argentina submitted an application to APHIS requesting FMD disease-free status (which would include permission to import fresh beef that is either chilled or frozen) with respect to a sub-national region designated as Patagonia North B. No final decision has been reached on these applications.

In its request for the establishment of a panel, Argentina alleges that the regulations and other measures of APHIS as applied to Argentina's request for import authorization breach various provisions of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) and the General Agreements on Tariffs and Trade 1994 (GATT 1994). For instance, Argentina asserts that APHIS's existing prohibition on the importation of animals, meat and other animal products in connection to FMD lacks scientific justification and is discriminatory. In addition, Argentina argues that APHIS has not processed Argentina's applications in a timely manner.

Public Comment: Requirements for Submissions

Interested persons are invited to submit written comments concerning the issues raised in this dispute. Persons may submit public comments electronically to *www.regulations.gov* docket number USTR–2013–0003. If you are unable to provide submissions by *www.regulations.gov*, please contact Sandy McKinzy at (202) 395–9483 to arrange for an alternative method of transmission.

To submit comments via *www.regulations.gov*, enter docket number USTR–2013–0003 on the home page and click "search". The site will provide a search-results page listing all documents associated with this docket. Find a reference to this notice and click on the link entitled "Comment Now!" (For further information on using the *www.regulations.gov* Web site, please consult the resources provided on the Web site by clicking on "How to Use This Site" on the left side of the home page.)

The *www.regulations.gov* Web site allows users to provide comments by filling in a "Type Comments" field, or by attaching a document using an "Upload File" field. It is expected that most comments will be provided in an attached document. If a document is attached, it is sufficient to type "See attached" in the "Type Comments"field.

A person requesting that information contained in a comment that he/she submitted, be treated as confidential business information must certify that such information is business confidential and would not customarily be released to the public by the submitter. Confidential business information must be clearly designated as such and the submission must be marked "BUSINESS CONFIDENTIAL" at the top and bottom of the cover page and each succeeding page. Any comment containing business confidential information must be submitted by fax to Sandy McKinzy at (202) 395–3640.

A non-confidential summary of the confidential information must be submitted to www.regulations.gov. The non-confidential summary will be placed in the docket and will be open to public inspection.

USTR may determine that information or advice contained in a comment submitted, other than business confidential information, is confidential in accordance with Section 135(g)(2) of the Trade Act of 1974 (19 U.S.C. 2155(g)(2)). If the submitter believes that information or advice may qualify as such, the submitter—

(1) Must clearly so designate the information or advice;

(2) Must clearly mark the material as "SUBMITTED IN CONFIDENCE" at the top and bottom of the cover page and each succeeding page; and

(3) Must provide a non-confidential summary of the information or advice. Any comment containing confidential information must be submitted by fax. A non-confidential summary of the

confidential information must be submitted to *www.regulations.gov*. The non-confidential summary will be placed in the docket and will be open to public inspection.

Pursuant to section 127(e) of the Urugnay Round Agreements Act (19 U.S.C. 3537(e)), USTR will maintain a docket on this dispute settlement proceeding, docket number USTR–2013–0003, accessible to the public at *www.regulations.gov*.

The public file will include non-confidential comments received by USTR from the public regarding the dispute. If a dispute settlement panel is convened, or in the event of an appeal from such a panel, the following documents will be made available to the public at www.ustr.gov: the United States' submissions, any non-confidential submissions received from other participants in the dispute, and any non-confidential summaries of submissions received from other participants in the dispute.

In the event that a dispute settlement panel is convened, or in the event of an appeal from such a panel, and, if applicable, the report of the Appellate Body, will also be available on the Web site of the World Trade Organization, at *www.wto.org*. Comments open to public inspection may be viewed at *www.regulations.gov*.

Juan Millan,

Assistant United States Trade Representative for Monitoring and Enforcement.

[FR Doc. 2013–04153 Filed 2–21–13; 8:45 am]

BILLING CODE 3290–F3–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Government/Industry Aeronautical Charting Forum Meeting

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of public meeting.

SUMMARY: This notice announces the bi-annual meeting of the Federal Aviation Administration (FAA) Aeronautical Charting Forum (ACF) to discuss informational content and design of aeronautical charts and related products, as well as instrument flight procedures development policy and design criteria.

DATES: The ACF is separated into two distinct groups. The Instrument Procedures Group (IPG) will meet April 23, 2013 from 8:30 a.m. to 5:00 p.m. The Charting Group will meet April 24 and 25, 2013 from 8:30 a.m. to 5:00 p.m.

ADDRESSES: The meeting will be hosted by Innovative Solutions International, a Pragmatics, Inc. Company at 1761 Business Center Drive, Reston, VA 20190.

FOR FURTHER INFORMATION CONTACT: For information relating to the Instrument Procedures Group, contact Thomas E. Schneider, FAA, Flight Procedures Standards Branch, AFS–420, 6500 South MacArthur Blvd., P.O. Box 25082, Oklahoma City, OK 73125; telephone: (405) 954–5852, fax: (405) 954–2528.

For information relating to the Charting Group, contact Valerie S. Watson, FAA, National Aeronautical Navigation Products (AeroNav Products), Quality Assurance & Regulatory Support, AJV–3, 1305 East-West Highway, SSMC4, Station 4640, Silver Spring, MD 20910; telephone: (301) 427–5155, fax: (301) 427–5412.

SUPPLEMENTARY INFORMATION: Pursuant to § 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463; 5 U.S.C. App. II), notice is hereby given of a meeting of the FAA Aeronautical Charting Forum to be held from April 23 through April 25, 2013, from 8:30 a.m. to 5:00 p.m. at Innovative Solutions International (ISI), a Pragmatics Inc. Company, at their offices at 1761 Business Center Drive, Reston, VA 20190.

The Instrument Procedures Group agenda will include briefings and discussions on recommendations regarding pilot procedures for instrument flight, as well as criteria, design, and developmental policy for instrument approach and departure procedures.

The Charting Group agenda will include briefings and discussions on recommendations regarding aeronautical charting specifications, flight information products, and new aeronautical charting and air traffic control initiatives. Attendance is open to the interested public, but will be limited to the space available.

Please note the following special security requirements for access to the Pragmatics, Inc. Corporation Headquarters. A picture I.D. is required of all US citizens. All foreign national participants are required to have a passport. Additionally, not later than April 5, 2013, foreign national attendees must provide their name, country of citizenship, company/organization representing, and country of the company/organization. Send the information to: Christy Nettleton, Innovative Solutions International, FAA, Flight Procedures Implementation & Oversight Branch, AFS–460, 6500 South MacArthur Blvd., P.O. Box 25082, Oklahoma City, OK, or via Email (preferred) to: *Christy.ctr.nettleton@faa.gov*. Foreign nationals who do not provide the required information will not be allowed entrance—NO EXCEPTIONS.

The public must make arrangements by April 5, 2013, to present oral statements at the meeting. The public may present written statements and/or new agenda items to the committee by providing a copy to the person listed in the **FOR FURTHER INFORMATION CONTACT** section not later than April 5, 2013. Public statements will only be considered if time permits.

Issued in Washington, DC, on February 19, 2013.

Valerie S. Watson,

Co-Chair, Aeronautical Charting Forum.

[FR Doc. 2013–04123 Filed 2–21–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

Notice of Applications for Modification of Special Permit

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: List of applications for modification of special permits.

SUMMARY: In accordance with the procedures governing the application for, and the processing of, special permits from the Department of Transportation's Hazardous Material Regulations (49 CFR part 107, subpart B), notice is hereby given that the Office of Hazardous Materials Safety has received the applications described herein. This notice is abbreviated to expedite docketing and public notice. Because the sections affected, modes of transportation, and the nature of application have been shown in earlier **Federal Register** publications, they are not repeated here. Requests for modification of special permits (e.g. to provide for additional hazardous materials, packaging design changes, additional mode of transportation, etc.) are described in footnotes to the application number. Application numbers with the suffix "M" denote a modification request. These applications have been separated from the new application for special permits to facilitate processing.

DATES: Comments must be received on or before March 11, 2013.

Address Comments To: Record Center, Pipeline and Hazardous

Materials Safety Administration, U.S. Department of Transportation, Washington, DC 20590.

Comments should refer to the application number and be submitted in triplicate. If confirmation of receipt of comments is desired, include a self-addressed stamped postcard showing the special permit number.

FOR FURTHER INFORMATION CONTACT: Copies of the applications are available for inspection in the Records Center, East Building, PHH–30, 1200 New Jersey Avenue Southeast, Washington DC or at *http://regulations.gov*.

This notice of receipt of applications for modification of special permit is published in accordance with Part 107 of the Federal hazardous materials transportation law (49 U.S.C. 5117(b); 49 CFR 1.53(b)).

Issued in Washington, DC, on February 7, 2013.

Donald Burger,

Chief, General Approval and Permits.

Application No.	Docket No.	Applicant	Regulation(s) affected	Nature of special permits thereof
		MODIFICATION SPECIAL PERMITS		
10915–M ...	.....	Luxfer Gas Cylinders Riverside, CA	49 CFR 173.302a, 173.304a and 180.205.	To modify the special permit to authorize a new maximum allowable working pressure and maximum allowable strength stiffness.
12531–M ...	.....	Worthing Cylinder Corporation Columbus, OH.	49 CFR 173.302(a), 173.304(a), 173.304(d), 178.61(b), 178.61(f), 178.61(g), 178.61(i) and 178.61(k).	To modify the special permit to authorize a Class 8 packaging group I material.
13336–M ...	.....	Renaissance Industries Sharpsville, PA.	49 CFR 173.302(a)(1) and 173.304.	To modify the special permit to authorize additional seamless stainless steel type 304 packaging and remove requirements when reoffered for transportation.
13581–M ...	.....	Bengal Products Inc. Baton, Rouge, LA.	49 CFR 173.306(a)(3) ..	To modify the special permit to reflect current statutes and regulations LA pertaining to consumer commodities.
14576–M ...	.....	Structural Composites Industries (SCI) Pomona. CA.	49 CFR 173.302a and 173.304a.	To modify the special permit to authorize additional Division 2.1 and 2.2 materials and add Division 2.3 materials.
15136–M ...	....	Luxfer Gas Cylinders Riverside, CA	49 CFR 173.302a, 173.304a, and 180.205.	To modify the special permit to authorize a new maximum allowable volume and allowable contents.

[FR Doc. 2013–03785 Filed 2–21–13; 8:45 am]

BILLING CODE 4909–60–M

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

Notice of Application for Special Permits

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: List of applications for special permits.

SUMMARY: In accordance with the procedures governing the application for, and the processing of, special permits from the Department of Transportation's Hazardous Material Regulations (49 CFR Part 107, Subpart B), notice is hereby given that the Office of Hazardous Materials Safety has received the application described herein. Each mode of transportation for which a particular special permit is requested is indicated by a number in the "Nature of Application" portion of the table below as follows: 1—Motor vehicle, 2—Rail freight, 3—Cargo vessel, 4—Cargo aircraft only, 5—Passenger-carrying aircraft.

DATES: Comments must be received on or before March 25, 2013.

ADDRESS COMMENTS TO: Record Center, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, Washington, DC 20590.

Comments should refer to the application number and be submitted in triplicate. If confirmation of receipt of comments is desired, include a self-addressed stamped postcard showing the special permit number.

FOR FURTHER INFORMATION CONTACT: Copies of the applications are available for inspection in the Records Center, East Building, PHH–30, 1200 New Jersey Avenue Southeast, Washington DC or at *http://regulations.gov*.

This notice of receipt of applications for special permit is published in accordance with Part 107 of the Federal hazardous materials transportation law (49 U.S.C. 5117(b); 49 CFR 1.53(b)).

Issued in Washington, DC, on February 7, 2013.

Donald Burger,

Chief, General Approvals Permits.

Application No.	Docket No.	Applicant	Regulation(s) affected	Nature of special permits thereof
		NEW SPECIAL PERMITS		
15792–N ...	.....	American Spraytechorth Branch, NJ.	49 CFR 173.306(a)(3)(v).	To authorize the transportation in commerce of certain aerosols containing a Division 2.2 compressed gas in non-refillable aerosol containers which are not subject to the hot water bath test. (mode 1).

Application No.	Docket No.	Applicant	Regulation(s) affected	Nature of special permits thereof
15798–N ...	.....	Lockheed Martin Aeronautics Company Fort Worth, TX.	49 CFR 173.62	To authorize the transportation in commerce of aircraft fuselage assembles containing explosives in alternative packaging. (modes 1, 3, 4).
15799–N ...	.....	Consumer Products Safety Commission (CPSC).	49 CFR 173.21(i)	To authorize the one way transportation in commerce of lighters without LA approvals. (modes 1, 4).
15800–N ...	.....	EQ Industrial Services, Inc. Ypsilanti, MI.	49 CFR 173.51(a), 173.56(i).	To authorize the transportation of small arms cartridges, flares, and other similar explosives that have been desensitized to remove their explosive characteristics, as Division 4.1 flammable solids. (mode 1).
15804–N ...	.....	ThermoFisher Scientific, LLC Pittsburgh, PA.	49 CFR 172.101, HMT Column (7), and 107.102 Special Provision N5.	To authorize the transportation in commerce of dry titanium powder in glass packaging. (modes 1, 2, 3).
15806–N ...	.....	Precision Technik Atlanta, GA	49 CFR 173.201, 173.202, 173.203, 173.302a, 173.304a, and 180.209.	To authorize the manufacture, mark, sell, and use of non-DOT Specification salvage cylinders.
15807–N ...	.....	U.S. Department of Defense (DOD) Scott AFB, IL.	49 CFR 171.22(e), 172.101 Column (9A), and (9B), 173.62.	To authorize the transportation of forbidden explosives by air. (modes 1, 2, 3, 4, 5).
15808–N ...	.....	U.S. Department of Defense (DOD) Scott AFB, IL.	49 CFR 171.22(e), 172.101 Column (9A), and 173.62.	To authorize the transportation of forbidden explosives by air. (modes 1, 2, 3, 4, 5).
15809–N ...	.....	Olin Corporation Oxford, MS	49 CFR 173.63(b)(2)(v).	To authorize the transportation in commerce of .17 caliber rim-fire cartridges loosely packed in strong outside packagings. (modes 1, 2, 3, 4, 5).
15810–N ...	.....	Action Manufacturing Company Atglen, PA.	49 CFR 173.56	To authorize the one-way transportation of certain off-spec military explosives to an approved disposal facility without an EX classification. (mode 1).

[FR Doc. 2013–03784 Filed 2–21–13; 8:45 am]

BILLING CODE 4910–60–M

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

List of Special Permit Applications Delayed 180 Days

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: List of applications delayed more than 180 days.

SUMMARY: In accordance with the requirements of 49 U.S.C. 5117(c), PHMSA is publishing the following list of special permit applications that have been in process for 180 days or more. The reason(s) for delay and the expected completion date for action on each application is provided in association with each identified application.

FOR FURTHER INFORMATION CONTACT: Ryan Paquet, Director, Office of Hazardous Materials Special Permits and Approvals, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, East Building, PHH–30, 1200 New Jersey Avenue Southeast, Washington, DC 20590–0001, (202) 366–4535.

Key to "Reason for Delay"

1. Awaiting additional information from applicant
2. Extensive public comment under review
3. Application is technically complex and is of significant impact or precedent-setting and requires extensive analysis
4. Staff review delayed by other priority issues or volume of special permit applications

Meaning of Application Number Suffixes

N—New application
M—Modification request
R—Renewal Request
P—Party To Exemption Request

Issued in Washington, DC, on February 7, 2013.

Donald Burger,

Chief, General Approvals and Permits.

Application No.	Applicant	Reason for delay	Estimated date of completion
MODIFICATION TO SPECIAL PERMITS			
14562–M	The Lite Cylinder Company Franklin, TN	3	05–31–2013
NEW SPECIAL PERMIT APPLICATIONS			
15650–N	JL Shepherd & Associates San Fernando, CA	3	05–31–2013

Application No.	Applicant	Reason for delay	Estimated date of completion
RENEWAL SPECIAL PERMITS APPLICATIONS			
14455–R	EnergySolutions, LLC Oak Ridge, TN	3	03–31–2013
15228–R	FedEx Express Memphis, TN	3	03–31–2013

[FR Doc. 2013–03783 Filed 2–21–13; 8:45 am]
BILLING CODE 4910–60–M

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

Office of Hazardous Materials Safety Actions on Special Permit Applications

AGENCY: Pipeline And Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Notice of actions on Special Permit Applications.

SUMMARY: In accordance with the procedures governing the application for, and the processing of, special permits from the Department of Transportation's Hazardous Material Regulations (49 CFR part 107, subpart B), notice is hereby given of the actions on special permits applications in (January to January 2013). The mode of transportation involved are identified by a number in the "Nature of Application" portion of the table below as follows: 1—Motor vehicle, 2—Rail freight, 3—Cargo vessel, 4—Cargo aircraft only, 5—Passenger-carrying aircraft. Application numbers prefixed by the letters EE represent applications for Emergency Special Permits. It should be noted that some of the sections cited were those in effect at the time certain special permits were issued.

Issued in Washington, DC, on February 7, 2013.

Donald Burger,

Chief, Special Permits and Approvals Branch.

S.P. No.	Applicant	Regulations(s)	Nature of special permit thereof
Modification Special Permit Granted			
11914–M	Cascade Designs, Inc. Seattle, WA.	49 CFR 173.304(d)(3)(ii); 178.33	To modify the special permit to authorize cargo only aircraft.
11273–M	Cherry Air, Inc. Addison, TX.	49 CFR Part 107, Subpart B, Appendix B with exceptions; 172.101; 172.204(c)(3); 173.27(b)(2)(3); 175.30(a) (1).	To modify the special permit to authorize Division 1.5 and 1.6 explosives which are forbidden or exceed the quantity limitation authorized for transportation by cargo aircraft.
15599–M	Vodik Labs, LLC (formerly Ovonic Hydrogen Systems) Fort Worth, TX.	49 CFR 173.311	To modify the special permit originally issued on an emergency basis to authorize an additional two years.
15461–M	Kidde Products High Bentham.	49 CFR 171.23	To modify the special permit to extend the expiration date and add an additional location to the authorized shipment locations.
15634–M	SodaStream USA Cherry Hill, NJ.	49 CFR 171.2(k)	To modify the special permit to authorize rail freight, cargo vessel, cargo aircraft, and passenger aircraft as additional modes of transportation.
15689–M	AVL Test Systems Inc. Plymouth, MI.	49 CFR 172.200, 177.834	To reissue the special permit originally issued on an emergency basis and add rail freight as an additional mode of transportation authorized.
15664–M	Pollux Aviation Ltd. Wasilla, AK.	49 CFR 172.101 Column (9B); 175.30)(a)(1).	To modify the special permit originally issued on an emergency basis to routine with a two year renewal.
New Special Permit Granted			
15638–N	Lantis Productions Inc. dba Lantis Fireworks & Lasers Draper, UT.	49 CFR 172.101, 172.204(c)(3), 173.27, 175.30(a)(1), 175.320.	Authorizes the transportation of Fireworks, Division 1.3G, UN0335 by cargo aircraft only, which is otherwise forbidden for air transportation. (mode 3)
15693–N	Croman Corporation White City, OR.	49 CFR 172.101 Column (9B); 172.204(c)(3); 173.27(b)(2); 175.30(a)(1); 172.200; 172.301(c); 175.75.	To authorize the transportation in commerce of certain hazardous materials by Part 133 Rotorcraft External Load Operations, attached to or suspended from an aircraft, without meeting certain hazard communication and stowage requirements. (mode 4)
15706–N	Viking Packing Specialist Tulsa, OK.	49 CFR 106, 107, 171–180; 173.13(a); 173.13(b); 173.13(c)(1)(ii); 173.13(c)(1)(iv); 173.13(c)(2)(iii).	To authorize the manufacture, mark and sale of specially designed combination type packaging for transporting certain hazardous materials in limited quantities without required labelling and placarding. (modes 1, 2, 4, 5)
15707–N	Air Products and Chemicals, Inc. Allentown, PA.	49 CFR 173.240; 173.242; 176.83	To authorize the transportation in commerce of a gas purification apparatus containing bulk quantities of certain Division 4.2 (spontaneously combustible) solids in non-DOT specification stainless steel pressure vessels. (modes 1, 2, 3)

S.P. No.	Applicant	Regulations(s)	Nature of special permit thereof
15713–N	Bulk Tank International Guanajuato, Mexico.	49 CFR 178.345–2; 178.346–2; 178.347–2; 178.348–2.	To authorize the manufacture, marking, sale and use of DOT 400 series cargo tanks using alternative materials of construction, specifically duplex stainless steels. (mode 1)
15726–N	Giant Resource Recovery Sewickley, PA.	49 CFR 173.306(k)(2); 173.156(b)	To authorize the transportation in commerce of waste aerosol cans in intermediate bulk containers without covering or clipping the valve stems. (mode 1)
15765–N	Delphi Automotive Systems, LLC WARREN OH.	49 CFR 173.306(k)(2); 173.156(b)	To authorize the manufacture, mark, sale and use of a UN4B aluminum box used for the transportation in commerce of damaged or defective lithium ion batteries (originally approved under CA2011050032) that do not meet the requirements of §173.185(a). (modes 1, 3)
		Emergency Special Permit Granted	
12396–M	National Aeronautics and Space Administration Washington, DC.	49 CFR 180.209 and 173.302a	To modify the special permit to authorize a lithium battery along with the SAFER assembly (modes 1, 3, 4, 5)
15793–N	Northern Air Cargo Anchorage, AK.	49 CFR 172.101 Column (9B)	To authorize the one-time transportation of Division 1.3 Fireworks within the State of Alaska where no other means of transportation is available. (mode 4)
		New Special Permit Withdrawn	
15771–N	McLane Company, Inc. Temple, TX.	49 CFR 49 CFR Part 173.308 (e)	Renewal of SP 14600 permitting up to 5000 cigarette lighters in a truck. (mode 1)
15784–N	C L Smith Company Saint Louis, MO.	49 CFR 173.13(c)(i), (ii), (iii)	(To authorize the manufacture, mark, sale and use of the specially designed combination packagings described herein for transportation in commerce of the materials listed in paragraph 6 without hazard labels or placards, with quantity limits not exceeding 3.1 kg. (modes 1, 2, 3, 4, 5)
		Emergency Special Permit Withdrawn	
15796–N	Eaton Corporation Los Angeles, CA.	49 CFR 173.306(f)(1) thru (f)(4)	To authorize the transportation in commerce of a hydraulic strut accumulator containing nonliquefied, nonflammable gas and a Class 3 combustible liquid. (modes 1, 2, 3, 4, 5)

[FR Doc. 2013–03786 Filed 2–21–13; 8:45 am]
BILLING CODE 4909–60–M

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. AB 1108X]

Blacklands Railroad, Inc.—Discontinuance Exemption—In Rusk County, TX

On February 4, 2013, Blacklands Railroad, Inc. (Blacklands) filed with the Surface Transportation Board (Board) a petition under 49 U.S.C. 10502 for exemption from the prior approval requirements of 49 U.S.C. 10903 to discontinue lease operations over a 0.9-mile line of railroad owned by the Rusk County Rural Rail District (RCRRD) [1] between milepost 15.2 and milepost 16.1 at Henderson, in Rusk County, Tex. (the Line).[2] The line traverses U.S. Postal Service Zip Code 75652. There are no stations on the Line. According to the petition, there has been no local traffic on the Line since August 2011, and the Line is stub-ended and therefore not capable of handling overhead traffic.

The interest of railroad employees will be protected by the conditions set forth in *Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho*, 360 I.C.C. 91 (1979).

By issuance of this notice, the Board is instituting an exemption proceeding pursuant to 49 U.S.C. 10502(b). A final decision will be issued no later than May 24, 2013.

Because this is a discontinuance proceeding and not an abandonment, interim trail use/rail banking and public use conditions are not appropriate. Similarly, no environmental or historic documentation is required under 49 CFR 1105.6(c)(2) and 1105.8(b).

Any offer of financial assistance (OFA) under 49 CFR 1152.27(b)(2) to subsidize continued rail service will be due no later than June 3, 2013, or 10 days after service of a decision granting the petition for exemption, whichever occurs sooner. Each OFA to subsidize continued rail service must be accompanied by the filing fee, which is currently set at $1,600. *See* 49 CFR 1002.2(f)(25).

All filings in response to this notice must refer to Docket No. AB 1108X and must be sent to: (1) Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001; and (2) Karl Morell, Ball Janik LLP, 655 Fifteenth Street NW., Suite 225, Washington, DC 20005. Replies to the petition are due on or before March 14, 2013.

Persons seeking further information concerning discontinuance procedures may contact the Board's Office of Public Assistance, Governmental Affairs, and Compliance at (202) 245–0238 or refer

[1] On January 18, 2013, RCRRD filed a petition for exemption to abandon the Line. *See Rusk Cnty. Rural Rail Dist.—Aban. Exemption—in Rusk Cnty., Tex.*, Docket No. AB 1103X.

[2] Blacklands was granted authority to lease and operate the Line in *Blacklands Railroad, Inc.—Lease & Operation Exemption—Rusk County Rural Rail District*, FD 35327 (STB served Dec. 11, 2009).

to the full abandonment and discontinuance regulations at 49 CFR part 1152. Questions concerning environmental issues may be directed to the Board's Office of Environmental Analysis at (202) 245–0305. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.]

Board decisions and notices are available on our Web site at *www.stb.dot.gov*.

Decided: February 19, 2013.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Derrick A. Gardner,

Clearance Clerk.

[FR Doc. 2013–04132 Filed 2–21–13; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

February 19, 2013.

The Department of the Treasury will submit the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, Public Law 104–13, on or after the date of publication of this notice.

DATES: Comments should be received on or before March 25, 2013 to be assured of consideration.

ADDRESSES: Send comments regarding the burden estimate, or any other aspect of the information collection, including suggestion for reducing the burden, to (1) Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Treasury, New Executive Office Building, Room 10235, Washington, DC 20503, or email at *OIRA_Submission@OMB.EOP.GOV* and (2) Treasury PRA Clearance Officer, 1750 Pennsylvania Ave. NW., Suite 8140, Washington, DC 20220, or email at *PRA@treasury.gov*.

FOR FURTHER INFORMATION CONTACT: Copies of the submission(s) may be obtained by calling (202) 927–5331, email at *PRA@treasury.gov*, or the entire information collection request may be found at *www.reginfo.gov*.

Financial Crimes Enforcement Network (FinCEN)

OMB Number: 1506–0049.

Type of Review: Revision of a currently approved collection.

Title: Expansion of Special Information Sharing Procedures to Deter Money Laundering and Terrorist Activity.

Abstract: The relevant Bank Secrecy Act ("BSA") information sharing rules allows certain foreign law enforcement agencies, and State and local law enforcement agencies, to submit requests for information to financial institutions. The rule also clarifies that FinCEN itself, on its own behalf and on behalf of other appropriate components of the Department of the Treasury, may submit such requests. Modification of the information sharing rules is a part of the Department of the Treasury's continuing effort to increase the efficiency and effectiveness of its anti-money laundering and counter-terrorist financing policies.

Affected Public: Private Sector: Businesses or other for-profits.

Estimated Total Burden Hours: 1,087,236.

Dawn D. Wolfgang,

Treasury PRA Clearance Officer.

[FR Doc. 2013–04122 Filed 2–21–13; 8:45 am]

BILLING CODE 4810–02–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Identification of Additional Vessels Pursuant to the Iranian Transactions and Sanctions Regulations and Executive Order 13599

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Treasury Department's Office of Foreign Assets Control ("OFAC") is publishing the names of thirty-seven vessels identified as property owned or controlled by the Government of Iran under the Iranian Transactions and Sanctions Regulations, 31 CFR part 560, ("ITSR") and Executive Order 13599, and is updating the entries on OFAC's list of Specially Designated Nationals and Blocked Persons to identify the new names and/or other information given to those vessels.

DATES: The identification and updates made by the Director of OFAC of the vessels identified in this notice, pursuant to the ITSR and Executive Order 13599, is effective February 6, 2013.

FOR FURTHER INFORMATION CONTACT: Assistant Director, Sanctions Compliance and Evaluation, Office of Foreign Assets Control, Department of the Treasury, Washington, DC 20220, Tel.: 202/622–2490.

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

This document and additional information concerning OFAC are available from OFAC's Web site (*www.treas.gov/ofac*) or via facsimile through a 24-hour fax-on-demand service, Tel.: 202/622–0077.

Background

On February 5, 2012, the President issued Executive Order 13599, "Blocking Property of the Government of Iran and Iranian Financial Institutions" (the "Order"). Section 1 (a) of the Order blocks, with certain exceptions, all property and interests in property of the Government of Iran, including the Central Bank of Iran, that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person, including any foreign branch.

Section 1(c) of the Order blocks, with certain exceptions, all property and interests in property that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person, including any foreign branch, of the following persons: any person determined by the Secretary of the Treasury, in consultation with the Secretary of State, to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to the Order.

Section 7(d) of the Order defines the term "Government of Iran" to mean the Government of Iran, any political subdivision, agency, or instrumentality thereof, including the Central Bank of Iran, and any person owned or controlled by, or acting for or on behalf of, the Government of Iran.

Section 560.211 of the ITSR implements Section 1(a) and (c) of the Order. Section 560.304 defines the term "Government of Iran" to include: "(a) The state and the Government of Iran, as well as any political subdivision, agency, or instrumentality thereof, including the Central Bank of Iran; (b) Any person owned or controlled, directly or indirectly, by the foregoing; and (c) Any person to the extent that such person is, or has been, since the effective date, acting or purporting to act, directly or indirectly, for or on behalf of any of the foregoing; and (d) Any other person determined by the Office of Foreign Assets Control to be included within [(a) through (c)]."

Section 560.313 of the ITSR further defines an "entity owned or controlled by the Government of Iran" to include "any corporation, partnership, association, or other entity in which the Government of Iran owns a 50 percent or greater interest or a controlling interest, and any entity which is otherwise controlled by that government."

On February 6, 2013, the Director of OFAC, in consultation with the Secretary of State, identified thirty-seven vessels as the property of the Government of Iran pursuant to the Order and the ITSR, and updated the entries on OFAC's list of Specially Designated Nationals and Blocked Persons to identify new names or other information given to those vessels.

Already-Blocked Vessels With New Information

1. ALPHA (f.k.a. ABADAN) (T2EU4) Crude/Oil Products Tanker Unknown flag; Former Vessel Flag Malta; alt. Former Vessel Flag Tuvalu; Vessel Registration Identification IMO 9187629; MMSI 572469210 (vessel) [IRAN] (Linked To: NATIONAL IRANIAN TANKER COMPANY).

2. CRYSTAL (f.k.a. ABADEH) (9HDQ9) Crude/Oil Products Tanker Tanzania flag; Former Vessel Flag Malta; Vessel Registration Identification IMO 9187655; MMSI 256842000 (vessel) [IRAN] (Linked To: NATIONAL IRANIAN TANKER COMPANY).

3. CHRISTINA (f.k.a. AMOL; f.k.a. CASTOR) (T2EM4) Crude/Oil Products Tanker Tanzania flag; Former Vessel Flag Malta; alt. Former Vessel Flag Tuvalu; Vessel Registration Identification IMO 9187667; MMSI 256843000 (vessel) [IRAN] (Linked To: NATIONAL IRANIAN TANKER COMPANY).

4. SEAPRIDE (f.k.a. ASTANEH; f.k.a. NEPTUNE) (T2ES4) Crude/Oil Products Tanker Tanzania flag; Former Vessel Flag Malta; alt. Former Vessel Flag Tuvalu; Vessel Registration Identification IMO 9187643; MMSI 572467210 (vessel) [IRAN] (Linked To: NATIONAL IRANIAN TANKER COMPANY).

5. JUPITER (f.k.a. ASTARA) (9HDS9) Crude/Oil Products Tanker Unknown flag; Former Vessel Flag Tuvalu; alt. Former Vessel Flag Malta; Vessel Registration Identification IMO 9187631; MMSI 256845000 (vessel) [IRAN] (Linked To: NATIONAL IRANIAN TANKER COMPANY).

6. LEADERSHIP (f.k.a. DANESH) (5IM592) Crude Oil Tanker Unknown flag; Former Vessel Flag Cyprus; alt. Former Vessel Flag Tanzania; Vessel Registration Identification IMO 9356593; MMSI 677049200 (vessel) [IRAN] (Linked To: NATIONAL IRANIAN TANKER COMPANY).

7. COMPANION (f.k.a. DAVAR) (5IM593) Crude Oil Tanker Unknown flag; Former Vessel Flag Cyprus; alt. Former Vessel Flag Tanzania; Vessel Registration Identification IMO 9357717; MMSI 677049300 (vessel) [IRAN] (Linked To: NATIONAL IRANIAN TANKER COMPANY).

8. MAESTRO (f.k.a. FAEZ; f.k.a. SATEEN) (T2DM4) Chemical/Products Tanker Tanzania flag; Former Vessel Flag Malta ; alt. Former Vessel Flag Tuvalu; Vessel Registration Identification IMO 9283760; MMSI 572438210 (vessel) [IRAN] (Linked To: NATIONAL IRANIAN TANKER COMPANY).

9. PIONEER (f.k.a. HADI) (T2EJ4) Crude Oil Tanker Unknown flag; Former Vessel Flag Cyprus; alt. Former Vessel Flag Tuvalu; Vessel Registration Identification IMO 9362073; MMSI 572459210 (vessel) [IRAN] (Linked To: NATIONAL IRANIAN TANKER COMPANY).

10. TAMAR (f.k.a. HAMOON; f.k.a. LENA) (T2EQ4) Crude Oil Tanker Tanzania flag; Former Vessel Flag Malta; alt. Former Vessel Flag Tuvalu; Vessel Registration Identification IMO 9212929; MMSI 572465210 (vessel) [IRAN] (Linked To: NATIONAL IRANIAN TANKER COMPANY).

11. FREEDOM (f.k.a. HARAZ) (5IM597) Crude Oil Tanker Unknown flag; Former Vessel Flag Cyprus; alt. Former Vessel Flag Tanzania; Vessel Registration Identification IMO 9357406; MMSI 677049700 (vessel) [IRAN] (Linked To: NATIONAL IRANIAN TANKER COMPANY).

12. VALOR (f.k.a. HARSIN) (5IM600) Crude Oil Tanker Unknown flag; Former Vessel Flag Malta; alt. Former Vessel Flag Tanzania; Vessel Registration Identification IMO 9212917; MMSI 677050000 (vessel) [IRAN] (Linked To: NATIONAL IRANIAN TANKER COMPANY).

13. MAJESTIC (f.k.a. GLORY; f.k.a. HATEF) (T2EG4) Crude Oil Tanker Tanzania flag; Former Vessel Flag Cyprus; alt. Former Vessel Flag Tuvalu; Vessel Registration Identification IMO 9357183; MMSI 212256000 (vessel) [IRAN] (Linked To: NATIONAL IRANIAN TANKER COMPANY).

14. TULAR (f.k.a. HENGAM; f.k.a. LOYAL) (T2ER4) Crude Oil Tanker Tanzania flag; Former Vessel Flag Malta; alt. Former Vessel Flag Tuvalu; Vessel Registration Identification IMO 9212905; MMSI 256875000 (vessel) [IRAN] (Linked To: NATIONAL IRANIAN TANKER COMPANY).

15. MILLIONAIRE (f.k.a. HIRMAND; f.k.a. HONESTY) (T2DZ4) Crude Oil Tanker Tanzania flag; Former Vessel Flag Cyprus; alt. Former Vessel Flag Tuvalu; Vessel Registration Identification IMO 9357391; MMSI 572450210 (vessel) [IRAN] (Linked To: NATIONAL IRANIAN TANKER COMPANY).

16. EXPLORER (f.k.a. HODA; f.k.a. PRECIOUS) (T2EH4) Crude Oil Tanker Tanzania flag; Former Vessel Flag Cyprus; alt. Former Vessel Flag Tuvalu; Vessel Registration Identification IMO 9362059; MMSI 572458210 (vessel) [IRAN] (Linked To: NATIONAL IRANIAN TANKER COMPANY).

17. COURAGE (f.k.a. HOMA) (5IM596) Crude Oil Tanker Unknown flag; Former Vessel Flag Cyprus; alt. Former Vessel Flag Tanzania; Vessel Registration Identification IMO 9357389; MMSI 677049600 (vessel) [IRAN] (Linked To: NATIONAL IRANIAN TANKER COMPANY).

18. JANUS (f.k.a. HONAR; f.k.a. VICTORY) (T2EA4) Crude Oil Tanker Tanzania flag; Former Vessel Flag Cyprus; alt. Former Vessel Flag Tuvalu; Vessel Registration Identification IMO 9362061; MMSI 209511000 (vessel) [IRAN] (Linked To: NATIONAL IRANIAN TANKER COMPANY).

19. SCORPIAN (f.k.a. HORMOZ) (9HEK9) Crude Oil Tanker Tanzania flag; Former Vessel Flag Tuvalu; Vessel Registration Identification IMO 9212890; MMSI 256870000 (vessel) [IRAN] (Linked To: NATIONAL IRANIAN TANKER COMPANY).

20. MARIGOLD (f.k.a. BRAWNY; f.k.a. NABI) (T2DS4) Crude Oil Tanker Tanzania flag; Former Vessel Flag Malta; alt. Former Vessel Flag Tuvalu; Vessel Registration Identification IMO 9079080; MMSI 572443210 (vessel) [IRAN] (Linked To: NATIONAL IRANIAN TANKER COMPANY).

21. MIDSEA (f.k.a. MOTION; f.k.a. NAJM) (T2DR4) Crude Oil Tanker Tanzania flag; Former Vessel Flag Malta; alt. Former Vessel Flag Tuvalu; Vessel Registration Identification IMO 9079092; MMSI 572442210 (vessel) [IRAN] (Linked To: NATIONAL IRANIAN TANKER COMPANY).

22. OCEANIC (f.k.a. NESA; f.k.a. TRUTH) (T2DP4) Crude Oil Tanker Tanzania flag; Former Vessel Flag Malta; alt. Former Vessel Flag Tuvalu; Vessel Registration Identification IMO 9079107; MMSI 572440210 (vessel) [IRAN] (Linked To: NATIONAL IRANIAN TANKER COMPANY).

23. VOYAGER (f.k.a. ELITE; f.k.a. NOAH) (T2DQ4) Crude Oil Tanker Tanzania flag; Former Vessel Flag Malta; alt. Former Vessel Flag Tuvalu; Vessel Registration Identification IMO

9079078; MMSI 572441210 (vessel) [IRAN] (Linked To: NATIONAL IRANIAN TANKER COMPANY).

24. MAHARLIKA (f.k.a. NOOR) (9HES9) Crude Oil Tanker Tanzania flag; Former Vessel Flag Malta; alt. Former Vessel Flag Tuvalu; Vessel Registration Identification IMO 9079066; MMSI 256882000 (vessel) [IRAN] (Linked To: NATIONAL IRANIAN TANKER COMPANY).

25. CARNATION (f.k.a. SAFE; a.k.a. YARD NO. 1220 SHANGHAI WAIGAOQIAO) Crude Oil Tanker Tanzania flag; Former Vessel Flag Tuvalu; alt. Former Vessel Flag Malta; Vessel Registration Identification IMO 9569205 (vessel) [IRAN] (Linked To: NATIONAL IRANIAN TANKER COMPANY).

26. LANTANA (f.k.a. SANANDAJ) (5IM591) Crude Oil Tanker Unknown flag; Former Vessel Flag Malta; alt. Former Vessel Flag Tanzania; Vessel Registration Identification IMO 9172040; MMSI 677049100 (vessel) [IRAN] (Linked To: NATIONAL IRANIAN TANKER COMPANY).

27. BLACKSTONE (f.k.a. SARV) (9HNZ9) Crude Oil Tanker Seychelles flag; Former Vessel Flag Malta; alt. Former Vessel Flag Tuvalu; Vessel Registration Identification IMO 9357377; MMSI 249257000 (vessel) [IRAN] (Linked To: NATIONAL IRANIAN TANKER COMPANY).

28. MAGNOLIA (f.k.a. SARVESTAN) (5IM590) Crude Oil Tanker Unknown flag; Former Vessel Flag Malta; alt. Former Vessel Flag Tanzania; Vessel Registration Identification IMO 9172052; MMSI 677049000 (vessel) [IRAN] (Linked To: NATIONAL IRANIAN TANKER COMPANY).

29. CAMELLIA (f.k.a. SAVEH) (5IM 594) Crude Oil Tanker Unknown flag; Former Vessel Flag Malta; alt. Former Vessel Flag Tanzania; Vessel Registration Identification IMO 9171462; MMSI 677049400 (vessel) [IRAN] (Linked To: NATIONAL IRANIAN TANKER COMPANY).

30. CLOVE (f.k.a. SEMINAN) (5IM 595) Crude Oil Tanker Unknown flag; Former Vessel Flag Malta; alt. Former Vessel Flag Tanzania; Vessel Registration Identification IMO 9171450; MMSI 677049500 (vessel) [IRAN] (Linked To: NATIONAL IRANIAN TANKER COMPANY).

31. SEAHORSE (f.k.a. GARDENIA; f.k.a. SEPID) (T2EF4) Crude Oil Tanker Tanzania flag; Former Vessel Flag Malta; alt. Former Vessel Flag Tuvalu; Vessel Registration Identification IMO 9356608; MMSI 572455210 (vessel) [IRAN] (Linked To: NATIONAL IRANIAN TANKER COMPANY).

32. BAIKAL (f.k.a. BLOSSOM; f.k.a. SIMA) (T2DY4) Crude Oil Tanker Tanzania flag; Former Vessel Flag Malta; alt. Former Vessel Flag Tuvalu; Vessel Registration Identification IMO 9357353; MMSI 572449210 (vessel) [IRAN] (Linked To: NATIONAL IRANIAN TANKER COMPANY).

33. AZALEA (f.k.a. SINA) (9HNY9) Crude Oil Tanker Unknown flag; Former Vessel Flag Malta; alt. Former Vessel Flag Tuvalu; Vessel Registration Identification IMO 9357365; MMSI 249256000 (vessel) [IRAN] (Linked To: NATIONAL IRANIAN TANKER COMPANY).

34. SONATA (a.k.a. YARD NO. 1222 SHANGHAI WAIGAOQIAO) Crude Oil Tanker Unknown flag; Former Vessel Flag Malta; Vessel Registration Identification IMO 9569633 (vessel) [IRAN] (Linked To: NATIONAL IRANIAN TANKER COMPANY).

35. SONGBIRD (a.k.a. YARD NO. 1224 SHANGHAI WAIGAOQIAO) Crude Oil Tanker Unknown flag; Former Vessel Flag Malta; Vessel Registration Identification IMO 9569645 (vessel) [IRAN] (Linked To: NATIONAL IRANIAN TANKER COMPANY).

36. RAINBOW (f.k.a. SOUVENIR; a.k.a. YARD NO. 1221 SHANGHAI WAIGAOQIAO) Crude Oil Tanker Tanzania flag; Former Vessel Flag Malta; alt. Former Vessel Flag Tuvalu; Vessel Registration Identification IMO 9569619 (vessel) [IRAN] (Linked To: NATIONAL IRANIAN TANKER COMPANY).

37. DAISY (f.k.a. SUSANGIRD) (5IM584) Crude Oil Tanker Unknown flag; Former Vessel Flag Malta; alt. Former Vessel Flag Tanzania; Vessel Registration Identification IMO 9172038; MMSI 677048400 (vessel) [IRAN] (Linked To: NATIONAL IRANIAN TANKER COMPANY).

Dated: February 6, 2013.

Adam J. Szubin,

Director, Office of Foreign Assets Control.

[FR Doc. 2013–03834 Filed 2–21–13; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF VETERANS AFFAIRS

Public Availability of the Department of Veterans Affairs Fiscal Year (FY) 2011 Service Contract Inventory Analysis Report and FY 2012 Service Contract Inventory

AGENCY: Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In accordance with Section 743 of Division C of the Consolidated Appropriations Act of 2010 (Pub. L. 111–117), Department of Veterans Affairs (VA) is publishing this notice to advise the public of the availability of the FY 2011 Service Contract Inventory Analysis Report and FY 2012 Service Contract Inventory. The FY 2011 analysis report discusses the methodology, analysis, and special interest functions studied from the FY 2011 inventory, as well actions, planned and taken, to address any identified weaknesses or challenges. The FY 2012 inventory provides information on VA service contract actions over $25,000. The inventory information is organized by function to show how contracted resources are distributed throughout the agency. The report and inventory were developed in accordance with guidance issued on November 5, 2010, and updated on December 19, 2011, by the Office of Management and Budget's Office of Federal Procurement Policy (OFPP). OFPP's guidance is available at: *http://www.whitehouse.gov/omb/procurement-service-contract-inventories.* VA posted the report, inventory, and a summary of the inventory on the VA Web site at: *http://www.va.gov/oal/business/pps/scalnventory.asp.*

FOR FURTHER INFORMATION CONTACT: Marilyn Harris, Director of Procurement Policy and Warrant Management Service, Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420. Questions regarding the service contract inventory should be directed to Marilyn Harris at (202) 461–6918, or *Marilyn.Harris2@va.gov.*

Approved: February 14, 2013.

John R. Gingrich,

Chief of Staff, Department of Veterans Affairs.

[FR Doc. 2013–04117 Filed 2–21–13; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

Health Services Research and Development Service Scientific Merit Review Board, Notice of Meeting

The Department of Veterans Affairs gives notice under the Federal Advisory Committee Act, 5 United States Code Appendix 2, that the Health Services Research and Development Service Scientific Merit Review Board will conduct telephone conference call and web-conference based meetings of its six Health Services Research (HSR) subcommittees and its Nursing Research Initiative (NRI) subcommittee. The HSR subcommittees are: HSR 1—Medical Care and Clinical Management; HSR 2—Patient and Special Population

Determinants of Health and Care; HSR 3—Methods and Modeling for Research, Informatics, and Surveillance; HSR 4—Mental and Behavioral Health; HSR 5—Health Care System Organization and Delivery, and HSR 6—Post-acute and Long-term Care. The telephone conference call of its NRI subcommittee will be held on March 1, 2012, from 10 a.m. to 2 p.m. The HSR subcommittee meetings will be held on March 5–6, 2013, from 8 a.m. to 6 p.m. Each of these meetings will originate from offices within the Office of Research and Development, 131 M Street NE., Washington, DC.

The purpose of the Board is to review health services research and development applications involving the measurement and evaluation of health care services, the testing of new methods of health care delivery and management, and nursing research. Applications are reviewed for scientific and technical merit, mission relevance, and the protection of human and animal subjects. Recommendations regarding funding are submitted to the Chief Research and Development Officer.

Each subcommittee meeting of the Board will be open to the public at the start of the first day of the meetings for approximately one half-hour to cover administrative matters and to discuss the general status of the program. The remaining portion of each subcommittee meeting will be closed for the discussion, examination, reference, and oral review of the intramural research proposals and critiques. During the closed portion of each subcommittee meeting, discussion and recommendations will include qualifications of the personnel conducting the studies as well as research information. The disclosure of this information would constitute an unwarranted invasion of personal privacy, and the premature disclosure of research information could significantly compromise the implementation of proposed agency action regarding such research projects. As provided by subsection 10(d) of Public Law 92–463, as amended by Public Law 94–409, closing the meeting is in accordance with 5 U.S.C. 552b(c)(6) and (9)(B).

No oral or written comments will be accepted from the public for either portion of the meetings. Those who plan to participate on a telephone conference call during the open portion of a subcommittee meeting should contact Ms. Kristy Benton-Grover, Designated Federal Officer and Program Manager, Scientific Merit Review Board, Department of Veterans Affairs, Health Services Research and Development Service (10P9H), 810 Vermont Avenue NW., Washington, DC 20420. For further information, please call Mrs. Benton-Grover at (202) 443–5728 or by email at *kristy.benton-grover@va.gov*.

Dated: February 15, 2013.

By Direction of the Secretary.

Vivian Drake,

Committee Management Officer.

[FR Doc. 2013–04049 Filed 2–21–13; 8:45 am]

BILLING CODE P

DEPARTMENT OF VETERANS AFFAIRS

Privacy Act of 1974; System of Records

AGENCY: Department of Veterans Affairs.

ACTION: Notice of New Privacy Act System of Records.

SUMMARY: The Privacy Act of 1974 (5 U.S.C. 552(a)(e)) requires all agencies to publish in the **Federal Register** a notice of the existence and character of their systems of records. Notice is hereby given that the Department of Veterans Affairs (VA) is establishing a new system of records entitled "Principles of Excellence Centralized Complaint System-VA" 170VA22.

DATES: Comments on this new system of records must be received no later than March 25, 2013. If no public comment is received during the period allowed for comment, or unless otherwise published in the **Federal Register** by VA, the new system will become effective March 25, 2013.

ADDRESSES: Written comments concerning the proposed new system of records may be submitted by: mail or hand-delivery to Director, Regulations Management (02REG), Department of Veterans Affairs, 810 Vermont Avenue NW., Room 1068, Washington, DC 20420; fax to (202) 273–9026; or email to *http://www.Regulations.gov*. All comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461–4902 for an appointment. (This is not a toll-free number.) In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at *www.Regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Thomas Erickson, Performance Management Team, Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, (202) 461–9829.

SUPPLEMENTARY INFORMATION: Executive Order 13607, "Establishing Principles of Excellence for Institutions Serving Service Members, Veterans, Spouses, and Other Family Members," requires the creation of a centralized complaint system for students receiving Federal military and veteran educational benefits to submit complaints against institutions they feel have acted deceptively or fraudulently. VA proposes to establish this new system of records, entitled "Principles of Excellence Centralized Complaint System-VA" 170VA22. This system will provide a standardized method for students and others to submit a complaint or allegation that an entity or individual has not or may not have adhered to the Principles of Excellence established in the Executive Order. The notice of intent to publish and an advance copy of the system notice have been sent to the appropriate congressional committees and to the Director of the Office of Management and Budget (OMB) as required by 5 U.S.C. 552a(r) (Privacy Act) and guidelines issued by OMB (65 FR 77677), December 12, 2000.

Approved: February 4, 2013.

John R. Gingrich,

Chief of Staff, Department of Veterans Affairs.

170VA22

SYSTEM NAME:

"Principles of Excellence Centralized Complaint System-VA" 170VA22.

SYSTEM LOCATION:

Complaints or allegations concerning entities or individuals that have not or may not have adhered to the Principles of Excellence established in the Executive Order 13607 will be submitted by users of VA education benefits or veterans, service members, and their families. Registered complaints will be transmitted in a secure electronic format to VA Central Office for review. Policy issues concerning this system should be submitted to the Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals covered by this system are individuals who submit complaints to VA (on their own); individuals on whose behalf complaints are submitted by others (such as attorneys, members of Congress, third party advocates, and/or other governmental organizations); and employees, the Federal Trade Commission, other Federal agencies, state agencies, or VA. Information

collected is subject to the Privacy Act only to the extent that it concerns individuals; information pertaining to entities and organizations is not subject to the Privacy Act.

CATEGORIES OF RECORDS IN THE SYSTEM:

Records in the system may contain: (1) Correspondence or other information received; (2) information from the entity or individual referring the complaint; (3) records created of verbal communications by or with complainants or other individuals; (4) information regarding third party advocates or others who submit complaints on another's behalf; (5) information identifying the entity that is subject to the complaint or its employees; (6) communication with or by the entity that is subject to the complaint or its employees; (7) unique identifiers, codes, and descriptors categorizing each complaint file; (8) information about how complaints were responded to or referred, including any resolution; (9) records used to respond to or refer complaints, including information in VA's other systems of records; and (10) identifiable information regarding both the individual who is making the complaint, and the individual on whose behalf such complaint is made, and employees of the entity about which the complaint was made, including name, Social Security number, account numbers, address, phone number, email address, and date of birth.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Executive Order 13607, "Establishing Principles of Excellence for Educational Institutions Serving Service Members, Veterans, Spouses, and Other Family Members".

PURPOSE(S):

The information in the system is being collected to enable VA to receive, respond to, and refer complaints regarding VA educational assistance benefits. The system serves as a record of the complaint, and is used for collecting complaint data; responding to or referring the complaint; aggregating data that will be used to inform other functions of VA and, as appropriate, other agencies and/or the public; and preparing reports as required by law. This system consists of complaints received by VA or other entities and information concerning responses to or referrals of these complaints, as appropriate.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

1. For Law Enforcement Purposes—To disclose pertinent information to the appropriate Federal, state, or local agency responsible for investigating, prosecuting, enforcing, or implementing a statute, rule, regulation, or order, where VA becomes aware of an indication of a violation or potential violation of civil or criminal law or regulation. This includes the Federal Trade Commission's Sentinel Network.

2. For Congressional Inquiry—To provide information to a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of that individual.

3. Judicial/Administrative Proceedings—To disclose information to another Federal agency, to a court, or a party in litigation before a court or in an administrative proceeding being conducted by a Federal agency, when the Government is a party to the judicial or administrative proceeding. In those cases where the Government is not a party to the proceeding, records may be disclosed if a subpoena has been signed by a judge.

4. For National Archives and Records Administration and General Services Administration—To disclose to the National Archives and Records Administration and the General Services Administration in records management inspections conducted under authority of Title 44 of the United States Code (U.S.C.).

5. Within VA for Statistical/Analytical Studies—By VA in the production of summary descriptive statistics and analytical studies in support of the function for which records are collected and maintained, or for related workforce studies. While published studies do not contain individual identifiers, in some instances, the selection of elements of data included in the study may be structured in such a way as to make the data individually identifiable by inference.

6. For Litigation—To disclose information to the Department of Justice, or in a proceeding before a court, adjudicative body, or other administrative body before which VA is authorized to appear, when: (1) VA, or any component thereof; or (2) any employee of VA in his or her official capacity; or (3) any employee of VA in his or her individual capacity where the Department of Justice or VA has agreed to represent the employee; or (4) the United States, when VA determines that litigation is likely to affect VA or any of its components, is a party to litigation or has an interest in such litigation, and the use of such records by the Department of Justice or VA is deemed by VA to be relevant and necessary to the litigation provided, however, that the disclosure is compatible with the purpose for which records were collected.

7. For the Merit Systems Protection Board—To disclose information to officials of the Merit Systems Protection Board or the Office of the Special Counsel, when requested in connection with appeals, special studies of the civil service and other merit systems, review of VA rules and regulations, investigations of alleged or possible prohibited personnel practices, and such other functions, e.g., as promulgated in 5 U.S.C. 1205 and 1206, or as may be authorized by law.

8. For the Equal Employment Opportunity Commission—To disclose information to the Equal Employment Opportunity Commission when requested in connection with an investigation into alleged or possible discrimination practices in the Federal sector, compliance by Federal agencies with the Uniform Guidelines on Employee Selection Procedures or other functions vested in the Commission, and to otherwise ensure compliance with the provisions of 5 U.S.C. 7201.

9. For the Federal Labor Relations Authority—To disclose information to the Federal Labor Relations Authority or its General Counsel when requested in connection with investigations of allegations of unfair labor practices or matters before the Federal Service Impasses Panel.

10. For Consumer Reporting Agencies—VA may disclose the name and address of a veteran or beneficiary, and other information as is reasonably necessary to identify such individual or concerning that individual's indebtedness to the United States by virtue of the person's participation in a benefits program administered by the Department, to a consumer reporting agency for the purpose of locating the individual, obtaining a consumer report to determine the ability of the individual to repay an indebtedness to the United States, or assisting in the collection of such indebtedness, provided that the provisions of 38 U.S.C. 5701(g)(2) and (4) have been met. The purpose of this information disclosure to a consumer-reporting agency is to assist VA in locating an individual, obtaining a consumer report to determine his or her ability to repay indebtedness, and to collect indebtedness.

11. For OMB—VA may disclose information from this system of records

to the Office of Management and Budget (OMB) for the performance of its statutory responsibilities for evaluating Federal programs. VA must be able to provide information to OMB to assist it in fulfilling its duties as required by statute and regulation.

12. For Treasury, for Payment or Reimbursement—VA may disclose information to the Department of the Treasury to facilitate payments to physicians, clinics, and pharmacies for reimbursement of services rendered, and to veterans for reimbursements of authorized expenses, or to collect, by set off or otherwise, debts owed to the United States.

13. For Treasury, IRS—VA may disclose the name of a veteran or beneficiary, other information as is reasonably necessary to identify such individual to the Department of the Treasury, Internal Revenue Service (IRS), for the collection of Title 38 benefit overpayments, overdue indebtedness, and/or costs of services provided to an individual not entitled to such services, by the withholding of all or a portion of the person's Federal income tax refund. The purpose of this disclosure is to collect a debt owed to VA by an individual by offset of his or her Federal income tax refund.

14. For Contractors—VA may disclose information from this system of records to individuals, organizations, private or public agencies, or other entities or individuals with whom VA has a contract or agreement to perform such services as VA may deem practicable for the purposes of laws administered by VA, in order for the contractor, subcontractor, public or private agency, or other entity or individual with whom VA has a contract or agreement to perform services under the contract or agreement.

15. For Data Breach Response and Remedial Efforts—VA may, on its own initiative, disclose information from this system to appropriate agencies, entities, and persons when (1) VA suspects or has confirmed that the integrity or confidentiality of information in the system of records has been compromised; (2) the Department has determined that as a result of the suspected or confirmed compromise there is a risk of embarrassment or harm to the reputations of the record subjects, harm to economic or property interests, identity theft or fraud, or harm to the security, confidentiality, or integrity of this system or other systems or programs (whether maintained by the Department or another agency or entity) that rely upon the potentially compromised information; and (3) the disclosure is to agencies, entities, or persons whom VA determines are reasonably necessary to assist or carry out the Department's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

16. For GAO—VA may disclose information from this system of records to the U.S. Government Accountability Office (GAO) for the performance of its statutory responsibilities for evaluating Federal programs. VA must be able to provide information to GAO to assist it in fulfilling its duties as required by statute and regulation.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPENSING OF RECORDS IN THE SYSTEM:

STORAGE:

Information will be collected by VA Form 22–0959, Principles of Excellence Complaint Intake Questionnaire, and telephone and stored in an electronic format.

RETRIEVABILITY:

Records are retrievable by a variety of fields including without limitation the individual's name, complaint case number, address, phone number, date of birth, or by some combination thereof.

SAFEGUARDS:

Access to electronic records is restricted to authorized personnel who have been issued non-transferrable access codes and passwords. Other records are maintained in locked file cabinets or rooms with access limited to those personnel whose official duties require access.

RETENTION AND DISPOSAL:

Disposition of records is according to the National Archives and Records Administration guidelines.

SYSTEM MANAGER(S) AND ADDRESS:

Director, Education Service, Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420.

NOTIFICATION PROCEDURE:

Individuals may submit a request on whether a system contains records about them to the system manager indicated. Individuals must furnish the following for their records to be located and identified:

a. Full name.

b. Address.

c. Institution identified in complaint.

RECORD ACCESS PROCEDURES:

Individuals wishing to request access to records about them should contact the system manager indicated. Individuals must furnish the following for their records to be located and identified:

a. Full name.

b. Address.

c. Institution identified in complaint.

Individuals requesting access must also follow the Office of Personnel Management's Privacy Act Regulations regarding verification of identity and amendment of records (5 CFR part 297).

CONTESTING RECORD PROCEDURES:

Individuals wishing to request access amendment of records about them should contact the system manager indicated. Individuals must furnish the following for their records to be located and identified:

a. Full name.

b. Address.

c. Institution identified in complaint.

Individuals requesting access amendment of records must also follow the Office of Personnel Management's Privacy Act Regulations regarding verification of identity and amendment of records (5 CFR part 297).

RECORD SOURCE CATEGORIES:

Information in this system is obtained from individuals and entities filing complaints, about entities or individuals that have not or may not have adhered to the Principles of Excellence established in the Executive Order 13607. Furnishing the information is voluntary.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 2013–04114 Filed 2–21–13; 8:45 am]

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Part II

Department of Health and Human Services

Centers for Medicare & Medicaid Services

42 CFR Parts 422 and 423
Medicare Program; Medical Loss Ratio Requirements for the Medicare Advantage and the Medicare Prescription Drug Benefit Programs; Proposed Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Parts 422 and 423

[CMS–4173–P]

RIN 0938–AR69

Medicare Program; Medical Loss Ratio Requirements for the Medicare Advantage and the Medicare Prescription Drug Benefit Programs

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Proposed rule.

SUMMARY: This proposed rule would implement medical loss ratio (MLR) requirements for the Medicare Advantage Program and the Medicare Prescription Drug Benefit Program under the Patient Protection and Affordable Care Act.

DATES: To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. EST on April 16, 2013.

ADDRESSES: In commenting, please refer to file code CMS–4173–P. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

You may submit comments in one of four ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation to *http://www.regulations.gov.* Follow the "Submit a comment" instructions.

2. *By regular mail.* You may mail written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–4173–P, P.O. Box 8013, Baltimore, MD 21244–8013.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–4173–P, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.

4. *By hand or courier.* Alternatively, you may deliver (by hand or courier) your written comments ONLY to the following addresses prior to the close of the comment period:

a. For delivery in Washington, DC—Centers for Medicare & Medicaid Services, Department of Health and Human Services, Room 445–G, Hubert H. Humphrey Building, 200 Independence Avenue SW., Washington, DC 20201.

(Because access to the interior of the Hubert H. Humphrey Building is not readily available to persons without federal government identification, commenters are encouraged to leave their comments in the CMS drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of filing by stamping in and retaining an extra copy of the comments being filed.)

b. For delivery in Baltimore, MD—Centers for Medicare & Medicaid Services, Department of Health and Human Services, 7500 Security Boulevard, Baltimore, MD 21244–1850.

If you intend to deliver your comments to the Baltimore address, call telephone number (410) 786–1066 in advance to schedule your arrival with one of our staff members.

Comments erroneously mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and received after the comment period.

For information on viewing public comments, see the beginning of the SUPPLEMENTARY INFORMATION section.

FOR FURTHER INFORMATION CONTACT: Ilina Chaudhuri, 410–786–8628 or *Ilina.Chaudhuri@cms.hhs.gov.*

SUPPLEMENTARY INFORMATION:

Inspection of Public Comments: All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following Web site as soon as possible after they have been received: *http://www.regulations.gov.* Follow the search instructions on that Web site to view public comments.

Comments received timely will also be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, at the headquarters of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, phone 1–800–743–3951.

I. Background

The Patient Protection and Affordable Care Act (Pub. L. 111–148), was enacted on March 23, 2010; the Health Care and Education Reconciliation Act (Pub. L. 111–152) ("Reconciliation Act"), was enacted on March 30, 2010. In this preamble we refer to the two statutes collectively as the Affordable Care Act. The Affordable Care Act includes significant reforms to both the private health insurance industry and the Medicare and Medicaid programs. Provisions in the Affordable Care Act concerning the Part C Medicare Advantage (MA) and Part D Prescription Drug programs largely focus on beneficiary protections, MA payment reforms, and simplification of MA and Prescription Drug program processes for both programs. Regulations implementing most Affordable Care Act provisions pertaining to the MA and Prescription Drug Program provisions were published on April 5, 2011 (77 FR 22072) and a correction was published June 1, 2012 (77 FR 32407).

This proposed rule would implement section 1103 of Title I, Subpart B of the Reconciliation Act. This section of the Affordable Care Act amends section 1857(e) of the Social Security Act (the Act) to add new medical loss ratio (MLR) requirements. An MLR is expressed as a percentage, generally representing the percentage of revenue used for patient care, rather than for such other items as administrative expenses or profit. Because section 1860D–12(b)(3)(D) of the Act incorporates by reference the requirements of section 1857(e), these new Affordable Care Act medical loss ratio requirements also apply to the Part D program. Under these new requirements, MA organizations and Part D sponsors are required to report their MLR, and are subject to financial and other penalties for a failure to meet a new statutory requirement that they have an MLR of at least 85 percent. The Affordable Care Act requires several levels of sanctions for failure to meet the 85 percent minimum MLR requirement, including remittance of funds to CMS, a prohibition on enrolling new members, and ultimately contract termination. This proposed rule sets forth CMS' proposed approach to implement these new MLR requirements for the MA and Part D programs.

II. Provisions of the Proposed Regulations

A. Introduction

The new minimum MLR requirement in section 1857(e)(4) of the Act is intended to create incentives for MA organizations and Part D sponsors to reduce administrative costs, and marketing, profits, and other uses of the funds earned by plan sponsors and help

to ensure that taxpayers and enrolled beneficiaries receive value from Medicare health plans. Under this proposed rule, an MLR would be determined based on the percentage of contract revenue spent on clinical services, prescription drugs, quality improving activities, and direct benefits to beneficiaries in the form of reduced Part B premiums. The higher the MLR, the more the MA organization or Part D sponsor is spending on claims and quality improving activities and the less they are spending on other things. MA organizations and Part D sponsors will remit payment to CMS when their spending on clinical services, prescription drugs, quality improving activities, and Part B premium rebates, in relation to their total revenue, is less than the 85 percent MLR requirement established under section 1857(e)(4) of the Act. We believe the payment remittance of section 1857(4)(e)(A) of the Act is designed to encourage the provision of value to policyholders by creating incentives for MA organizations and Part D sponsors to become more efficient in their operations. If a plan sponsor fails to meet MLR requirements for more than 3 consecutive years, they will also be subject to enrollment sanctions and, after 5 consecutive years, to contract termination.

The Affordable Care Act also enacted a new MLR requirement under section 2718 of the Public Health Service Act (PHSA) that applies to issuers of employer group and individual market private insurance. We have already issued regulations implementing this private insurance MLR. A request for information (RFI) relating to the PHSA MLR provision was published in the April 4, 2010 (75 FR 19297) **Federal Register**. In the December 1, 2010 **Federal Register** (75 FR 74864), we published an interim final rule implementing the PHSA MLR requirements for health insurance issuers. Under this interim final rule, health insurance issuers must report an MLR and related supporting data by state and market (individual, small group or large group). If the required MLR threshold is not met in any one year, generally 85 percent in the large group market and 80 percent in the small group or individual market, health insurance issuers must provide a rebate to enrollees, which is generally done by providing it to the policyholder on behalf of the enrollees. Finally, enforcement of the reporting and rebate requirements of section 2718(a) and (b) of the PHSA are addressed, as specifically authorized in section 2718(b)(3) of the PHSA. This interim final rule applies to covered private health insurance issuers beginning January 1, 2011.

Since then, we have made several revisions and technical corrections to 45 CFR part 158. On March 23, 2012, we also published a final rule (75 FR 17220), entitled "Patient Protection and Affordable Care Act; Standards Related to Reinsurance, Risk Corridors, and Risk Adjustment," that establishes standards for the establishment and operation of a transitional reinsurance program, temporary risk corridors program, and a permanent risk adjustment program. These programs do not go into effect until January 1, 2014. Therefore, the commercial MLR and rebate calculations in the December 1, 2010 interim final rule do not take these programs into account. Section 2718(c) of the PHSA directs the National Association of Insurance Commissioners (NAIC), subject to certification by the Secretary, to establish uniform definitions and calculation methodologies related to MLRs. In the MLR IFR, we adopt the recommendations in the NAIC's model MLR regulations. In 45 CFR 158.221(c) of the MLR IFR allows an issuer to deduct from earned premium federal and state taxes, and assessments, and in some instances, community benefit expenditures. We interpreted the MLR IFR to mean that a tax exempt not-for-profit issuer could deduct either state premium tax or community benefit expenditures, but not both. Therefore, on December 7, 2011, we published a final rule with comment period (76 FR 76574) to revise the MLR IFR, in which we clarified that any issuer may deduct either state premium tax or community benefit expenditures, but not both. The final rule limited the community benefit expenditures deduction at the highest premium tax rate in the state. On December 7, 2012, we published a proposed rule (73 FR 73117), which discusses revising the policy of community benefit expenditures, in addition to discussion on the treatment of premium stabilization payments, timing of the annual commercial MLR reports, and distribution of rebates. We will call the body of rules on commercial MLR requirements the "commercial MLR rules."

Section 2718 of the PHSA directed the NAIC to make recommendations to the Secretary of Health and Human Services (the Secretary), subject to certification by the Secretary, NAIC's recommendations regarding definitions and methodologies for calculating MLRs were adopted in the commercial MLR rules. The NAIC, in making its recommendations, conducted a thorough and transparent process in which the views of regulators and stakeholders were discussed, analyzed, addressed and documented in numerous open forums held by a number of stakeholders, including state insurance departments (which includes the commissioner/superintendent and directors), the NAIC, issuers, and consumer representatives. The commercial MLR rules largely adopted the NAIC recommendations.

In this proposed rule for the MA and Prescription Drug Benefit Programs, we are using the commercial MLR rules as a reference point for developing the Medicare MLR requirements. We have decided to do this for several reasons. First, the intent of the provisions to help ensure value for health coverage is comparable. Second, keeping the requirements similar will limit the burden on organizations that participate in both markets (the overwhelming majority of those offering Medicare products). Third, aligning the commercial and Medicare regulations will make commercial and Medicare MLRs as comparable as possible for comparison and evaluation purposes, including by Medicare beneficiaries. We recognize that some areas of the regulation for private health insurance plans needed to be revised to fit the unique characteristics of the MA and Prescription Drug plan (PDP) markets. For example, we propose that MA and Part D PDP MLRs will be reported on a contract basis, rather than by state and market.

B. Scope, Applicability, and Definitions

As noted previously, section 1857(e)(4) of the Act, which establishes requirements for a minimum MLR directly applies to the MA program. The requirements at section 1857(e)(4) of the Act also apply to the Medicare Prescription Drug Benefit Program, because section 1860D–12(b)(3)(D) of the Act requires that the contractual requirements at section 1857(e) of the Act apply to the Part D program.

1. Scope and Applicability

Part 422 of the Code of Federal Regulations (CFR) regulates the MA Program, and Part 423 of the CFR regulates the Part D program. This proposed rule would implement sections 1857(e)(4) and 1860D–12(b)(3)(D) of the Act by adding to both Parts 422 and 423 a new Subpart X, "Requirements for a Minimum Medical Loss Ratio."

The proposed Subpart X for the MA program has the same structure as the proposed Subpart X for the Part D program. Thus, discussion in this

preamble is organized by each Subpart X section, and both MA and Part D proposals are discussed within each section. Any differences between the MA and Part D proposals are described within the relevant section.

Because section 1857(e) of the Act, where the MLR requirement appears in statute, does not directly apply to Cost HMOs/CMPs (Cost Health Maintenance Organizations/Competitive Medical Plans), HCPPs (Health Care Prepayment Plans) or PACE (Program of All-Inclusive Care for the Elderly) organizations, the proposed MLR requirements set forth in this rule generally do not apply to section 1876 Cost HMO/CMPs, section 1833 HCPPs, or to PACE organizations, which are authorized under section 1894 of the Act.

However, given the incorporation of section 1857(e)(4) by 1860–12(b)(3) of the Act, we believe that, to the extent Cost HMOs/CMPs offer Part D as an optional supplemental benefit under § 417.440(b)(2)(ii), these requirements would apply to that Part D product. While an HCPP cannot offer Part D, to the extent an employer or union offering an HCPP to its members separately offers Part D coverage as an Employer/Union Only PDP under section 1860D–22(b) of the Act, the MLR requirement does apply to these Part D programs. Therefore, for Cost HMOs/CMPs and employers or unions offering HCPPs, only those offering Part D are subject to the MLR requirements, and then only for the Part D portion of their benefit offerings. Since the MLR rule can only apply to the Part D portion of the benefits offered by Cost HMOs/CMPs and employers/unions offering HCPPs, we will treat them more like PDPs than MA–PDs for MLR purposes. Cost HMOs/CMPs and employers/unions offering HCPPs bid on Part D and receive Part D payments based on their bid. Thus, we propose to require remittances, suspend enrollment, and/or terminate such Part D contracts based on whether the cost HMOs/CMPs or employers/unions offering HCPPs meet the MLR requirement for the Part D benefits they offer under their contract with CMS. In essence, a Cost HMO/CMP or an HCPP that did not meet the minimum MLR requirement on the Part D portion of the benefits it provides to Medicare enrollees would potentially (after 3 consecutive years) be forced to stop enrolling new individuals in such Part D coverage and, after 5 consecutive years, would potentially lose the Part D portion of its contract.

For PACE organizations offering Part D, the situation is different. Similar to Cost HMOs/CMPs and HCPPs, we do not believe that the MLR requirements at section 1857(e)(4) of the Act and this proposed rule apply to the A/B portion of a PACE organization's benefit offering. In-so-far as section 1857(e)(4) of the Act does not apply to PACE organizations directly, its application to them would be only through its application to Part D through incorporation at section 1860D–12(b)(3) of the Act. However, unlike Cost HMOs/CMPs and section 1833 HCPPs addressed in section 1876 of the Act, which are not compelled by any specific statutory or regulatory authority to offer Part D benefits, PACE organizations are required by both statute and regulation to provide drug coverage (see section1894(b)(1)(A)(i) of the Act and § 460.92(a)). Thus, while Cost HMOs/CMPs and HCPPs could continue to operate without offering Part D coverage to their enrolled members, PACE organizations as a practical matter could not, as they would likely have to absorb the full cost of fulfilling their obligation to cover drugs. To the extent that drug coverage other than Part D drug coverage could not be offered by PACE organizations, such a result would effectively terminate not only the Part D drug plan offered by a PACE organization, but the PACE organization itself. This result would have the effect of applying a Part D penalty on Part A benefits, Part B benefits and Medicaid benefits offered to dual eligibles. The Congress did not directly apply the MLR rule directly to these benefits (as MA–PD rules only apply to the Part D component of PACE plans). We believe this result would be inconsistent with the intent of the statutory authority establishing the PACE program at section 1894 of the Act as an option for dual eligibles. We note, however, that we have the authority to waive application of Part D requirements (including the new MLR requirements) to PACE organizations as such application could potentially result in the inability of a PACE program to continue, which we do not believe the Congress intended. Specifically, section 1860D–21(c)(2) of the Act (incorporated for PACE under section 1860D–21(f)(1)) of the Act provides authority to waive provisions, such as the MLR requirement, to the extent such provisions duplicate, conflict with, or as may be necessary in order to improve coordination between Part D and PACE. We believe that application of the Part D MLR requirement to PACE organizations, even for only their Part D offering, would conflict with our understanding of the intent of the PACE statute and implementing regulations, as it could thwart the ability of the PACE plan to serve its special needs enrollees. Therefore, we propose not to apply the Part D MLR requirements to the Part D offerings of PACE organizations.

2. Definitions

In § 422.2401 and § 423.2401, we propose certain definitions pertaining to the MLR provisions. Note that there also are terms defined in other sections of the Part 422 Subpart X and Part 423 Subpart X (for example, "incurred claims" is defined in § 422.2420(b) and § 423.2420(b), and "quality improving activities" are defined in § 422.2430 and § 423.2430.)

First, we propose that the acronym MLR be used to refer to the medical loss ratio referenced in throughout Part 422, Subpart X and Part 423, Subpart X.

We propose to define non-claims costs as those expenses for administrative services that are not: incurred claims, payments toward reducing the Part B premium for MA plan enrollees, expenditures on quality improving activities, licensing and regulatory fees, or state and federal taxes and assessments that cannot be deducted from total revenue.

C. General Requirements for MA Organizations and Part D Sponsors

Sections 1857(e)(4) and section 1860D–12 of the Act (which incorporates section 1857(e)(4) of the Act by reference) set forth a requirement that MA organizations and Part D sponsors report MLRs, and that these MLRs meet the statutory standard of 85 percent. Those organizations that do not meet this MLR requirement will be required to pay remittances. If organizations are unable to meet the minimum MLR for 3 consecutive years, they will also be subject to enrollment sanctions and for 5 consecutive years, contract termination. MA organizations and Part D sponsors will be required to submit data to CMS that will allow enrollees of health plans, consumers, regulators, and others to take into consideration MLRs as a measure of health insurers' efficiency. Similar to the intentions of section 2718 of the PHSA, we believe that this provision is intended to provide beneficiaries both with information needed to better understand how much of plan sponsor revenue is used to pay for services, quality improving activities, and direct rebates for enrollees versus how much is used to pay for the "non-claims," or administrative expenses, incurred by the plan sponsor as well as profits, and to provide incentives to spend more on the former gromp activities and less on the latter.

This section discusses two general issues regarding our proposed implementation of the MLR requirement: the level of aggregation at which MLRs must be reported, and the sanctions facing MA organizations and Part D sponsors when they do not meet the MLR requirement.

1. Aggregation of MLR to the Contract Level

Under the MA program, MA organizations offer MA plan benefit packages (MA plans, defined at § 422.2) under contracts with CMS. Plans offered under an MA contract can be MA-only plans (which only offer non-drug benefits) and/or MA–PD plans (which also offer Part D qualified prescription drug coverage). Further, under the Part D program, Part D sponsors, as defined in § 423.4, offer plan benefit packages (prescription drug plans or PDPs) under contracts with CMS. An MA organization or a Part D sponsor can have one or multiple contracts with CMS and, under each contract, the MA organization or Part D sponsor can offer one or multiple plans in which beneficiaries may enroll.

We propose at § 422.2410(a) and § 423.2410(a) that an MA organization and a Part D sponsor must report an MLR for each contract they have with CMS. We believe that the contract is the best level of aggregation for MLR reporting in Medicare. The contract provides the legal framework for our statutory and regulatory authority over MA organizations and Part D sponsors. For example, an MA organization is defined, at section 1857(a) of the Act and § 422.2, as a state-licensed entity that is certified by CMS as meeting the CMS contract requirements.

Aggregating MLRs to the contract level is an approach that closely parallels the commercial MLR approach, which aggregates the MLR to the state and market level, rather than to each specific health plan policy or benefit offering. We note that MA and PDP contracts are also often executed at the state level.

Moreover, we believe that requiring contract-level MLRs will promote program stability and the continued availability to beneficiaries of a variety of benefit structures in MA and Part D plans. Lastly, contract-level reporting is administratively less burdensome for MA organizations and Part D sponsors; for example, administrative costs will not need to be disaggregated by plan.

We also considered the approach of requiring MLR reporting at the plan level, since beneficiaries enroll in a plan and experience their health care at the plan level (known as plan benefit package level), and since CMS' bids and payments occur at this level. In addition, for a contract with a large number of plans, it arguably would be less disruptive to apply an enrollment or termination sanction at the plan level rather than the contract level. Plan-level MLRs also would be based on fewer enrollees and be more prone to random variations in claims experience. Contract-level MLRs would generally represent a more stable population and a larger claims base, resulting in more reliable and, therefore, more meaningful MLRs. In future years, we may reconsider the approach of calculating MLRs at the plan level.

Finally, we considered applying the MLR at the organization level. Because many MA organizations and Part D sponsors are national organizations, an MLR at this level of aggregation would be less meaningful, particularly for beneficiaries who are comparing plans in a specific geographic area. Because resource commitments to services offered may differ by market, due to differences in labor costs, demand, and competition, a national MLR would provide less information to consumers. In addition, we determined that the application of enrollment-related and termination action sanctions to an MA organization or Part D sponsor that is nationally representative would have a much larger enrollee impact than contract-level sanctions.

In short, we believe our proposal of contract-level aggregation for MLR calculation is both reasonable and in alignment with important goals of program stability and administrative simplification.

We note that, while the statutory language at 1857(e)(4) of the Act uses the terms "MA plan," it also uses the term "contract" six times. Further, the requirement that an MA "plan" "remit" an amount to CMS when the minimum MLR is not met clearly refers to the organization offering one or more MA plans, and not to a specific plan benefit package, which cannot take an action such as remitting an amount to CMS. We believe that the statute uses the term "plan" in the generic sense in which it is often used to refer to an organization offering products, and that CMS thus has the discretion to apply and enforce the MLR requirement at the contract level.

Note that the proposed requirement at § 422.2410(a) and § 423.2410(a) refers to "an MLR" for each contract. This proposal means that the MLR calculation for a contract that includes MA–PD plans must combine non-drug costs with prescription drug costs and non-drug revenues with prescription drug revenues, across all plans under the contract. We also considered the approach of requiring MA organizations to report two MLRs for each contract that include MA–PD plans: one for nondrug benefits and another for prescription drug benefits. We decided to require one MLR per MA contract, as this aligns better with the commercial MLR requirements, which require one MLR per issuer regardless of plan type, and which include prescription drug costs along with other expenditures on health care services. Further, it is not clear how meaningful having two effectively partial MLRs would be to consumers.

Finally, Part C rebates often fund the Part D premiums for MA–PD plans and thus are used to provide Part D benefits. Since most MA contracts include MA–PD plans, requiring a single MLR for each MA contract is an administratively simple approach that eliminates the need for disaggregation of these rebates.

2. Remittance Requirement

Per section 1857(e)(4)(A) of the Act and as set forth in proposed § 422.2410(b) and § 423.2410(b), if we determine for a contract year that an MA organization or Part D sponsor has an MLR for a contract year that is less than 0.85 (85 percent), the MLR requirement would not have been met and the sponsoring organization would be required to remit a payment to CMS. The amount of the remittance would be equal to the product of: (1) The total revenue under the contract for the contract year; and (2) the difference between 0.85 and the contract's MLR. Total revenue is discussed later in section II.D. of this proposed rule.

In order to support the reported MLR for each contract year, and in order to further allow comparison of MLRs across product lines (for example, Medicare and commercial), MA organizations and Part D sponsors would be required to report to CMS certain data concerning the MLR. Reporting requirements are addressed in section II.G. of this proposed rule.

3. Enrollment Sanction

As set forth in proposed § 422.2410(c) and § 423.2410(c), if an MA or PDP contract fails to have an MLR of at least 0.85 for 3 or more consecutive contract years, we would not permit the enrollment of new enrollees in plans under that contract during the second succeeding contract year. We interpret this requirement to mean that, if a contract fails to have an MLR of 0.85 for 3 or more consecutive years, we would halt all new enrollment into all plans covered under that contract. The year

for which the enrollment sanction would apply would be the second succeeding year after the third consecutive year in which the MA organization or Part D sponsor fails to meet the MLR requirement. For example, the MLRs for contract years 2014 through 2016 would be reported in 2015 through 2017. If a contract did not meet the MLR requirement for the 2014, 2015, and 2016 contract years, we would not permit new enrollment in plans under that contract in 2018, which is the second succeeding contract year after the third consecutive year of failure (2016) to meet the MLR requirement.

As discussed later in this section, if an MA or PDP contract fails to meet the MLR requirement for 5 consecutive years, we are required by statute to terminate the contract. Because a contract that fails to meet the MLR requirement for 4 consecutive years has failed to meet the requirement for 3 consecutive years, we are thus proposing in § 422.2410(c) and § 423.2410(c) to clarify that an enrollment sanction would apply to contracts that fail to meet the MLR for 3 or more (that is, 4) consecutive years.

4. Termination

If the contract fails to have an MLR of at least 0.85 (85 percent) for 5 consecutive contract years, we are required under section 1857(e)(4)(C) of the Act to terminate the contract. This requirement is reflected in proposed § 422.2410(d) and § 423.2410(d). We propose to implement section 1857(e)(4)(C) of the Act by terminating the contract for the year following the year in which the plan sponsor is required to report the MLR for the fifth year. With respect to termination, we propose to implement the "second succeeding contract year" requirement in a manner similar to how we propose to implement the enrollment termination after 3 or more consecutive years of not meeting the minimum MLR requirement. Thus, for a contract that failed to meet the MLR requirement in 2014 through 2018, we would terminate the contract in 2020.

D. Calculation of Medical Loss Ratio

1. Definition of Medical Loss Ratio

In this section, we address the calculation of an MLR for MA and Part D contracts. Generally, our approach to what counts as costs and revenues (which are in the numerator and denominator, respectively) is consistent with the approach in the commercial MLR rules. Proposed § 422.2420(a) and § 423.2420(a) set forth a high-level definition of the MLR as a ratio of the numerator defined in paragraph (b) to the denominator defined in paragraph (c). We propose to follow the commercial MLR rules by allowing MA organizations and Part D sponsors to increase the MLRs of low-enrollment contracts with a credibility adjustment. This adjustment is discussed in section F.

Proposed section § 422.2410(a)(2) provides that the MLR for an MA contract not offering Part D prescription drug benefits would only be required to reflect the costs and revenues related to the benefits defined at § 422.100(c), basic benefits, mandatory supplemental benefits, and optional supplemental benefits. If the MA contract includes MA–PD plans, the MLR would also under this proposed rule be required to reflect costs and revenues for benefits described at § 423.104(d)(e), and (f), standard coverage, alternative coverage, and enhanced alternative coverage. Proposed § 423.2410(a)(2) also specifies that the MLR for a PDP contract would be required to reflect costs and revenues for standard coverage, alternative coverage, and enhanced alternative coverage.

Details about our proposal for the calculation of the numerator and denominator for MA and PDP contracts are discussed later in this section. For MA and PDP contracts, the MLR would be calculated using the cost and revenue data for a contract year, which is a 1-year reporting period in accordance with 1857(e)(4) of the Act, in contrast to the 3-year period (starting in 2014) for the commercial MLR.

2. MLR Numerator

In proposed § 422.2420(b) and § 423.2420(b) for MA and Part D contracts, respectively, we identify the elements that we would require to be included in the numerator for a contract's MLR. Proposed § 422.2420(b)(1) and § 423.2420(b)(1) identify two basic elements that constitute the MLR numerator: incurred claims (as defined in paragraphs (b)(2) through (b)(4) for both programs) and expenditures under the contract for activities that improve health care quality, which are referenced at paragraph (b)(1)(iii) for both programs, and described in detail at sections § 422.2430 and § 423.2430. This approach of including incurred claims and quality improving activities mirrors the commercial MLR rules.

In addition, under our proposal, the MLR numerator for MA contracts would include a third element, which is unique to MA contracts: the amount to reduce the Part B premium, if any, for all MA plans under the contract for the contract year. The Part B premium reduction is a benefit design option available to MA organizations, and is one of five uses of Part C rebate dollars described at § 422.266(b) and in section II.D.3. of this proposed rule. Because this is an allowed benefit under MA, we are allowing the use of these dollars to pay for the Part B premium to be in the numerator.

We propose that, under an assumptive or 100 percent indemnity reinsurance agreement, the assuming MA organization or Part D sponsor be required to report incurred claims in the numerator for those contracts, and that no incurred claims for the contracts under the agreement be permitted to be reported by the ceding MA organization or Part D sponsor. This clarification would ensure that incurred claims implicated in assumptive or 100 percent indemnity agreements are neither double counted by both the assuming and ceding MA organizations and Part D sponsors nor omitted by both the assuming and ceding organizations. Instead, the incurred claims would be counted for MLR purposes only once; by the assuming MA organization or Part D sponsor.

a. Incurred Claims

We propose that incurred claims consist of several amounts. For the MA program, incurred claims would include direct claims that the MA organization pays to providers (including under capitation contracts) for covered services that are provided to all enrollees under the contract, as described at § 422.2420(b)(2)(i).

In addition, under proposed § 422.2420(b)(2)(ii) and § 423.2420(b)(2)(i), for MA contracts that include MA–PD plans and for PDP contracts, respectively, incurred claims would be required to include only drug costs that are "actually paid" by the Part D sponsor. The concept of "actually paid" is defined at in § 423.308 and refers to Part D costs that must be actually incurred by the Part D sponsor, net of any direct or indirect remuneration from any source. Prescription drug rebates are rebates that pharmaceutical companies pay to MA organizations or Part D sponsors based upon the drug utilization of the MA organization's or Part D sponsor's enrollees and should be deducted from incurred claims. This approach aligns with the commercial MLR rules, which require that prescription drug rebates be deducted from incurred claims. In addition, "actually paid" claims refers to those costs for which the MA organization or Part D sponsor is liable,

through all phases of the benefit. Thus, the reinsurance portion of claim costs in the catastrophic phase of the benefit is also included in the numerator of the MLR.

For both MA and Part D contracts, under proposed § 422.2420(b)(2)(iii) through (xi) and § 423.2420(b)(2)(ii) through (x), incurred claims would also be required to reflect the following: unpaid claims reserves for the current contract year, including claims reported and in the process of adjustment; percentage withholds from payments made to contracted providers; incurred but not reported claims based on past experience, and modified to reflect current conditions such as changes in exposure, claim frequency or severity and changes in other claims-related reserves; claims that are recoverable for anticipated coordination of benefits (COB); and claims payments recoveries received as a result of subrogation; reserves for contingent benefits and the medical or Part D claim portion of lawsuits. We follow the commercial MLR rules in proposing to allow the amount of claim payments recovered through fraud reduction efforts, not to exceed the amount of fraud reduction expenses, to be included in incurred claims. Fraud reduction efforts include fraud prevention as well as fraud recovery. The preamble to the commercial MLR rule stated and we continue to believe that without such an adjustment, the recovery of paid fraudulent claims would reduce an MLR and could create a disincentive to engage in fraud reduction activities. Thus, requiring that incurred claims reflect claims payments recoveries up to a limit would help mitigate whatever disincentive might occur if fraud reduction expenses were treated solely as non-claims and non-quality improving expenses. However, allowing an unlimited adjustment for fraud reduction expenses would undermine the purpose of requiring issuers to meet the MLR standard.

For MA and MA–PD contracts, incurred claims would be required to reflect the amount of incentive and bonus payments made to providers, as set forth at § 422.2420(b)(2)(xi). Medical incentive pools are arrangements with providers and other risk sharing arrangements whereby the MA organization agrees to either share savings with or make incentive payments to providers. These payments would be required to be included under incurred claims and would not be permitted to be counted under quality improving expenditures.

b. Adjustments to and Exclusions From Incurred Claims

After proposing which elements should be included in incurred claims, we propose which elements would be deducted from incurred claims and which elements would not be included in incurred claims at all. Under proposed § 422.2420(b)(3) and § 423.2420(b)(3), two adjustments would be deducted from incurred claims for the MA and Part D programs, both of which are currently required in the commercial MLR rules. First, prescription drug rebates and other direct or indirect remuneration as defined in § 423.308 that are received by the MA organization or Part D sponsor would be required to be deducted. Second, any amounts paid to providers that were recovered because they were overpayments would have to be deducted from incurred claims.

Next, there are several expenditures that would not be included in incurred claims for MA and PDP contracts, as provided in proposed § 422.2420(b)(4) and § 423.2420(b)(4). The three types of administrative costs that would be required to be excluded from incurred claims reflect the provisions in the commercial MLR rules: (1) Amounts paid to third party vendors for secondary network savings; (2) amounts paid to third party vendors for network development, administrative fees, claims processing, and utilization management; and (3) amounts paid, including amounts paid to a provider, for professional or administrative services that do not represent compensation or reimbursement for covered services provided to an enrollee, such as medical record copying costs, attorneys' fees, subrogation vendor fees, bona fide service fees, compensation to paraprofessionals, janitors, quality assurance analysts, administrative supervisors, secretaries to medical personnel and medical record clerks would not be permitted to be included in incurred claims. Regarding item (2), for example, if an MA organization, contracts with a behavioral health, chiropractic network, or high technology radiology vendor, or if an MA organization or Part D sponsor contracts with a pharmacy benefit manager, and the vendor reimburses the provider at one amount but bills the MA organization or Part D sponsor at a higher amount to cover the vendor's network development, utilization management costs, claims processing, and profits, then the amount that exceeds the reimbursement to the provider would not under our proposal be permitted to be included in incurred claims.

Finally, under proposed § 422.2420(b)(4)(ii) and § 423.2420(b)(4)(ii), amounts paid to CMS by an MA organization or Part D sponsor as a remittance under § 422.2410(b) or § 423.2410(b) would not be permitted to be included in incurred claims for any contract year.

3. MLR Denominator

We propose at § 422.2420(c) and § 423.2420(c) that the MLR denominator would equal the total revenue under the contract (as described in § 422.2420(c)(1) and § 423.2420(c)(1)), net of deductions set forth in § 422.2420(c)(2) and § 423.2420(c)(2), taking into account the exclusions described in § 422.2420(c)(3) and § 423.2420(c)(3), and in accordance with § 422.2420(c)(4) and § 423.2420(c)(4). Total revenue for the MA program, as defined under proposed § 422.2420(c)(1) and § 423.2420(c)(1), must be reported on a direct basis and would mean our payments to the MA organization for all enrollees under a contract, including, for MA plans under a contract that offer Part D, direct subsidy payments and reinsurance payments as reconciled per § 423.329(c)(2)(ii); all premiums paid by or on behalf of enrollees to the MA organization as a condition of receiving coverage under an MA plan; our payments for low income premium subsidies under § 423.780; all unpaid premium amounts that an MA organization or Part D sponsor could have collected from enrollees in the plan(s) under the contract; all changes in unearned premium reserves, and risk corridor payments under § 423.315(e). We note that MA organizations or Part D sponsors that volunteer to waive the portion of the monthly adjusted basic beneficiary premium that is a *de minimis* amount above the low-income benchmark for a subsidy eligible individual per section 3303(a) of the Affordable Care Act would not be permitted to consider the *de minimis* amount an unpaid premium amount that could have been collected from beneficiaries. We propose that calculation and reporting of total revenue for purposes of the Medicare MLR would include total risk-adjusted payments, and would take into account payments or receipts for risk corridors and payments under the reinsurance phase of the Part D benefit (adjusted for reconciled amounts). While this approach is generally consistent with the commercial MLR rules, it is not identical. We believe that the nature of the payment mechanisms required under these programs support this

approach. The payments which we make to MA organizations and Part D sponsors are risk-adjusted as part of the payment calculation to reflect the appropriate adjustment to revenue to reflect the risk profile of each enrolled beneficiary. Further, risk corridors and reinsurance, which are permanent features of Part D payment, are adjustments to plan payment. In the case of risk corridors, payment adjustments reflect the extent to which an MA organization or Part D sponsor over- or under-bid for their projected population. Part D reinsurance is more appropriately classified as a cost-based reimbursement methodology than reinsurance, per se, and as such is appropriately treated as revenue.

MA organizations would also be required to account for Part C rebate payments in their total revenue. Rebates are paid for enrollees in plans with bids below the benchmark described under section 1853(a)(1)(E) of the Act, and may be allocated to one or more uses: reduction of A/B cost sharing and reduction of the premium for additional non-drug benefits, reduction of the Part B premium (mentioned previously), and reduction of the Part D basic premium and Part D supplemental premium. Essentially, the effect of rebates is that the beneficiary pays a smaller share of total plan premium (the total price of the plan benefit package) and the government pays a larger share. Thus, these funds would correctly be accounted for as revenue.

Total revenue for the Part D program, as defined at § 423.2420(c)(1), means CMS' payments to the Part D sponsor for all enrollees under a contract, including: direct subsidy payments at § 423.329(a)(1), reinsurance payments at § 423.329(a)(2), and payment adjustments resulting from reconciliation per § 423.329(c)(2)(ii); all premiums paid by or on behalf of enrollees to the Part D sponsor as a condition of receiving coverage under a plan; CMS' payments for low income premium subsidies under § 423.780; all unpaid premium amounts that a Part D sponsor could have collected from enrollees in the plan(s) under the contract; and risk corridor payments under § 423.315(e).

Adjustments to and exclusions from total revenue. After proposing which elements should be included in total revenue, we propose which elements must be deducted from and which elements should not be included in total revenue. CMS is largely following the commercial MLR rule in the treatment of adjustments and exclusions.

There are four categories of expenditures that would be required to be deducted from total revenue for both MA and PDP contracts, as provided under proposed § 422.2420(c)(2) and § 423.2420(c)(2). Note that, unlike commercial issuers, MA organizations and Part D sponsors are exempt from state premium tax "or similar tax" on their Part C and D premium revenues, per sections 1854(g) and 1860D–12(g) of the Act.

Three of these categories that would be deducted from total revenue for a contract are taxes and fees. First, federal taxes and assessments allocated to MA plans and enrollees would be deducted from total revenue for purposes of calculating the MLR. Two examples are the "user fee" described in section 1857(e)(2) of the Act and the portion of the "annual fee on health insurance providers" attributable to Part C and D premium revenues described in section 9010 of the Affordable Care Act. Second, licensing and regulatory fees, consisting of statutory assessments to defray operating expenses of any state or federal department and examination fees in lieu of premium taxes as specified by state law, would be deducted from total revenue for purposes of calculating the MLR. Third, state taxes and assessments that would be deducted from total revenue for purposes of calculating the MLR would include: (1) Any industry-wide (or subset) assessments (other than surcharges on specific claims) paid to the state directly; (2) guaranty fund assessments; (3) assessments of state industrial boards or other boards for operating expenses or for benefits to sick employed persons in connection with disability benefit laws or similar taxes levied by states; and (4) state income, excise, and business taxes other than premium taxes.

We note that there are some taxes and fees that would not be permitted to be deducted from the MLR denominator. For example, we propose that the denominator would not include fines and penalties of regulatory authorities, and fees for examinations by any state or federal departments that are not specified in § 422.2420(c)(2)(i) and § 423.2420(c)(2)(i). Fines, penalties, and fees that do not fall under § 422.2420(c)(2)(i) and § 423.2420(c)(2)(i) would be appropriately reported as non-claims costs, not as an adjustment to total revenue. Federal income taxes on investment income and capital gains would not be deducted from total revenue for purposes of calculating the MLR and would instead be considered a non-claims cost. Finally, we propose that state sales taxes may not be deducted from total revenue if the MA organization or Part D sponsor does not exercise the options of including such taxes with the cost of goods and services purchased. Examples include any portion of commissions or allowances on reinsurance assumed that represent specific reimbursement of premium taxes and any portion of commissions or allowances on reinsurance ceded that represents specific reimbursement of premium taxes.

The fourth category of expenditures that would be deducted from total revenue under our proposal is community benefit expenditures. Federal income tax-exempt issuers are required to make community benefit expenditures to maintain their federal income tax exempt status. The commercial MLR rules allow a federal income tax-exempt issuer to deduct community benefit expenditures in the same manner that a for-profit issuer is allowed to deduct its federal income taxes. We propose to align with the commercial MLR regulations by defining community benefit expenditures, up to a cap, at § 422.2420(c)(2)(iv) and § 423.2420(c)(2)(iv) as expenditures for activities or programs that seek to achieve the objectives of improving access to health services, enhancing public health, and relief of government burden.

For purposes of the commercial MLR rule, the NAIC determined that the deduction for community benefit expenditures should be limited to a reasonable amount to discourage fraud and abuse. We propose to follow the commercial MLR approach as suggested in the December 7, 2012 proposed rule (73 FR 73117) by allowing federal income tax-exempt MA organizations and Part D sponsors to deduct community benefit expenditures in the same manner that a for-profit issuer is allowed to deduct its federal income taxes, up to the limit of 3 percent of total revenue under this part or the highest premium tax rate in the state for which the MA organization or Part D sponsor is licensed. As one contract may span more than one state, we seek comment on methods to apply the limit in these circumstances, perhaps by blending the highest premium tax rates for the states in which the contract is offered. Organization-wide community benefit expenditures would be required to be allocated to a contract or multiple contracts as required under paragraph (d)(1).

Next, amounts that would not be included in total revenue under our proposal include the amount of unpaid premiums that the MA organization or Part D sponsor can demonstrate to us

that it made a reasonable effort to collect, as required under § 422.74(d)(i), and § 423.44(d)(1)(i), respectively. In addition, HITECH, or EHR, payments would not be included, specifically EHR incentive payments for meaningful use of certified electronic health records by qualifying MAOs, MA EPs and MA-affiliated eligible hospitals (as administered under Part 495 subpart C), and EHR payment adjustments for a failure to meet meaningful use requirements (as administered under Part 495 subpart C). Such incentive payments and payment adjustments would not be considered for purposes of MLR calculations to be covered under this part. Finally, Coverage Gap Discount Program payments under § 423.2320 would not be included in total revenue under our proposal. The Coverage Gap Discount amounts represent a 50 percent discount on the negotiated price of applicable (generally, brand) drugs for applicable (generally, non-low-income) beneficiaries, and is essentially an amount paid by pharmaceutical manufacturers and passed through to applicable beneficiaries and does not represent revenue to the MA organization or Part D sponsor.

Note that we are not proposing to adjust total revenue for commercial reinsurance in this proposed rule because, as stated in the preamble to the commercial MLR rules, this largely would provide a tool for issuers to manipulate reported premiums.

4. Projection of Net Total Revenue

We are proposing that, when calculating Medicare MLRs, MA organization and Part D sponsors would be required to account for all Part C and D revenue that would be paid after the final risk adjustment reconciliation occurs, and all Part D revenue that would be paid after all reinsurance and risk corridor reconciliations occur.

Risk adjustment is an adjustment to payment that reflects expected relative risk of a beneficiary. Reinsurance reconciliation is a cost-based adjustment to the Part D prospective payments made throughout the year, and the net reinsurance payments would be counted as total revenue. Risk corridors are risk-sharing arrangements around the Part D direct subsidy payments, and we are proposing to count all adjustments through the risk corridor process as adjustments to total revenue.

We propose to require MA organizations and Part D sponsors to project revenue from all expected reconciliation processes, and account for the net adjustments from all and any risk adjustment reconciliations, risk corridor reconciliations, and reinsurance reconciliations as adjustments to total revenue. Because the same data underlies reconciliation and MLR reporting, we would not expect large discrepancies between data reported before and after reconciliation. We propose to validate that the data used in reconciliation is consistent with that used in MLR reporting, and make appropriate payment adjustments should there be irregularities in reporting. We also propose that the MLR would be reported once and that neither any reopening(s) of any reconciliation processes nor any risk adjustment data validation audits would result in a reopening of the MLR reported for a contract year.

5. Allocation of Expenses

MA organizations and Part D sponsors would, under our proposal, be required to properly allocate all expenses stemming from each contract, as provided under proposed § 422.2420(d) and § 423.2420(d). We propose that each expense would be required to be included under only one type of expense, unless a portion of the expense fits under the definition of one type of expense and the remainder fits into a different type of expense, in which case the expense would be required to be pro-rated between types of expenses. Expenditures that benefit multiple contracts, or contracts other than those being reported, including but not limited to those that are for, or benefit, commercial plans, would have to be reported on a pro rata share basis. This proposed approach aligns with the commercial MLR rules.

There are several different methods for allocating costs incurred by MA organizations and Part D sponsors that would be allowable under our interpretation of statutory accounting principles. All costs reported by MA organizations or Part D sponsors would have to be allocated according to generally accepted accounting methods that yield the most accurate results and are well-documented. An MA organization's or Part D sponsor's allocation method would be required to illustrate the costs associated with a specific activity and any resulting effect the activity has had on its MA or Part D line of business. If the expense is related to a specific activity, the allocation of such expenditure would have to be on a direct basis. If an expense is not easily attributable to a specific activity, then the expense would, under our proposal, have to be apportioned based on pertinent factors or ratios, such as studies of employment activities, salary ratios or similar analyses. Any shared expenses between two or more affiliated entities would have to be "apportioned pro rata to the entities incurring the expense" even if the expense has been paid solely by one of the incurring entities.

We are proposing that each expense that is allocated by an MA organization or Part D sponsor to a type of expenditure would have to be appropriately attributed using a generally accepted accounting method to each contract. However, all federal and state taxes paid by an organization would be required to be attributed proportionately and appropriately to each contract. While federal taxes are not typically allocated to contracts on a state-by-state basis, for purposes of complying with the MLR requirements in this subpart, all organizations would be required to report some percentage of federal taxes paid on their behalf, along with applicable state taxes (other than premium taxes, which do not apply to the plans offered under the MA and Part D programs).

We are proposing that MA organizations and Part D sponsors would be required to allocate their non-claims and quality improving expenses on a contract basis as stated in the commercial MLR rules. If an expense is attributable to a specific activity, then the MA organization or Part D sponsor would allocate the expense to that particular activity. However, if it is not feasible to allocate such expenditure to a specific activity, then the organization would, under our proposal, be required to apportion the costs using a generally accepted accounting method that yields the most accurate results.

E. Activities That Improve Health Care Quality

We propose to adopt a definition of activities that improve health care quality for the purposes of this MLR rule that would result in a uniform accounting of the associated costs for MA organizations and Part D sponsors. This proposed definition aligns with that in the commercial MLR requirements at 45 CFR 158.150 through 45 CFR 158.151. We propose to align with the definition of activities that improve health care quality, also referred to as "quality improving activities," in the commercial MLR rules so that there is a uniform definition across lines of business. This alignment would help reduce burden on plan sponsors that also have commercial business by aligning the accounting and tracking of quality improving activities. It also allows for the comparison of quality spending across products. We note that we are proposing to adopt this

definition of quality solely for the purposes of MLR reporting and calculation, and not for other purposes, such as Medicare star ratings that determine MA quality bonus payments as authorized under the Affordable Care Act or any quality activities related to the Medicaid program. However, we anticipate large areas of overlap.

The definition of quality improving activities that was adopted for the commercial MLR, which we are proposing to adopt for the Medicare MLR, is derived from section 2717 of the PHSA. The PHSA has the goal of improving the quality of care by encouraging health care spending on the following activities that would:

- Improve health outcomes through the implementation of activities such as quality reporting, effective case management, care coordination, chronic disease management, and medication and care compliance initiatives, including through the use of the medical homes model as defined for purposes of section 3602 of the Affordable Care Act, for treatment or services under the plan or coverage.
- Implement activities to prevent hospital readmissions through a comprehensive program for hospital discharge that includes patient-centered education and counseling, comprehensive discharge planning, and post-discharge reinforcement by an appropriate health care professional.
- Implement activities to improve patient safety and reduce medical errors through the appropriate use of best clinical practices, evidence-based medicine, and health information technology under the plan or coverage.
- Implement wellness and health promotion activities; or
- Enhance the use of health care data to improve quality, transparency, and outcomes and support meaningful use of health information technology.

This proposed rule would allow for a non-claims expense incurred by an MA organization or Part D sponsor to be accounted for as a quality improving activity only if the activity falls into one of the categories described previously and meets all of the following requirements:

- It must be designed to improve health quality.
- It must be designed to increase the likelihood of desired health outcomes in ways that are capable of being objectively measured and of producing verifiable results and achievements.
- It must be directed toward individual enrollees or incurred for the benefit of specified segments of enrollees or provide health improvements to the population beyond those enrolled in coverage as long as no additional costs are incurred due to the non-enrollees.
- It must be grounded in evidence-based medicine, widely accepted best clinical practice, or criteria issued by recognized professional medical associations, accreditation bodies, government agencies or other nationally recognized health care quality organizations.

Examples of activities that improve health outcomes would include those that increase the likelihood of desired outcomes compared to a baseline and reduce health disparities among specified populations, and may involve the direct interaction of the MA organization or Part D sponsor (including those services delegated by contract for which the MA organization or Part D sponsor retains ultimate responsibility under the insurance policy), providers and the enrollee or the enrollee's representative (for example, face-to-face, telephonic, web-based interactions or other means of communication) to improve health outcomes. These activities would under our proposal include the following:

- Effective case management, care coordination, chronic disease management, and medication and care compliance initiatives including through the use of the medical homes model as defined in section 3606 of the Affordable Care Act.
- Identifying and addressing ethnic, cultural or racial disparities in effectiveness of identified best clinical practices and evidence based medicine.
- Quality reporting and documentation of care in non-electronic format.
- Health information technology to support these activities.
- Accreditation fees directly related to quality of care activities.

Examples of activities that prevent hospital readmissions through a comprehensive program for hospital discharge would include the following:

- Comprehensive discharge planning (for example, arranging and managing transitions from one setting to another, such as hospital discharge to home or to a rehabilitation center) in order to help assure appropriate care that will, in all likelihood, avoid readmission to the hospital.
- Patient-centered education and counseling.
- Personalized post-discharge reinforcement and counseling by an appropriate health care professional.
- Any quality reporting and related documentation in non-electronic form for activities to prevent hospital readmission.
- Health information technology to support these activities.

Examples of activities that improve patient safety, reduce medical errors, and lower infection and mortality rates would include the following:

- The appropriate identification and use of best clinical practices to avoid harm.
- Activities to identify and encourage evidence-based medicine in addressing independently identified and documented clinical errors or safety concerns.
- Activities to lower the risk of facility-acquired infections.
- Prospective prescription drug Utilization Review aimed at identifying potential adverse drug interactions.
- Any quality reporting and related documentation in non-electronic form for activities that improve patient safety and reduce medical errors.
- Health information technology to support these activities.

Examples of activities that implement, promote, and increase wellness and health activities would include the following:

- Wellness assessments.
- Wellness/lifestyle coaching programs designed to achieve specific and measurable improvements.
- Coaching programs designed to educate individuals on clinically effective methods for dealing with a specific chronic disease or condition.
- Public health education campaigns that are performed in conjunction with state or local health departments.
- Actual rewards, incentives, bonuses, reductions in copayments (excluding administration of such programs), that are not already reflected in premiums or claims should be allowed as a quality improving activity for the group market to the extent permitted by section 2705 of the PHSA.
- Any quality reporting and related documentation in non-electronic form for wellness and health promotion activities.
- Coaching or education programs and health promotion activities designed to change member behavior and conditions (for example, smoking or obesity).
- Health information technology to support these activities.

Examples of activities that enhance the use of health care data to improve quality, transparency, and outcomes and support meaningful use of health information technology would include activities related to health information technology (HIT). HIT offers providers, MA organizations, Part D sponsors, and beneficiaries the capability to share clinical information in a real-time

setting. Any HIT expenditure that is attributable to improving health care, preventing hospital readmissions, improving safety and reducing errors, or promoting health activities and wellness to an individual or an identified segment of the population, would under our proposal be classified as a quality improving activity. HIT resources that are designed to improve the quality of care received by an enrollee would include the provision of electronic health records and patient portals, as well as the monitoring, measuring, and reporting of clinical effectiveness measures. HIT expenses that are consistent with meaningful use requirements would be treated as expenditures to improve health care quality.

We are proposing to follow the commercial MLR rules and recognize HIT as a category of quality improving activities, provided that the use of HIT meets the criteria discussed earlier.

In this proposed rule, we recognize that some quality improving activities may be what are sometimes referred to as "population-directed" and may not involve face-to-face interaction between an employee or contractor of the MA organization or Part D sponsor and the enrollee. However, such activities would have to be directed to identified segments of the MA organization's or Part D sponsor's enrollees. The MA organization or Part D sponsor would be required to be able to measure the level of engagement with these enrollees in addition to tracking the effect(s) of these activities on health outcomes in this population through a process that is well defined, well developed, and utilized.

Any quality improving activity that results in cost savings to a contract would not, by itself, cause expenditures on that activity to be classified as non-quality improving expenditures under our proposal, if they meet the criteria set forth in this proposed rule. However, if the activity is designed primarily to control or contain costs, then expenditures for it would not be permitted to be included as a quality improving activity, as provided in proposed § 422.2430(b) and § 423.2430(b).

As many quality improving activities are fluid in nature, they may properly be classified in more than one quality improving activity category. However, the proposed rule would not permit issuers to count any occurrence of a quality improving activity more than once, as explained in § 422.2420(d) and § 423.2420(d). Moreover, shared expenses among related entities as well as expenses that are for lines of business or products other than those being reported, including self-funded plans, would have to be apportioned among the entities and among the lines of business or products. For example, a quality improving program that is developed and implemented for commercial plans would have to be pro-rated among the lines of business, and the portion of expenditures for the program that are for the commercial plans may not be included in quality improving activities reported under 1857 of the Act.

We propose to adopt at § 422.2430(b) and § 423.2430(b) the list of activities in its entirety that are not to be reported as a quality improving activity under the commercial MLR rules at 45 CFR 158.150(c). These include the following:

- Those that are designed primarily to control or contain costs.
- The pro rata share of expenses that are for lines of business or products other than those being reported, including but not limited to, those that are for or benefit self-funded plans.
- Those which otherwise meet the definitions for quality improving activities but which were paid for with grant money or other funding separate from premium revenue.
- Those activities that can be billed or allocated by a provider for care delivery and which are, therefore, reimbursed as clinical services.
- Establishing or maintaining a claims adjudication system, including costs directly related to upgrades in health information technology that are designed primarily or solely to improve claims payment capabilities or to meet regulatory requirements for processing claims, including maintenance of ICD–10 code sets adopted pursuant to the Health Insurance Portability and Accountability Act (HIPAA), 42 U.S.C. 1320d–2, as amended, and ICD–10 implementation costs in excess of 0.3 percent of a MA organization or Part D sponsor's total revenue.
- That portion of the activities of health care professional hotlines that does not meet the definition of activities that improve health quality.
- All retrospective and concurrent utilization review.
- Fraud prevention activities.
- The cost of developing and executing provider or pharmacy contracts and fees associated with establishing or managing a provider or pharmacy network, including fees paid to a vendor for the same reason.
- Provider credentialing and pharmacy network credentialing.
- Marketing expenses.
- Costs associated with calculating and administering individual enrollee or employee incentives.
- That portion of prospective utilization review that does not meet the definition of activities that improve health quality.
- Any function or activity not expressly permitted as a quality improving activity in this rule.

This proposed rule provides a set of criteria in § 422.2430 and § 423.2430 which MA organizations or Part D sponsors would be required to comply with in order for the activity in question to be treated as improving quality. The definition, or foundational criteria, of a quality improving activity would have to be specific enough so as to provide clear guidance without overly prescribing acceptable activities and possibly stifling future innovative quality improving activities. We believe that the definition used in the commercial MLR rules, which we have proposed to adopt, would achieve these goals.

A quality improving activity would have to be grounded in evidence-based practice, widely accepted best clinical practice, or criteria issued by recognized medical associations, accreditation bodies, government agencies, or other nationally recognized health care quality organizations. Any proposed quality improving activities would be required to be designed to improve the quality of care received by an enrollee and capable of being objectively measured (taking into account the individual needs of the beneficiary) and of producing verifiable results and achievements. While an MA organization or Part D sponsor would not have to present initial evidence proving the effectiveness of a quality improving activity, the MA organization or Part D sponsor would have to show measurable results stemming from the executed quality improving activity.

While administrative expenses such as network fees would not be counted as quality improving, some traditional administrative activities could under our proposal qualify as quality improving if they met the criteria set forth in proposed § 422.2430 and § 423.2430. For example, expenses for prospective utilization review could under our proposal be classified as expenses for quality improving activities. Prospective utilization review would be considered a quality improving activity because it is rendered before care or services are delivered and can help ensure that the most appropriate treatment or service is given in the most appropriate setting. In contrast, the network fees associated

with third party provider networks do not stem from a quality improving activity and therefore would only count as an administrative expense.

We also propose to limit the amount spent converting from International Classification of Disease code set ICD–9 to ICD–10 that may be counted as a quality improving activity, in line with the commercial rules approach. As a general matter, the development and maintenance of claims adjudication systems are not designed primarily to improve the quality of care received by an individual and, therefore, are not classified as a quality improving activity. However, there is general recognition that the conversion to ICD–10 will enhance the provision of quality care through the collection of better and more refined data. The difficulty is in parsing expenses associated with ICD–10 conversions that may be solely "development and maintenance of claims adjudication systems" as opposed to those that are uniquely conversion costs. As with some other cost categories defined in this proposed rule, little public data currently exist to guide decision making regarding this distinction. For the commercial MLR rules, we considered the impacts of ICD–10 on improving data collection for diagnoses and medical procedure coordination, patient safety, health outcomes, and medical research. In addition, we consulted with our Office of E-Health Standards and Services (OESS). OESS oversees ICD–10 and considers some of the impact of ICD–10 to be quality improving activities, and supports the treatment of ICD–10 set forth in this proposed rule. We recognize that ICD–10 has some claims processing functions as well. Recognizing the dual nature of ICD–10, we propose to include as a quality improving activity those ICD–10 conversion costs incurred in 2014 (or until the deadline for converting to ICD–10) up to 0.3 percent of an MA organization's or Part D sponsor's total revenue under this part in 2014, which would be reported on a direct basis. We chose this proposed cap to be consistent with the approach in the commercial MLR rules, which allows as quality improving activity amounts that issuers projected spending on ICD–10 conversion, without permitting issuers to include claims adjudication systems costs in quality improving activities. In addition, ICD–10 maintenance costs are excluded from quality improving activities in this proposed rule, based on the industry's collective comments on the commercial MLR rules, stating that separating conversion costs from maintenance costs is feasible, and based on their support for excluding ICD–10 maintenance costs from quality improving activities. Similarly, we propose excluding any ICD–10 implementation costs in excess of the 0.3 percent limitation from quality improving activities in this proposed rule.

We recognize that there may be certain quality improving activities that are unique to a Part D context, and we seek comment as to whether modifications to our proposed definition in § 423.2430 are needed. In particular, we are interested to consider whether the concepts of prospective, concurrent, and retrospective utilization review apply in a Part D context. Whereas beneficiaries receive medical services at the time they are rendered, a safety-related review of a beneficiary's chronic or recurring use of medications, such as opiates or other high risk medications, could result in a prospective change to the beneficiary's drug regimen and a resulting improvement to his or her health and safety. However, we hesitate to define all utilization review, without any bounds, as a quality improving activity. Further, we solicit comment on whether Medication Therapy Management requirements for the Part D program would be considered to qualify as a health care improving activity under § 423.2430.

F. Credibility Adjustment

As noted in section II.A. of this proposed rule, we are using the commercial MLR rules as a reference point for developing the Medicare MLR. We propose that the methodology for the Medicare MLR calculation take into account the special circumstances of contracts with lower enrollment. Proposed § 422.2440 and § 423.2440 set forth a credibility adjustment that would be designed to meet the same goals as the commercial MLR requirements in 45 CFR 158.230.

A credibility adjustment is a method that can be used to address the impact of claims variability on the MLR for smaller contracts. All MA organizations and Part D sponsors experience some random claims variability, where actual claims experience deviates from expected claims experience. In a contract with a large enrollment, the predictability of expected claims experience is more reliable than in a contract with fewer members. One source of variability is the impact of outlier claims, which can be infrequent and in either direction. For smaller contracts, these random variations in the claims experience for enrollees could cause a contract's reported MLR to be considerably below or above the statutory requirement in any particular year, even though the MA organization or Part D sponsor estimated in good faith that the combination of the projected premium and projected claims would produce an MLR that meets the statutory requirement. The credibility adjustment is a method to address the effect of this random variation. A credibility adjustment serves to increase the MLR of a contract, thereby reducing the probability that a contract will fail to meet the statutory requirement simply because of random claims variability.

In evaluating the desirability of including a credibility adjustment, it is important to emphasize that MA organizations and Part D sponsors bid prospectively, based on trends, assumptions and estimates from previous claims experience. When an actuary estimates that a plan bid will produce an 85 percent MLR in the upcoming year, whether or not that 85 percent MLR materializes depends on how closely members' actual use of health care services aligns with the assumptions the actuary has made, including estimates of the mix of enrollees the plans under the contract will attract, the intensity and frequency with which its enrollees will use health care services, and unit costs for payments to providers. All things being equal, it is more likely that those assumptions driving the level of the bid and estimated claims costs will align with actual experience when a contract enrolls a large number of members rather than a small number.

To avoid requiring MA organizations and Part D sponsors to pay remittances due to random claim variation, rather than due to their underlying pricing and benefits structure, it is necessary to assess MLRs on sufficient numbers of member months for statistical credibility. Requiring MA organizations and Part D sponsors to pay remittances when random variation leads to surpluses (low MLRs), while requiring issuers to absorb losses when random variation leads to losses (high MLRs), could lead to product volatility, market exit, and inadequate levels of surplus to ensure solvency. We agree that remittance amounts should be based on the underlying premium pricing, rather than chance variation in claims experience. However, any credibility adjustment could also serve to deprive the federal government (and, thus, taxpayers and Medicare beneficiaries) of remittance amounts that they would otherwise be paid under the Affordable Care Act.

For the commercial MLR rules, we adopted a credibility adjustment methodology developed from statistical analysis conducted for the NAIC by an independent actuarial consulting firm, using historical claims data for commercial insurers.

After extensive analysis and public discussion, the methodology that we adopted to adjust the commercial MLR in instances of partial credibility was designed to reduce the probability that an issuer with smaller enrollment had to pay a rebate in a given year to 25 percent of the time or less. As discussed in the proposed commercial MLR rule, NAIC did consider setting the commercial base credibility adjustments so that such an issuer would be required to pay a rebate less than 10 percent of the time. The NAIC concluded, and we agreed, that setting credibility adjustments based on a 25 percent probability of paying a rebate struck a more equitable balance of consumer and issuer interests.

For the MA and Part D prescription drug programs, we propose to mirror the commercial approach by designing credibility adjustment factors for smaller enrollment contracts that result in a 25 percent chance of having to pay a remittance for contracts priced at an 85 percent MLR. We believe that this approach provides an acceptable balance between the interests that MA organizations and Part D sponsors have in not paying remittance when a low MLR is the result of ordinary variation in claims experience, and the interests of Medicare beneficiaries in having plan benefits at prices that provide value and the government receiving remittances, as required by the Affordable Care Act. One difference from the approach in the commercial MLR rules is that we do not propose to include a deductible factor, because Medicare deductibles are more confined than in the commercial market. Thus, the limited range of Medicare cost sharing does not prompt the need for such an adjustment.

Our proposal for calculation of the probability of a remittance is based solely on the variability of expected claims, assuming plans are priced exactly at an 85 percent MLR. In order to estimate the variability of expected MA–PD claims, we analyzed 4 years of fee-for-service (FFS) claims data for medical claims and 4 years of prescription drug event claims and reconciliation data for the Part D benefit under MA–PD contracts (2008 to 2011). In order to estimate the variability of expected claims for Part D stand-alone contracts, we analyzed 4 years of prescription drug event claims and reconciliation data (2008 to 2011).

Generally, Medicare claims vary less than commercial claims around the average per person claim amount (in statistical terms, the coefficient of variation of claims costs (standard deviation of claims costs relative to the mean claims cost) is lower for Medicare than commercial business relative to the mean claim cost). As a result, the threshold for full-credibility falls at a lower level of enrollment for MA–PD and Part D stand-alone contracts compared to commercial insurers. Further, claims for MA–PD contracts have a lower coefficient of less variation around the average than do claims for Part D stand-alone contracts, thus the full-credibility threshold for MA–PD contracts is lower than for Part D stand-alone contracts.

The Office of the Actuary (OACT), Centers for Medicare and Medicaid Services, derived the MA–PD and Part D stand-alone credibility adjustments using the following methodology. The credibility adjustment is intended to reduce the probability that a contract will fail to meet the MLR requirement due to random variation in claims experience. The target failure rate is 25 percent for contracts priced at an 85 percent MLR. The adjustments only account for variation in the claim experience, as related to the numerator of the MLR. Variations due to other risks and other components of the MLR formula are not considered. This approach is equivalent to the approach used in developing the commercial MLR credibility adjustments.

OACT modeled the distribution of the MLR using the following statistical formula by applying the Central Limit Theorem:

$$MLR_n = \frac{\sum_{i=1}^{n} X_i}{n\mu} / 0.85 \xrightarrow{d} N\left(0.85, \frac{0.85^2\sigma^2}{n\mu^2}\right)$$

Where

Xi is the annual claim amount with mean (μ) and variance ($\sigma 2$) for an individual. Xi is assumed to be independently and identically distributed for each individual. OACT calculated the mean and variance from historical claim experience from Medicare Parts A and B (as a proxy for Part C) and Medicare Part D. Claims were tabulated consistent with the definitions used to define the MLR. We reviewed four calendar years of experience from 2008 through 2011 for consistency and trends over time;

n is the number of individuals in the group; and

N

$$\left(0.85, \frac{0.85^2\sigma^2}{n\mu^2}\right)$$

denotes the Normal distribution with mean, 0.85, and variance,

$$\frac{0.85^2\sigma^2}{n\mu^2}$$

The numerator of the formula represents the aggregate claims (a variable), and the denominator represents the aggregate premium. The denominator is modeled as a single point equal to the expected premium because we are not evaluating the variability in the denominator.

The credibility adjustment equals the expected value of the MLR less the 25th percentile (25 percent target failure rate). This difference can be calculated by multiplying the z-score for the standard Normal distribution by the standard deviation for the MLR. The credibility adjustment equals,

$$\left| -0.6745 \frac{0.85\sigma}{\sqrt{n}\mu} \right|$$

where −0.6745 is the z-score for the 25th percentile of the standard normal distribution.

We propose to use member months (instead of life years, used in the commercial MLR credibility adjustment) to describe the enrollment thresholds pertinent to application of the Medicare credibility adjustments, because member months are consistently and predominantly used in other reporting requirements for Medicare Advantage organizations and Part D sponsors. Member months for a contract year equal the sum across the 12 months of a year of the total number of enrollees for each month. This includes enrollees who are in ESRD and hospice status for a month. As with the commercial rule,

we intend to evaluate the credibility adjustments and update them, if necessary.

In proposed § 422.2440(a) and § 423.2440(a), we follow the commercial MLR rule by proposing that an MA organization and a Part D sponsor may add a credibility adjustment to a contract's MLR if the contract's experience (level of enrollment) is partially credible, as determined by us. In § 422.2440(b) and § 423.2440(b), we note that an MA organization and Part D sponsor would not be permitted to add a credibility adjustment if the contract's experience is fully-credible, as determined by us. In § 422.2440(c) and § 423.2440(c), we propose that for contract years when a contract has non-credible experience, as determined by us, the sanctions specified in statute (and implemented at § 422.2410(b), (c), and (d) and § 423.2410(b) through (d)) for having an MLR that does not meet the minimum requirement of 85 percent would not apply. Finally, in § 422.2440(d) and § 423.2440(d), we state that we will propose updates to the credibility adjustments, solicit comments, and finalize any updates through the Advance Notice and Final Rate Announcement process.

Credibility adjustments would be applied to contracts with partially-credible experience. We propose to define partially-credible experience for MA contracts as enrollment that is greater than or equal to 2,400 member months and no greater than 180,000 member months of enrollment for a contract year. We propose to define partially-credible experience for Part D standalone contracts as enrollment that is greater than or equal to 4,800 member months and no greater than 360,000 member months of enrollment for a contract year.

Accordingly, we propose that non-credible MA contracts would have annual enrollment of less than 2,400 member months, and non-credible Part D "standalone" contracts would have annual enrollment of less than 4,800 member months. Further, we propose that a fully-credible MA contract would have an enrollment greater than 180,000 member months, and a fully-credible Part D "standalone" contract would have an enrollment greater than 360,000 member months.

Table 1a provides the proposed credibility adjustments for partially-credible MA–PD contracts, and Table 1B provides the proposed credibility adjustments for partially-credible Part D stand-alone contracts. We propose that the credibility adjustments in these tables will be effective for 2014 and subsequent years. We propose that the credibility adjustments for the contracts with enrollment sizes that fall between the categories of member months displayed in Tables 1a and 1b would be determined using linear interpolation. (For example, an MA–PD contract with 75,000 member months would have a credibility adjustment of 1.575, calculated as $1.7 \times (120{,}000 - 75{,}000) \div (120{,}000 - 60{,}000) + 1.2 \times (75{,}000 - 60{,}000) \div (120{,}000 - 60{,}000)$.)

TABLE 1A.—PROPOSED MLR CREDIBILITY ADJUSTMENTS FOR MA-PD*CONTRACTS

Member months	Credibility adjustment
≤2,400	*Non-credible*
2,400	*8.4%*
6,000	*5.3%*
12,000	*3.7%*
24,000	*2.6%*
60,000	*1.7%*
120,000	*1.2%*
180,000	*1.0%*
>180,000	*Fully-credible*

* MA-PD combined with MA-only

TABLE 1B.—PROPOSED MLR CREDIBILITY ADJUSTMENTS FOR PART D STAND-ALONE CONTRACTS

Member months	Credibility adjustment
<4,800	Non-Credible
4,800	8.4%
12,000	5.3%
24,000	3.7%
48,000	2.6%
120,000	1.7%
240,000	1.2%
360,000	1.0%
> 360,000	Fully-credible

For years after 2014, we propose that any updates to the enrollment thresholds demarcating partial credibility and updates to the credibility adjustments be proposed in the annual Advance Notice of Methodological Changes for Medicare Advantage (MA) Capitation Rates and Part C and Part D Payment Policies, also known as the Advance Notice. After the comment period for the Advance Notice ends, the updates would be finalized in the annual Announcement of Medicare Advantage Capitation Rates and Medicare Advantage and Part D Payment Policies, otherwise known as the Final Rate Announcement. We do not envision that it will be necessary to make annual updates to the credibility adjustments, but should the need arise to make any updates in future years (for example, due to changes in payment policies that would require changes to the variables included in the MLR numerator and/or denominator), we propose to use the Advance Notices as a vehicle for additional opportunity for notice and comment.

G. Reporting Requirements

Consistent with already established reporting requirements in § 422.504(f)(2) and § 423.505(f)(2), we are proposing that MA organizations and Part D sponsors be required to submit a report to us. For each contract year, each MA organization and Part D sponsor would submit a report to us, in a timeframe and manner specified by us. We propose that MA organizations and Part D sponsors' submissions will include information that includes, but is not limited to the data needed by the MA organization and Part D sponsor to calculate and verify the MLR and remittance amount, if any, for each contract. This information may include reimbursement for clinical services and prescription drugs, total revenue, expenditures on quality improving activities, non-claim costs, taxes, licensing and regulatory fees, and any remittance owed to us under § 422.2410 and § 423.2410. MA organizations and Part D sponsors would be required to calculate MLRs and remittance as part of their submission to the Secretary.

At a later date, we will provide information on the nature of this report, when it will be due, and how and where on the internet the information will be made available to the public, in a time and manner that we determine.

We are requesting comment on when the MLR should be reported. While it is arguably preferable to set a reporting date after the payment reconciliations are complete, there are at least two reasons why this may not be feasible. First, there are occasional reopenings of reconciliations that occur after the year immediately following the contract year, and it seems unreasonable to wait until all reopenings have been completed. Second, we are statutorily required to halt new enrollment the second succeeding year after a contract has an MLR of less than the MLR required at § 422.2410(b) and § 423.2410(b) for 3 or more consecutive years, and to terminate a contract after that contract has had an MLR of less than the required MLR for 5 consecutive years. We are proposing to apply the termination sanction the second succeeding year after the fifth consecutive year that a contract does not meet the required MLR. We must balance any preference for a later reporting date with disruption that beneficiaries would experience if we halted new enrollment or terminated a

contract after open enrollment has begun.

We are considering several options. First, we are considering requiring the reporting of Medicare MLRs data in July, even before risk adjustment reconciliation is complete. MA organizations and Part D sponsors must submit their bids by the first Monday in June and the base year for the bids is the same year as the contract year for MLR reporting. We typically provide nearly complete risk scores to MA organizations and Part D sponsors to support this bidding process, and base year costs must be developed by this time. The cutoff for PDEs to be reported for reinsurance and risk corridor reconciliation is June 30th after the contract year, and MA organizations and Part D sponsors, which report the prescription drug events (PDEs) themselves, should be able to project their final risk corridor and reinsurance reconciled amounts by this time. A July 31 reporting date would provide time for MA organizations and Part D sponsors to project their final costs and revenues for the contract year, and allow us time to apply new enrollment and termination sanctions.

Another option we are considering is to require reporting of a contract year MLR data in September, after risk adjustment reconciliation, but before Part D reinsurance and risk corridor reconciliation. This would better inform the calculation of the total revenue for the contract year, and still permit us sufficient time to apply enrollment and termination sanctions, and also to adjust Part D reassignments for low-income beneficiaries.

A further option we are considering is setting a reporting date in December, after Part D reconciliation of risk corridors and reinsurance. While MA organizations and Part D sponsors would still need to project any future reconciliations, this approach would provide more information for MA organizations' and Part D sponsors' total revenue calculations. However, we have concerns about this timing since it would mean that we would not receive reported MLRs data until after open season has started, and the enforcement of enrollment and termination sanctions would create disruptions for beneficiaries who are newly enrolled in plans under a contract (for enrollment sanctions) or all beneficiaries enrolled in plans under a contract (for termination sanctions).

We reiterate that, regardless of when a contract's MLR is actually reported, we are proposing that the MA organization or Part D sponsor must project future run-out of all payments and receipts as a result of the reconciliation of risk adjustment, reinsurance, or risk corridors. Because of the need to prevent disruption to beneficiaries who are choosing health plans for the coming year, and the necessity of projecting all future run-out, we are proposing a July 31 reporting date and request comment on this proposal.

H. Remittances to CMS if Applicable MLR Requirement Is Not Met

Proposed § 422.2470 and § 423.2470, paragraphs (a), (b), (c), and (d), delineate the proposed general requirements regarding sanctions, the calculation of the amount to be remitted to us, the time frame for payment of any amount that may be due, and the treatment of remittances in future years' numerator and denominator. In accordance with section 1857(e)(4) of the Act, proposed § 422.2470(a) and § 423.2470(a) simply provide that if a contract is partially or fully-credible and does not meet the applicable MLR standard set forth in § 422.2410(b) and § 423.2410(b), then the plan sponsor would remit payment to CMS as calculated under this proposed rule. As discussed earlier, because an MA–PD or Part D stand-alone contract that has fewer than 2,400 or 4,800 member months, respectively, does not have sufficiently credible data to determine whether the minimum MLR standard has not been met, we are proposing that an MA organization or Part D sponsor would not be required to remit any payment to us for non-credible contracts.

Proposed § 422.2470(b) and § 423.2470(b) explain the amount of the payment that would be due to CMS. The Affordable Care Act provides that MA organizations and Part D sponsors must remit to CMS the amount by which the MLR requirement exceeds the contract's actual MLR, multiplied by total revenue under this part. In this proposed rule, we specifically propose that MA organizations and Part D sponsors be required to remit to us the amount by which the applicable MLR requirement in § 422.2410(b) and § 423.2410(b) exceeds the contract's actual MLR, multiplied by the total revenue of the contract, as provided under proposed § 422.2420(c) and § 423.2420(c).

Sections 422.2470(c) and 423.2470(c) specify that we would subtract remittances from plan payment amounts in a timely manner after the MLR is reported, on a schedule determined by us. Remittances by MA and Part D organizations would occur as part of regular monthly payments that we make to plan sponsors. In § 422.2470(d) and § 423.2470(d), we specify that remittances paid in any 1 year would not be included in the numerator or denominator of the next year's or any year's MLR.

We request comment on the specials circumstances of certain MA organizations in Puerto Rico with respect to the Medicare MLR requirement. MA organizations in Puerto Rico that have Platino agreements with the Commonwealth of Puerto Rico tend to have higher Part C profit margins than other MA organizations and are thus less likely to meet the 85 percent MLR requirement.

I. MLR Review and Non-Compliance

Under this proposed rule, we would conduct selected reviews of reports submitted under § 422.2460 and § 423.2460 to determine that remittance amounts under § 422.2410(b) and § 423.2410(b) and sanctions under §§ 422.2410(c), 422.2410(d), 423.2410(c), and 423.2410(d) were accurately calculated, reported, and applied.

MA organizations and Part D sponsors would be required to retain documentation relating to the data reported, and provide access to that data to CMS, HHS, the Comptroller General, or their designees, in accordance with proposed § 422.504 and § 423.505. These proposed provisions are intended to give CMS or its designees access to information needed to determine whether the reports and amounts submitted with respect to the MLR are accurate and valid. Sanctions would be imposed for non-compliance with the MLR requirements. Furthermore, under § 422.2480(c) and § 423.2480(c), MA organizations and Part D sponsors with third party vendors would be required to have or be able to obtain and validate, in a timely manner, all underlying data associated with their services prior to the preparation and submission of MLR reporting to CMS. This includes all claims data paid on behalf of the MA organization or Part D sponsor, direct and indirect remuneration data and supporting materials, and all pricing components and utilization data that were used or rendered to substantiate invoices submitted to sponsors or financial data submitted to us.

In addition, we propose to add a failure to provide accurate and timely MLR data to the list of items in § 422.510(a) and § 423.509(a) that constitute grounds for termination, and for intermediate sanctions and civil money penalties, by adding a paragraph (15) related to MLR reporting. Such an addition will provide CMS authority to invoke the contract termination procedures in § 422.510(b) through (d)

and § 423.509(b) through (d) for failure by an MA organization or Part D plan sponsor to provide timely and accurate MLR data. Further, intermediate sanctions at § 422.752(b) and (c) and § 423.752(b) and (c) would also be available, as well as civil monetary penalties at § 422.760 and § 423.760.

III. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995, we are required to provide 60-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. In order to fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires that we solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

We are soliciting public comment on each of these issues for the following sections of this document that contain information collection requirements:

A. ICRs Regarding MLR and Remittance Reporting Requirement (§ 422.2470 and § 423.2470)

This proposed rule describes the information that would be reported by MA organizations and Part D sponsors on an annual basis to the Secretary starting in 2014. We propose that MA organizations and Part D sponsors' submissions will include information regarding reimbursement for clinical services, expenditures for activities that improve health care quality, other non-claim costs, total revenue, and federal and state taxes and regulatory fees, among other data elements. MA organizations and Part D sponsors would be required to calculate MLRs and remittance as part of their submission to the Secretary.

At this time, CMS has not developed the MLR reporting instructions and forms that MA organizations and Part D sponsors would have to complete on an annual basis beginning for contract years starting January 1, 2014. We expect the first year of MLR reporting for MA organizations and Part D sponsors to occur in 2015 for the 2014 contract year, and we propose to continue collecting MLR data for the foreseeable future. We plan to publish the instructions and forms that issuers must file for all plans in future guidance. At that time, we will solicit public comments on both the forms and the estimated burden imposed on health insurance issuers for complying with the provisions of this proposed rule. We will publish the required 60-day and 30-day notices in the **Federal Register** notifying the public of OMB approval as required by the PRA.

B. ICRs Regarding Retention of Records (§ 422.2480(b) and (c) and § 423.2480(b) and (c)

Subpart I of the proposed rule establishes our enforcement authority regarding the reporting requirements under section 1857(e) of the Act. MA organizations and Part D sponsors must maintain all documents and other evidence necessary to enable us to verify that the data required to be submitted comply with the definitions and criteria set forth in this proposed rule, and that the MLR is calculated and any remittances owed are calculated and provided in accordance with this proposed rule. The proposed rule at § 422.2480(c) and § 423.2480(c) would require plan sponsors to maintain all of the documents and other evidence for 10 years.

We expect all MA organizations and Part D sponsors will have to retain data relating to the calculation of MLRs; those who have owed remittances would also have to retain information regarding the payment of remittances. We believe that the burden associated with our record retention requirements does not exceed standard record retention practices because MA organizations and Part D sponsors are already required to retain the records and information required by this proposed rule in order to comply with the legal requirements of their states' departments of insurance. For that reason, we are assigning a lesser burden to these requirements as compared with the commercial MLR requirements. We estimate that about 616 contracts would be subject to the aforementioned requirements. (The 616 contracts are comprised of 605 contracts subject to the remittance requirement plus 11 non-credible contracts that are subject to reporting requirements). We further estimate that it will take MA organizations and Part D sponsors about 28 hours in total to meet the record retention requirements, at a cost of about $4.00 per report. The total estimated annual burden associated with the requirements in § 422.2480(b) and (c) and § 423.2480(b) and (c) is shown in the regulatory impact analysis.

While we have developed preliminary burden estimate, we are not seeking OMB approval at this time. We will seek OMB approval for the aforementioned recordkeeping requirements at the same time we seek OMB approval for the information collection requirements associated with proposed MLR remittance reporting requirements discussed in § 422.2470 and § 423.2470.

We welcome comments regarding the burden associated with maintaining the information described in subpart I of this proposed rule.

If you comment on these information collection and recordkeeping requirements, please mail copies directly to the following:

Centers for Medicare & Medicaid Services, Office of Strategic Operations and Regulatory Affairs, Regulations Development Group, Attn.: William Parham (CMS–4173–P), Room C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850; and

Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503, Attn: CMS Desk Officer, (CMS–4173–P). Fax (202) 395–6974.

IV. Response to Comments

Because of the large number of public comments we normally receive on **Federal Register** documents, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this preamble, and, when we proceed with a subsequent document, we will respond to the comments in the preamble to that document.

V. Regulatory Impact Analysis

A. Introduction

This proposed rule implements section 1857(e)(4) of the Act, which sets forth requirements for a medical loss ratio (MLR) for MA organizations and Part D sponsors. The MLR is an accounting statistic that, stated simply, measures the percentage of total revenue that MA organizations and Part D sponsors spend on health care and quality initiatives (and, under this rule, amounts spent to reduce Part B premiums), versus what they spend on such other items as administration, marketing and profit. The higher the MLR, the more the MA organization or Part D sponsor is spending on claims and quality improving activities and the less they are spending on other items

and retaining as profit. As proposed earlier, MA organizations and Part D sponsors must submit MLR-related data to the Secretary on an annual basis, and in the event that a contract's MLR fails to meet the minimum statutory requirement, MA organizations and Part D sponsors would remit a payment to CMS. If the contract continues to fall below the minimum MLR standard, the contract would be subject to enrollment sanctions and possibly termination. This proposed regulation also proposes uniform definitions and standardized methodologies for calculating the MLR and addresses enforcement of the reporting requirements. These provisions are generally effective for contract years beginning on or after January 1, 2014.

We have examined the effects of this rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Act, section 202 of the Unfunded Mandates Reform Act of 1995 (March 22, 1995, Pub. L. 104–4), Executive Order 13132 on Federalism (August 4, 1999), and the Congressional Review Act (5 U.S.C. 804(2)).

Executive Orders 12866 (58 FR 51735) and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 is supplemental to and reaffirms the principles, structures, and definitions governing regulatory review as established in Executive Order 12866, emphasizing the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as an action that is likely to result in a rule: (1) Having an annual effect on the economy of $100 million or more in any 1 year, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities (also referred to as "economically significant"); (2) creating a serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year), and a "significant" regulatory action is subject to review by the Office of Management and Budget (OMB). This proposed rule is likely to have economic impacts of $100 million or more in any 1 year, and therefore has been designated an "economically significant" rule under section 3(f)(1) of Executive Order 12866. Therefore, we have prepared an RIA that details the anticipated effects (costs, savings, and expected benefits), and alternatives considered in this proposed rule. Accordingly, OMB has reviewed this proposed rule pursuant to the Executive Order.

B. Statement of Need

Consistent with the provisions in section 1857(e)(4) of the Act, which are incorporated by reference in section 1860D–12(b)(3)(D) of the Act, this proposed rule requires MA organizations and Part D sponsors to meet the minimum MLR requirement of 85 percent. If this requirement is not met at the contract level, which is the level of aggregation proposed in this notice, MA organizations and Part D sponsors are subject to penalties. Section 1857(e)(4) of the Act requires MA organizations and Part D sponsors to "remit to the Secretary an amount equal to the product of the total revenue of the MA plan under this part for the contract year and the difference between 0.85 and the medical loss ratio." Section 1857(e)(4) of the Act also provides that the Secretary shall not permit enrollment of new enrollees if the plan does not meet the MLR requirement of 85 percent for 3 or more consecutive years and shall terminate the contract if the plan (contract) fails to have such a medical loss ratio for 5 consecutive contract years.

C. Summary of Impacts

We limited the period covered by the regulatory impact analysis (RIA) to calendar year (CY) 2014 (with the exception of section V.D.5. of this proposed rule, which presents estimates for ongoing annual administrative costs for 2014 and subsequent years). We anticipate that the transparency and standardization of MLR reporting in this proposed rule would help ensure that taxpayers, the federal government, and enrolled beneficiaries receive value from Medicare health plans. Additionally, including in the MLR calculation those costs related to quality-improving activities could help to increase the level of investment in and implementation of effective quality improving activities, which could result in improved quality outcomes and lead to a healthier beneficiary population.

Executive Order 12866 also requires consideration of the "distributive impacts" and "equity" of a rule. As described in this RIA, this regulatory action will help ensure that MA organizations and Part D sponsors spend at least a specified portion of total revenue on reimbursement for clinical services, prescription drugs, quality improving activities, and direct benefits to beneficiaries in the form of reduced Part B premiums, and will result in a decrease in the proportion of health insurance revenue spent on administration and profit. It will require MA organizations and Part D sponsors to remit payment to CMS if this standard is not met. MA organizations and Part D sponsors may also experience sanctions if this standard is not met over a period of 3 to 5 consecutive years. The remittance will help incent MA organizations and Part D sponsors to price their benefit packages such that a specified portion of premium income is likely to be spent on reimbursement for clinical services and quality improving activities, resulting in increased value to beneficiaries enrolled in MA and Part D. In accordance with Executive Order 12866, we believe that the benefits of this regulatory action justify the costs.

Although we are unable to quantify benefits, Table 2 shows that the estimated transfer amounts due to failure to meet the minimum MLR requirement (that is, remittances to the HHS Secretary) could be substantial. Estimates for CY 2014 remittances are $717 million for MA–PD contracts and $141 million for Part D stand-alone contracts. (Note that the estimates in Tables 2 through 5 are based on CY 2013 bid data, which are a proxy for actual CY 2014 costs and revenues that will be used in actual MLR calculations.) Additional details relating to these estimates are discussed later in this regulatory impact analysis. We also estimate that administrative costs of the rule would be approximately $9.6 million upfront and $2.8 million in subsequent years.

TABLE 2—ESTIMATED REMITTANCE FOR CY 2014
[With Credibility Adjustment]

Contract type	Remittance estimates (in millions)		
	Contracts with MLRs < 80%	Contracts with MLRs from 80% to 84.99%	All Contracts Below MLR Requirement of 85% [Total Remittance]
MA–PD	$293	$424	$717
Part D Stand-alone	5	136	141
Total	298	560	858

Source: 2013 approved bids.
Notes: Estimates reflect application of the credibility adjustment to MLRs for partially-credible contracts. The remittance for a contract is the product of the difference between 0.85 and the contract's MLR and the total revenue of the contract, as provided in § 422.2420(c) and § 423.2420(c). All MA contracts include at least one MA–PD plan, so are labeled MA–PD. This analysis does not explicitly model the impact of potential plan sponsor behavioral changes.

D. Detailed Economic Analysis

1. Benefits

In developing this proposed rule, we carefully considered its potential effects including both costs and benefits. We identify several potential benefits which are discussed later in this section.

A potential benefit of this proposed rule is greater market transparency and improved ability of beneficiaries to make informed insurance choices. The uniform reporting required under this proposed rule, along with other programs such as *www.Medicare.gov*, a Web site with plan-level information, will mean that beneficiaries will have better data to inform their choices, enabling the market to operate more efficiently.

In addition, contracts that would not otherwise meet the MLR minimum defined by this proposed rule may opt to increase spending on quality-promoting activities. These programs, which include case management, care coordination, chronic disease management and medication compliance, have the potential to create a societal benefit by improving outcomes and beneficiary population health.

MA organizations and Part D sponsors that would not otherwise meet the MLR minimum may also expand covered benefits or reduce cost sharing for beneficiaries. To the extent that these changes result in increased consumption of effective health services, the proposed rule could result in improved beneficiary health outcomes, thereby creating a societal benefit.

2. Costs

We have identified the direct costs associated with this proposed rule as the costs associated with reporting, recordkeeping, remittance payments, enrollment and termination sanctions, and other costs.

a. Direct Costs

We estimate that each MA organizations and Part D sponsor would incur approximately $16,000 one-time administrative costs (per report), and about $5,000 in annual ongoing administrative costs (per report) related to complying with the requirements of this proposed rule. Additional details relating to these costs are discussed later in this RIA.

b. Other Costs

Additionally, there are three other potential types of costs associated with this proposed rule: costs of potential increases in medical care use, the cost of additional quality-improving activities, and costs to beneficiaries if MA organizations and Part D sponsors decide to limit offered products as a result of this proposed rule.

As discussed in the benefits section, there may be increases in quality-improving activities, provision of medical services, and Part D covered items due to this proposed rule. This is likely have some benefit to beneficiaries but also potentially represents an additional cost to MA organizations, Part D sponsors, and the federal government.

It is also possible that some MA organizations and Part D sponsors in particular areas or markets would not be able to operate profitably when required to comply with the proposed requirements. They may respond by changing or reducing the number of products they offer. MA organizations and Part D sponsors are likely to consider whether they expect to be successful competitors in a given market. Entire contracts or subsets of plans under contracts with low MLRs contracts may be withdrawn from a given market entirely, while MA organizations and Part D sponsors with low MLR contracts (particularly those that are subsidiaries of larger organizations) may find ways to achieve higher MLRs through increased efficiencies.

To the extent that MA organizations and Part D sponsors decide to limit product offerings in response to this proposed rule, individual enrollees in these contracts may bear some costs associated with searching for and enrolling in a new Medicare health plan. For Medicare beneficiaries, this may also lead to reduced choice, the inability to purchase similar coverage, and higher search costs related to finding affordable insurance coverage.

c. Transfers

To the extent that MA organizations and Part D sponsors have contracts with MLRs that fall short of the minimum requirement, they must remit payment to the Secretary. These remittances would reflect transfers from the MA organizations or Part D sponsors to the Secretary. Using 2013 approved bid data, we have estimated remittances for CY 2014, which are presented in Table 2.

d. Additional Sanctions

To the extent that MA organizations' and Part D sponsors' MLRs fall short of the minimum MLR requirements for a period of 3 or 5 consecutive years, they will undergo additional sanctions. If an MA organization's or Part D sponsor's MLR falls below 85 percent for 3 consecutive contract years, the Secretary shall not permit the enrollment of new enrollees under the contract for coverage. If the MLR falls below 85 percent for 5 consecutive contract years, the Secretary shall terminate the contract. To the extent that enrollment sanctions are issued, this may lead to

reduced choice for Medicare beneficiaries. To the extent that contracts are terminated, individual enrollees in these contracts may bear some costs associated with searching for and enrolling in a new Medicare health or drug plan. One benefit of enrollment sanctions would be the movement of beneficiaries into contracts with a more efficient operating cost structure.

3. Overview of Data Sources, Methods, and Limitations

The most recent data on the number of licensed entities offering Medicare coverage through MA or Part D prescription drug plans are the 2013 approved bids. These bid data contain information on MA organizations' and Part D sponsors' projected revenues, expenses, and enrollment. Generally, these projections are based on actual plan experience from previous years. CY 2013 bid data are a proxy for actual CY 2014 costs and revenues that will be used in actual MLR calculations.

We used 2013 approved plan bid data, aggregated to the contract level. An MA organization or Part D sponsor can have one or multiple contracts with CMS and, under each contract, the MA organization or Part D sponsor can offer one or multiple plans (plan benefit packages) in which beneficiaries may enroll. Although these data represent the most recent data source with which to estimate impacts of the MLR regulations, there are limitations that should be noted. For example, plan bids are projected estimates of per person per month revenue needed to offer a benefit package, where required revenue is the sum of direct medical costs or prescription drug costs, administrative costs and margin. Member month projections may differ from actual enrollment, and revenue projections in the bid may differ from the actual revenue MA organizations and Part D sponsors truly require given actual claims experience in a year.

Moreover, we propose to follow the commercial MLR regulations by including expenditures on quality improving activities in the numerator of the MLR (and, under this rule, amounts spent to reduce Part B premiums), and allowing certain amounts to be subtracted from the denominator of the MLR, such as licensing and regulatory fees; federal and state taxes and assessments; and community benefit expenditures. Some data for this RIA was collected in the bid pricing tool for the first time in 2013, such as reported estimates by MA organizations and Part D sponsors of expenditures on quality and levels of taxes and fees. Part D employer-group waiver plans are not required to submit bids, and therefore they are not included in the data analysis. Therefore, these plans are excluded from the analysis of Part D stand-alone contracts. Employer group waiver plans offered under MA–PD contracts are included in the RIA, although the bid data available for these plans are only from the MA portions of the bids.

As discussed at greater length in section V.D.4 of this proposed rule, we expect that MA organization and Part D sponsor behavior would change as a result of this proposed rule, which would impact the MLRs and remittances calculated. Because we are limited in our ability to predict behavioral changes, we do not explicitly model these behavioral changes in our estimates. We seek comment on our methods and limitations presented in this regulatory impact analysis, anticipated impacts of behavioral changes, and additional ideas for quantifying the costs and benefits of this proposed rule.

4. Number of Affected Entities Subject to the MLR Provisions

We are proposing that the MLR provisions will apply to all MA organizations and Part D sponsors offering Part C or D coverage (except for the proposed exclusion of PACE organizations, and the proposed inclusion of cost plans' Part D coverage). For purposes of the RIA, we have estimated the total number of entities that would be affected by the requirements of this proposed rule at the contract level because this is the level at which we propose to apply the MLR. We believe that this is the best read of the statute at 1857(e) of the Act and that applying the MLR adjustment at the contract level would promote program stability and a variety of benefit structures.

Table 3 shows the estimated distribution of entities offering Part C and D contracts subject to MLR remittance requirements. Note that section 1876 Cost HMO/CMPs and section 1833 Cost HCPPs (Health Care Prepayment Plans) are excluded from this MLR analysis, as they do not submit Part C bids and only a few Part D bids for 2013 were submitted for section 1876 cost plans.

TABLE 3—ESTIMATED NUMBER OF CONTRACTS SUBJECT TO MLR REMITTANCE REQUIREMENTS

Contract type	Contract count	Estimated number of beneficiaries (in millions)
MA–PD*	544	14.3
Part D Stand-alone**	61	19.3
Total	605	33.6

* All MA contracts include at least one MA–PD plan, so are labeled MA–PD. Non-credible contracts, of which there are 11, are not displayed or included in this table as they are not subject to the remittance requirements.

** PACE and costs contracts are excluded.

Source: CMS administrative data on MA and Part D contracts, based on 2013 accepted bids. Beneficiary counts are bid projections.

Of the 605 MA–PD and Part D stand-alone contracts subject to the remittance requirement, we estimate that only 14 percent of these contracts will be required to pay an MLR related remittance to the Secretary in 2014. (see Table 5). This RIA provides estimates only for CY 2014, and, as a result, does not estimate the number of contracts that could undergo MLR-related enrollment suspensions or terminations in subsequent years.

5. MLR Remittance Payments

a. Data Limitations and Modeling Assumptions

As described in the commercial MLR rules, we expect that as a result of this proposed rule, MA organization and Part D sponsor behavior would change. Even if the 2013 bid data were a precise indication of actual claims costs and revenue for 2013, MLRs in 2014 may well be different as a result of plan sponsor behavioral change. However, for purposes of this analysis, we do not explicitly model these behavioral changes in our estimates. Potential behavioral changes as a result of this

proposed rule and the anticipated impact on our estimates are as follows:

- Pricing Policy—MA organizations and Part D sponsors would likely consider a number of responses in 2014 to minimize or avoid remittance (for example, reducing premium increases, or paying providers bonuses if incurred claims fall short of a certain threshold).
- Activities That Improve Quality—MA organizations and Part D sponsors may increase their quality-improving activities given the financial incentive to do so, or newly describe existing activities as such, and spending on these activities may change and vary significantly by MA organization or Part D sponsor.
- Other Changes—MA organizations and Part D sponsors are expected to carefully scrutinize all of their expenditures to determine whether some could legitimately be categorized as expenditures for clinical services, prescription drugs, or quality improving activities based on the definitions implemented by this regulation. Further, it is unclear to what extent companies may make other behavioral changes that could affect MLR remittances (for example, expanding coverage to increase medical claims, consolidation, requesting permission to split contracts into smaller contracts in order to receive credibility adjustments, etc.).

b. Methods for Estimating MLR Remittances

The analysis includes estimates that are based on both unadjusted and adjusted MLRs. An "adjusted MLR" refers to the MLR for a contract to which a credibility adjustment has been added, as described in section II.F. of this proposed rule. Accordingly, an unadjusted MLR is calculated without any credibility adjustment. Comparisons of unadjusted and adjusted MLRs are provided to assess the impact of the proposed credibility adjustments on partially-credible contracts. All MLRs reported in this analysis have denominators net of estimated federal and state taxes and licensing and regulatory fees, using data reported by MA organizations and Part D sponsors in their 2013 bids. Because the definitions of these taxes and fees are new to this rule, the estimates from the 2013 bid data may differ from how much they will actually spend on taxes and fees in 2014. Similarly, all estimated MLRs reported in this analysis also incorporate 2013 bid estimates of expenses for quality improving activities, as reported by MA organizations and Part D sponsors. Because the definitions of quality improving activities are new to this rule, the estimates from the 2013 bid data may differ from how much they will actually spend on these activities in 2014.

The adjusted MLRs reflect application of the credibility adjustments for contracts that have partially credible experience. As described in section II.F. of this proposed rule, we propose that an MA–PD contract be defined as partially-credible when the enrollment is greater than or equal to 2,400 member months and no greater than 180,000 member months for a contract year. We propose that a Part D stand-alone contract be defined as partially-credible when the enrollment is greater than or equal to 4,800 member months and no greater than 360,000 member months for a contract year. We propose that these contracts receive a credibility adjustment to their MLRs to account for statistical variability in their claims experience that is inherent in contracts with smaller enrollment. We propose that MA–PD contracts are defined as fully-credible when the enrollment is greater than 180,000 member months and Part D stand-alone contracts are defined as fully-credible when the enrollment is greater than 360,000 member months. Reported MLR values for fully-credible contracts would not reflect a credibility adjustment. Finally, we propose that contracts are defined as having non-credible experience if the enrollment for a year is less than 2,400 member months for MA–PD contracts and less than 4,800 member months for Part D stand-alone contracts. Non-credible contracts would not be subject to the remittance requirements or other MLR-related sanctions specified in statute (and implemented in the regulations at § 422.2410(b), (c), and (d) and § 423.2410(b) through (d)). Section II.F. of the proposed rule describes the rationale and method for calculating credibility adjustments.

First, the unadjusted MLR for a contract is calculated as follows. Each component of the MLR numerator (incurred claims, expenditures for quality activities, Part B premium rebates amount, and Part D reinsurance) is summed across all plans under the contract for all projected enrollees and the contract-level components are then summed. Next, each component of the MLR denominator (revenue net of taxes and fees, and Part D reinsurance) is summed across all plans under the contract for all projected enrollees, and the contract-level components are then summed. The ratio is then calculated to determine the unadjusted MLR. Finally, for contracts that are partially-credible and thus eligible for a credibility adjustment, and have an MLR below 85 percent prior to application of a credibility adjustment, we calculate an adjusted MLR for the contract by adding the applicable percentage points.

To estimate a remittance for a contract whose MLR falls below the minimum MLR requirement of 85 percent, we multiply the contract's difference between the minimum MLR requirement of 85 percent and the contract's MLR by the contract's total revenue (as provided at § 422.2430(c) and § 423.2420(c)).

c. Numbers and Enrollment of MA Organizations and Part D Sponsors Affected by the MLR Requirements and Associated MLR Remittance Payments

As shown in Table 4, we estimate that 336 MA–PD contracts and 26 Part D stand-alone contracts would be designated as "partially-credible" according to the standards of this proposed rule, and thus eligible for a credibility adjustment. That is, about 62 percent of MA–PD contracts (representing about 13 percent of projected total MA–PD enrollment) would be partially-credible, and about 43 percent of Part D stand-alone contracts (representing about 1 percent of projected total stand-alone enrollment) would be eligible for a credibility adjustment if the MLR falls below 85 percent. (Many MLRs for partially-credible contracts are estimated to meet the minimum MLR requirement, as shown in Table 5.).

A total of 208 MA–PD contracts and 35 Part D stand-alone contracts are estimated to be fully-credible, so are not eligible for a credibility adjustment. As discussed elsewhere in this proposed rule, contracts with non-credible experience during a given contract year that do not meet the minimum MLR requirement would not be required to provide any remittance to the Secretary nor be subject to enrollment or termination sanctions because the contract would not have a sufficiently large number of member months to yield a statistically valid MLR.

TABLE 4—ESTIMATED ENROLLMENT, REVENUE, AND AVERAGE MLR BY CREDIBILITY STATUS

Contract type	Credibility status	Contract count	Number of beneficiaries (in millions)	Total revenue (in billions)	Avg MLR* percent
MA–PD	Partial	336	1.8	$20.8	89.6
	Full	208	12.5	135.8	88.9
Part D Stand-alone	Partial	26	0.2	0.4	86.7
	Full	35	19	31.3	88.4

Notes: The table excludes 9 MA–PD contracts and 2 Part D stand-alone contracts that are non-credible. Employer group waiver plans do not submit Part D bids, so are absent from the Part D stand-alone analysis, and only their MA bid data are included in the MA–PD analysis. This analysis does not explicitly model the impact of potential plan sponsor behavioral changes.

* Average MLRs reflect adjusted MLRs for those partially-credible contracts with MLRs below 85% prior to application of a credibility adjustment. Averages are enrollment-weighted. The average MLR for partially-credible contracts uses the MLR with credibility adjustment. Enrollment and total revenue are projections from the 2013 approved bids.

Source: CMS analysis of administrative data on MA and Part D contracts, based on 2013 accepted bids.

Finally, Table 4 shows average MLRs for the subgroups of MA–PD and Part D stand-alone partially- and fully-credible contracts. (The average MLRs for partially-credible contracts reflect the MLRs after application of a credibility adjustment for those partially-credible contracts with an MLR below 85 percent prior to application of a credibility adjustment.) On average, each of these four subgroups of contracts is estimated to meet the minimum MLR requirement, with average MLRs ranging from 86.7 percent to 89.6 percent. However, there are contracts within both subgroups of partially-credible and fully-credible that do not meet the minimum MLR requirement, as shown in Table 5.

Total revenue for MA–PD contracts is the total MA revenue requirement + MA optional supplemental benefit premium (if any) + Part D basic bid + Part D reinsurance—Parts C and D taxes and fees.

Total revenue for Part D stand-alone contracts is the sum of the basic bid and Part D reinsurance, minus taxes and fees. Low-income cost sharing (LICS) payments are excluded.

Table 5 shows the number of MA–PD and Part D stand-alone contracts estimated to owe a remittance payment, before and after application of a credibility adjustment to eligible partially-credible contracts. The figures in Table 5 were determined as follows. First, we used enrollment projections to determine which contracts are fully-credible and which are partially-credible. Next we calculated the MLRs with the credibility adjustment added for those partially-credible contracts with MLRs below 85 percent. Finally, to show the overall program impact of credibility adjustments, we calculated the estimated remittances for partially-credible and fully-credible contracts before and after application of credibility adjustments.

TABLE 5—ESTIMATED IMPACT OF CREDIBILITY ADJUSTMENT ON ESTIMATED MLR REMITTANCE PAYMENTS FOR CY 2014

Contract type	Credibility status	Number contracts	Number of contracts below 85% MLR *before credibility adjustment*	Estimated remittance without credibility adjustment (in millions)	Number of contracts below 85% *after credibility adjustment*	Estimated remittance with credibility adjustment (in millions)
MA–PD	Partial	336	68	$109	34	$55
	Full	208	37	662	37	662
	Total	544	105	771	71	717
Part D stand-alone	Partial	26	12	11	9	8
	Full	35	2	133	2	133
	Total	61	14	144	11	141

* Partially-credible contracts are those with enrollment levels that make them eligible for a credibility adjustment.

This analysis does not explicitly model the impact of potential plan sponsor behavioral changes.

Source: CMS analysis of administrative data on MA and Part D contracts, based on 2013 accepted bids.

Of the 336 MA–PD contracts that would categorized as partially-credible, 68 would fail to meet the MLR minimum requirement of 85 percent in the absence of a credibility adjustment. The average MLR for this group of 68 contracts, prior to adding a credibility adjustment, is 82.6 percent. Upon application of the credibility adjustment, 34 of these 68 would pass the MLR requirement, and 34 would still have MLRs below 85 percent. The subset of 34 contracts that passes with application of the credibility adjustment has an average MLR of 85.7 percent. As a result, the credibility adjustment decreases the estimated remittance amount by about $54 million (from $771 to $717 million). However, it should be noted that the majority of the estimated remittance of $717 million, that is, $662 million, is owed by fully-credible contracts.

For Part D stand-alone contracts, 12 of the 26 partially-credible contracts would fail to meet the MLR minimum requirement in the absence of a credibility adjustment. The average MLR for this group of 12 contracts, prior to adding a credibility adjustment, is 80.4 percent. Upon application of the credibility adjustment, 3 of these 12 contracts would pass the requirement, and 9 would still have MLRs below 85 percent. The subset of 3 contracts that passes with application of the credibility adjustment has an average MLR of 86.8 percent. As a result, the credibility adjustment decreases the estimated remittance amount by about $3 million (from $144 to $141 million). However, it should be noted that the majority of the estimated remittance of $141 million, that is $133 million, is owed by fully-credible contracts. Non-

credible contracts were excluded from this analysis because no sanctions under § 422.2410(b) through (d) would apply to these contracts; as these contracts will not have remittances, they do not factor into the analysis of the estimated impacts.

6. Administrative Costs Related to MLR Provisions

As stated previously this proposed rule implements the reporting requirements of section 1857(e)(4) of the Act, describing the medical loss ratio requirements and sanctions for not meeting those requirements, including a remittance payment of the difference to the Secretary and enrollment suspensions and contract termination for those who do not meet the requirements. Implementation of these requirements necessitates that a report be submitted to the Secretary and that MLR information be made available to the public in a time and manner that we determine, as well as the remittance calculation, payment and enforcement provisions of section 1857(e)(4) of the Act. We have quantified the primary sources of start-up costs that MA organizations and Part D sponsors will incur to bring themselves into compliance with this proposed rule, as well as the ongoing annual costs that they will incur related to these requirements. These costs and the methodology used to estimate them are discussed later in this section, on which we welcome comment.

a. Methodology and Assumptions for Estimating Administrative Costs

Many MA organizations and Part D sponsors already report to CMS several elements needed for the MLR calculation, for example, certain fields in the Part D prescription drug events records, and some information in the annual Part C and Part D Technical Reporting. This proposed rule includes requirements related to additional data elements. As discussed earlier in this impact analysis, in order to assess the potential administrative burden relating to the requirements in this proposed rule, we drew on the regulatory impact analysis from the commercial MLR rules to gain insight into the tasks and level of effort required, and modified these estimated impacts for Medicare. Based on this review, we estimate that MA organizations and Part D sponsors will incur one-time start-up costs associated with developing teams to review the requirements in this proposed rule, and with developing processes for capturing the necessary data (for example, automating systems, writing new policies for tracking expenses in the general ledger, and developing methodologies for allocating expenses by lines of business and by contract). We estimate that MA organizations and Part D sponsors will also incur ongoing annual costs relating to data collection, populating the MLR reporting forms, conducting a final internal review, submitting the reports to the Secretary, conducting internal audits, record retention, preparing and submitting remittances, suspending enrollment (where appropriate), modifying marketing, and/or terminating contracts (where appropriate).

We anticipate that the level of effort relating to these activities will vary depending on the scope of an MA organization or Part D sponsor's operations. The complexity of each MA organization or Part D sponsor's estimated reporting burden is likely to be affected by a variety of factors, including the number of contracts it offers, enrollment size, the degree to which it currently captures relevant data, whether it is a subsidiary of a larger carrier, and whether it currently offers coverage in the commercial market (and is therefore subject to the commercial MLR requirements).

b. Costs Related to MLR Reporting

For each contract year, MA organizations or Part D sponsors must submit a report to the Secretary that complies with the requirements of this proposed rule and in a time and manner that the Secretary determines. For purposes of these impact estimates, we assume that this report would include data relating to both the amounts expended on reimbursement for clinical services and prescription drugs, activities that improve quality and other non-clinical costs, as well as information relating to remittance payments.

The estimated total number of MLR data reports that MA organizations and Part D sponsors will be required to submit to the Secretary under the provisions of this proposed rule depends on the number of contracts held. We anticipate one report per contract. Our analysis here is based on 553 MA contracts and 63 Part D stand-alone contracts, for a total of 616 reports. The 616 contracts are comprised of 605 contracts subject to the remittance requirement plus 11 non-credible contracts that are subject to reporting requirements. We estimated the average cost per hour to be $94.88. This figure was derived by using the May 2011 mean hourly wage of $60.41 for computer and information systems managers from the Department of Labor's Bureau of Labor Statistics. This rate was increased by 48 percent to account for fringe benefits and overhead (36 percent for fringe benefits and 12 percent for overhead). This figure was then converted to 2014 dollars using an average annual growth rated derived from the changes to the Consumer Price Index. This is an upper-bound estimate that assumes all MA organizations and Part D sponsors would be submitting a separate MLR report for each contract. Table 6 shows our estimates that MA organizations and Part D sponsors will incur one-time costs in 2014 and ongoing costs thereafter, relating to the MLR reporting requirements in this proposed rule of approximately $16,000 per contract on average in 2014.

TABLE 6—ESTIMATED ADMINISTRATIVE COSTS RELATED TO MEDICAL LOSS RATIO (MLR) REPORTING REQUIREMENTS

Type of administrative cost	Total number of contracts	Total number of reports	Estimated total hours	Estimated average cost per hour	Estimated total cost	Estimated average cost per report
One-Time Costs	616	616	90,000	$94.88	$9,600,000	$16,000
Ongoing Costs	616	616	26,000	94.88	2,800,000	5,000

Notes: Total number of reports represents the estimated total number of MLR reports that will be submitted to the Secretary. The source data has been modified to reflect estimated costs for MA organizations and Part D sponsors. Values may not be exact due to rounding. Estimates reflect 2011 wage data from the U.S. Department of Labor, Bureau of Labor Statistics.

c. Costs Related to MLR Record Retention Requirements

Consistent with the assumptions discussed earlier, MLR record retention costs are assumed to be relatively negligible, since MA organizations and Part D sponsors already retain similar data for general MA and Prescription Drug audits and per the established requirements in § 422.504(f)(2) and § 423.505(f)(2). Therefore, to arrive at an estimate for MA organizations and Part D sponsors, we adjusted downward the 3.5 minute-per-report estimate that appears in the RIA for the commercial MLR rule. Table 7 shows that we estimate that MA organizations and Part D sponsors would incur annual ongoing costs relating to the MLR reporting requirements in this proposed rule of approximately $4.00 per report on average. We estimated the average cost per hour to be $94.88. This figure was derived by using the May 2011 mean hourly wage of $60.41 for computer and information systems managers from the Department of Labor's Bureau of Labor Statistics. This rate was increased by 48 percent to account for fringe benefits and overhead (36 percent for fringe benefits and 12 percent for overhead). This figure was then converted to 2014 dollars using an average annual growth rated derived from the changes to the Consumer Price Index.

TABLE 7—MLR RECORD RETENTION REQUIREMENTS—ESTIMATED ONGOING ADMINISTRATIVE COSTS

Description	Total number of contracts	Total number of reports	Estimated total hours	Estimated average cost per hour	Estimated total cost	Estimated average cost per report
Ongoing Costs	616	616	28	$94.88	$2,600	$4

Notes: Total number of reports represents the estimated total number of MLR reports that will be submitted to the Secretary.
The source data has been modified to reflect estimated costs for MA organization and Part D sponsors. Values may not be exact due to rounding. Estimates reflect 2011 wage data from the U.S. Department of Labor, Bureau of Labor Statistics.

d. Costs Related to MLR Remittance Payments

Consistent with the assumptions discussed earlier, costs around submitting remittances to the Secretary are expected to be relatively negligible, in particular because we propose to implement payment of remittances using a standard payment adjustment procedure in our payment system, which is a routine systems interface for the industry.

E. Alternatives Considered

Under the Executive Order, we are required to consider alternatives to issuing regulations and alternative regulatory approaches. We consider a variety of regulatory alternatives to the policies proposed thus far, and solicit comments on these alternatives.

1. Credibility Adjustment

One alternative to the credibility adjustment in this proposed rule would be to not make any adjustment for credibility, and to require smaller plans to make remittance payments on the same terms as larger plans. If we do not adopt a credibility adjustment, the estimated remittance in 2014 would be approximately $915 million for MA–PD and Part D stand-alone contracts, or approximately $57 million larger, as shown in Table 5. As described elsewhere in this preamble, we believe that the credibility adjustment as proposed would best balance the goals of providing value to beneficiaries and assuring that contracts with relatively low enrollment would be able to function effectively.

2. Aggregation of MLR to the Contract Level

We considered two alternatives to aggregating MLRs to the contract level. Determining MLRs at the level of plan benefit package would increase the burden on MA organizations and Part D sponsors and the size of many plan benefit packages is too small for an MLR to reasonably represent the MA organization's or Part D sponsor's approach to resource allocation. We also considered calculating MLRs at the parent organization level, but we believe that this high level of aggregation would obscure local variation in resource allocation that would be important to enrollees. As described elsewhere in this proposed rule, we believe that the contract-level of aggregation is closest to the commercial MLR regulations of state-level aggregation and best promotes program stability.

3. Quality Improving Activities

After considering the commercial MLR regulations' approach to defining quality improving activities, we decided to propose aligning our definition of quality improving activities with the commercial MLR rule's approach. As discussed elsewhere in this proposed rule, potential alternatives would be to adopt narrower or broader definitions of quality improving activities. These distinctions could be made based on the criteria for selecting quality improving activities and/or the specific types of activities included in the definition.

This proposed rule defines quality-improving activities as being grounded in evidence-based medicine, designed to improve the quality of care received by an enrollee, and capable of being objectively measured and producing verifiable results and achievements. A narrower definition might include only evidence-based quality improving initiatives, while excluding activities that have not been demonstrated to improve quality. Similarly, a narrower definition would not allow for inclusion of future innovations before data are available demonstrating their effectiveness.

Conversely, a broader definition might allow additional types of administrative expenses to be counted as activities that improve quality, such as network fees associated with third party provider networks or costs associated with converting International Classification of Disease (ICD) code sets from ICD–9 to ICD–10 that are in excess of 0.3 percent of a MA organization or Part D sponsor's total revenue. As discussed elsewhere in this proposed rule, while we agree that certain administrative expenses should not be counted as expenditures on quality improving activities, some traditional administrative activities could qualify as expenditures on quality improving activities if they meet the criteria set forth in this proposed rule.

We do not have data available to estimate the effects of alternative definitions of quality improving activities on MLRs, although it should be clear that if a broader definition of quality improving activities were adopted, then estimated remittances would be smaller, and if a narrower definition were adopted, estimated remittances would be larger.

F. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 et seq.) (RFA) requires

agencies that issue a regulation to analyze options for regulatory relief of small businesses if a rule has a significant impact on a substantial number of small entities. The Act generally defines a "small entity" as (1) A proprietary firm meeting the size standards of the Small Business Administration (SBA), (2) a not-for-profit organization that is not dominant in its field, or (3) a small government jurisdiction with a population of less than 50,000. (States and individuals are not included in the definition of "small entity.") HHS uses as its measure of significant economic impact on a substantial number of small entities a change in revenues of more than 3 to 5 percent.

As discussed earlier, in general, health insurance issuers offering Part C and D coverage, including MA organizations, Part D sponsors, 1876 Cost HMO/CMPs, and section 1833 HCPPs (Health Care Prepayment Plans), would be affected by the proposed rule. We believe that health insurers would be classified under the North American Industry Classification System (NAICS) Code 524114 (Direct Health and Medical Insurance Carriers). According to SBA size standards, entities with average annual receipts of $7 million or less would be considered small entities for this NAICS code. Health issuers could possibly also be classified in NAICS Code 621491 (HMO Medical Centers) and, if this is the case, the SBA size standard would be $10 million or less.

As discussed in the Web Portal interim final rule (75 FR 24481), HHS examined the health insurance industry in depth in the RIA we prepared for the proposed rule on establishment of the Medicare Advantage program (69 FR 46866, August 3, 2004). In that analysis we determined that there were few, if any, insurance firms underwriting comprehensive health insurance policies (in contrast, for example, to travel insurance policies or dental discount policies) that fell below the relevant size thresholds for "small" business established by the SBA.

Similarly, MA organizations and Part D sponsors, the entities that will largely be affected by the provisions of this proposed rule, are not generally considered small business entities. They must follow minimum enrollment requirements (5,000 in urban areas and 1,500 in nonurban areas) and because of the revenue from such enrollments, these entities are generally above the revenue threshold required for analysis under the RFA. While a very small rural plan could fall below the threshold, we do not believe that there are more than a handful of such plans. Additionally, a fraction of MA organizations and sponsors could be considered small businesses because of their non-profit status and lack of dominance in their field. As its measure of significant economic impact on a substantial number of small entities, HHS uses a change in revenue of more than 3 to 5 percent. We do not believe that this threshold will be reached by the requirements in this proposed rule because very few small entities are subject to the provisions in this proposed rule, the estimated administrative costs associated with reporting MLR data to the Secretary are very low (see section V.D.6. of this proposed rule), and the credibility adjustment addresses the special circumstances of contracts with lower enrollment. For these reasons, we believe this proposed rule would have minimal impact on small entities. As a result, the Secretary has determined that this proposed rule would not have a significant impact on a substantial number of small entities. We welcome comment on the analysis described in this section and on HHS' conclusion.

G. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires that agencies assess anticipated costs and benefits before issuing any rule that includes a federal mandate that could result in expenditure in any 1 year by state, local or tribal governments, in the aggregate, or by the private sector, of $100 million in 1995 dollars, updated annually for inflation. In 2013, that threshold level is approximately $141 million.

UMRA does not address the total cost of a rule. Rather, it focuses on certain categories of cost, mainly those "federal mandate" costs resulting from: (1) Imposing enforceable duties on state, local, or tribal governments, or on the private sector; or (2) increasing the stringency of conditions in, or decreasing the funding of, state, local, or tribal governments under entitlement programs.

Consistent with policy embodied in UMRA, this proposed regulation has been designed to a low-burden alternative for state, local and tribal governments, and the private sector while achieving the objectives of the Affordable Care Act.

This proposed rule contains reporting requirements and data retention requirements for MA organizations and Part D sponsors. We estimate that administrative costs related to MLR reporting requirements would be $9.6 million in total one-time costs in 2014 and $2.8 million per year in ongoing costs. We estimate that ongoing costs per year for record retention requirements will be $2,600. This proposed rule also contains requirements related to remittance payments paid by MA organizations and Part D sponsors that do not meet the minimum MLR standards. We estimate approximately $858 million in remittance payments to the Secretary in 2014, contingent upon certain changes in bidding and payment behavior. It includes no mandates on state, local, or tribal governments.

H. Federalism

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on state and local governments, preempts state law, or otherwise has federalism implications.

States generally regulate health insurance coverage. However in 2003, section 232(a) of the MMA amended section 1856 for MA plans by eliminating the general and specific preemption distinctions from section 1856 and expanded federal preemption of state standards to broadly apply preemption to all state law or regulation (other than state licensing laws or state laws relating to plan solvency). In our view, while this proposed rule does not impose substantial direct requirement costs on state and local governments, this proposed rule has minimal Federalism implications due to direct effects on the distribution of power and responsibilities among the state and federal governments relating to determining and enforcing minimum MLR standards, reporting and remittance requirements relating to coverage that MA organizations and Part D sponsors offer.

We anticipate that the federalism implications (if any) are substantially mitigated because the Affordable Care Act does not provide any role for the states in terms of receiving or analyzing the data or enforcing the requirements of section 1857(e)(4) of the Act. The enforcement provisions of this proposed rule state that the Secretary has enforcement authority and does not require the states to do anything.

As discussed earlier, in developing this proposed rule for the Medicare Advantage and the Medicare Prescription Drug Benefit programs, HHS used the commercial MLR regulations as a reference point for developing the Medicare MLR requirements. In compliance with the requirement of Executive Order 13132 that agencies examine closely any

policies that may have federalism implications or limit the policymaking discretion of the states. HHS made efforts to consult with and work cooperatively with states during the development of the commercial MLR regulation, including participating in conference calls with and attending conferences of the National Association of Insurance Commissioners, and consulting with state insurance officials on an individual basis. Throughout the process of developing the commercial MLR regulations, to the extent feasible within the specific preemption provisions of HIPAA as it applies to the Affordable Care Act, the Department attempted to balance the states' interests in regulating health insurance issuers, and Congress' intent to provide uniform minimum protections to consumers in every state.

By doing so, it is the Department's view that we have complied with the requirements of Executive Order 13132. Pursuant to the requirements set forth in section 8(a) of Executive Order 13132, and by the signatures affixed to this regulation, the Department certifies that we have complied with the requirements of Executive Order 13132 for the attached proposed rule in a meaningful and timely manner.

I. Congressional Review Act

This proposed rule is subject to the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 et seq.) and has been transmitted to the Congress and the Comptroller General for review.

In accordance with the provisions of Executive Order 12866, this proposed rule was reviewed by the Office of Management and Budget.

J. Accounting Statement

As required by OMB Circular A–4 (available at *http://www.whitehouse.gov/omb/circulars_a004_a-4*), we have prepared an accounting statement in Table 8 showing the classification of the transfers and costs associated with the provisions of this proposed rule for CY 2014.

TABLE 8—ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED EXPENDITURES FOR THE MA–PD AND PART D STAND-ALONE MLR REMITTANCE PAYMENTS FOR CY 2014

[In millions of 2013 dollars]

Category	Transfers		
Annualized monetized transfers	Discount Rate		Period Covered
	7%	3%	CY 2014
Primary Estimate	$802	$833	
From/To	From MA Organizations and Part D Sponsors/To Federal Government		
Category	**Costs**		
Annualized Costs to MA Organizations and Part D Sponsors	Discount Rate		Period Covered
	7%	3%	CY 2014
Primary Estimate	$9.0	$9.3	

List of Subjects

42 CFR Part 422

Administrative practice and procedure, Health facilities, Health maintenance organizations (HMO), Medicare, Penalties, Privacy, Reporting and recordkeeping requirements.

42 CFR Part 423

Administrative practice and procedure, Emergency medical services, Health facilities, Health maintenance organizations (HMO), Health professionals, Medicare, Penalties, Privacy, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services proposes to amend 42 CFR parts 422 and 423 as set forth below:

PART 422 MEDICARE ADVANTAGE PROGRAM

■ 1. The authority citation for part 422 continues to read as follows:

Authority: Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh).

■ 2. Section 422.510 is amended by adding paragraphs (a)(15) and (16) to read as follows:

§ 422.510 Termination of contract by CMS.

(a) * * *

(15) Has failed to report MLR data in a timely and accurate manner in accordance with § 422.2460.

(16) Has failed to have a minimum MLR per § 422.2410(d) for 5 consecutive contract years.

* * * * *

Subpart U—[Reserved]

Subpart W—[Reserved]

■ 3. Add reserved subparts U and W.

■ 4. Add subpart X to read as follows:

Subpart X—Requirement for a Minimum Medical Loss Ratio

Sec.

§ 422.2400 Basis and scope.

This subpart is based on section 1857(e)(4) of the Act, and sets forth

medical loss ratio requirements for Medicare Advantage organizations, and financial penalties and sanctions against MA organizations when minimum medical loss ratios are not achieved by MA organizations.

§ 422.2401 Definitions.

Non-claims costs means those expenses for administrative services that are not—

(1) Incurred claims (as provided in § 422.2420(b)(2) through (4));

(2) Expenditures on quality improving activities (as provided in § 422.2430);

(3) Licensing and regulatory fees (as provided in § 422.2420(c)(2)(ii));

(4) State and federal taxes and assessments (as provided in § 422.2420(c)(2)(i) and (iii)).

§ 422.2410 General requirements.

(a) For contracts beginning in 2014 or later, an MA organization (defined at § 422.2) is required to report an MLR for each contract under this part for each contract year.

(b) *MLR requirement.* If CMS determines for a contract year that an MA organization has an MLR for a contract that is less than 0.85, the MA organization has not met the MLR requirement and must remit to CMS an amount equal to the product of the following:

(1) The total revenue of the MA contract for the contract year.

(2) The difference between 0.85 and the MLR for the contract year.

(c) If CMS determines that an MA organization has an MLR for a contract that is less than 0.85 for 3 or more consecutive contract years, CMS does not permit the enrollment of new enrollees under the contract for coverage during the second succeeding contract year.

(d) If CMS determines that an MA organization has an MLR for a contract that is less than 0.85 for 5 consecutive contract years, CMS terminates the contract under the authority at § 422.510(a)(12) and (15) effective as of the second succeeding contract year.

§ 422.2420 Calculation of the medical loss ratio.

(a) *Determination of MLR.* (1) The MLR for each contract under this part is the ratio of the numerator (as defined in paragraph (b) of this section) to the denominator (as defined in paragraph (c) of this section). An MLR may be increased by a credibility adjustment according to the rules at § 422.2440.

(2) The MLR for an MA contract not offering Medicare prescription drug benefits must only reflect costs and revenues related to the benefits defined at § 422.100(c). The MLR for an MA contract that includes MA–PD plans (defined at § 422.2) must also reflect costs and revenues for benefits described at § 423.104(d) through (f).

(b) Determining the *MLR numerator.* (1) For a contract year, the numerator of the MLR for an MA contract must equal the sum of paragraphs (b)(1)(i) through (iii) of this section and be in accordance with paragraph (b)(1)(iv) of this section.

(i) Incurred claims for all enrollees, as defined in paragraphs (b)(2) through (4) of this section.

(ii) The amount of the reduction, if any, in the Part B premium for all MA plan enrollees under the contract for the contract year.

(iii) The expenditures under the contract for activities that improve health care quality, as defined in § 422.2430.

(iv) Incurred claims under this part for policies issued by one MA organization and later assumed by another MA organization under an assumptive or 100 percent indemnity reinsurance must be reported by the assuming organizations for the entire MLR reporting year during which the policies were assumed and no incurred claims under this part for that contract year must be reported by the ceding MA organization.

(2) *Incurred claims for clinical services and prescription drug costs.* Incurred claims must include the following:

(i) Direct claims that the MA organization pays to providers (including under capitation contracts with physicians) for covered services described at paragraph (a)(2) of this section provided to all enrollees under the contract.

(ii) For an MA contract that includes MA–PD plans (described in paragraph (a)(2) of this section), drug costs provided to all enrollees under the contract, as defined at § 423.2420(b)(2)(i).

(iii) Unpaid claims reserves for the current contract year, including claims reported in the process of adjustment.

(iv) Percentage withholds from payments made to contracted providers.

(v) Incurred but not reported claims based on past experience, and modified to reflect current conditions such as changes in exposure, claim frequency or severity.

(vi) Changes in other claims-related reserves.

(vii) Claims that are recoverable for anticipated coordination of benefits.

(viii) Claims payments recoveries received as a result of subrogation.

(ix) Claims payments recoveries as a result of fraud reduction efforts not to exceed the amount of fraud reduction expenses.

(x) Reserves for contingent benefits and the medical claim portion of lawsuits.

(xi) The amount of incentive and bonus payments made to providers.

(3) Adjustments that must be deducted from incurred claims include the following:

(i) Prescription drug rebates and other direct or indirect remuneration as defined in § 423.308 received by the MA organization under the contract.

(ii) Overpayment recoveries received from providers.

(4) *Exclusions from incurred claims.* The following amounts must not be included in incurred claims:

(i) Non-claims costs, as defined in § 422.2401, which include the following:

(A) Amounts paid to third party vendors for secondary network savings.

(B) Amounts paid to third party vendors for all of the following:

(*1*) Network development.

(*2*) Administrative fees.

(*3*) Claims processing.

(*4*) Utilization management.

(C) Amounts paid, including amounts paid to a provider, for professional or administrative services that do not represent compensation or reimbursement for covered services provided to an enrollee, such as the following:

(*1*) Medical record copying costs.

(*2*) Attorneys' fees.

(*3*) Subrogation vendor fees.

(*4*) Bona fide service fees.

(*5*) Compensation to any of the following:

(*i*) Paraprofessionals.

(*ii*) Janitors.

(*iii*) Quality assurance analysts.

(*iv*) Administrative supervisors.

(*v*) Secretaries to medical personnel.

(*vi*) Medical record clerks.

(ii) Amounts paid to CMS as a remittance under § 422.2410(b).

(c) *Determining the MLR denominator.* For a contract year, the denominator of the MLR for an MA contract must equal the total revenue under the contract, as described in paragraph (c)(1) of this section, net of deductions described in paragraph (c)(2) of this section, taking into account the exclusions described in paragraph (c)(3) of this section, and be in accordance with paragraph (c)(4) of this section.

(1) *Total revenue* must be reported on a direct basis and means CMS' payments to the MA organization for all enrollees under a contract, including the following:

(i) Payments under § 422.304(a) through (3) and (c).

(ii) The amount applied to reduce the Part B premium, as provided under § 422.266(b)(3).

(iii) Payments under § 422.304(b)(1), as reconciled per § 423.329(c)(2)(ii).

(iv) All premiums paid by or on behalf of enrollees to the MA organization as a condition of receiving coverage under an MA plan, including CMS' payments for low income premium subsidies under § 422.304(b)(2).

(v) All unpaid premium amounts that an MA organization could have collected from enrollees in the MA plan(s) under the contract.

(vi) All changes in unearned premium reserves.

(vii) Payments under § 423.315(e).

(2) The following amounts must be deducted from total revenue in calculating the MLR:

(i) *Licensing and regulatory fees.* (A) Statutory assessments to defray operating expenses of any State or Federal department, such as the "user fee" described in section 1857(e)(2) of the Act.

(B) Examination fees in lieu of premium taxes as specified by state law.

(ii) *Federal taxes and assessments.* All federal taxes and assessments allocated to health insurance coverage.

(iii) *State taxes and assessments.* State taxes and assessments such as the following:

(A) Any industry-wide (or subset) assessments (other than surcharges on specific claims) paid to the state directly.

(B) Guaranty fund assessments.

(C) Assessments of state industrial boards or other boards for operating expenses or for benefits to sick employed persons in connection with disability benefit laws or similar taxes levied by States.

(D) State income, excise, and business taxes other than premium taxes.

(iv) *Community benefit expenditures* are payments made by a federal income tax-exempt MA organization for community benefit expenditures as defined in paragraph (c)(2)(iv)(A) of this section, limited to the amount defined in paragraph (c)(2)(iv)(B) of this section, and allocated to a contract as required under paragraph (d)(1) of this section.

(A) Community benefit expenditures means expenditures for activities or programs that seek to achieve the objectives of improving access to health services, enhancing public health and relief of government burden.

(B) Such payment may be deducted up to the limit of either 3 percent of total revenue under this part or the highest premium tax rate in the State for which the Part D sponsor is licensed, multiplied by the Part D sponsor's earned premium for the contract.

(3) The following *amounts must not be included in total revenue:*

(i) The amount of unpaid premiums for which the MA organization can demonstrate to CMS that it made a reasonable effort to collect, as required under § 422.74(d)(i).

(ii) The following EHR payments and adjustments:

(A) EHR incentive payments for meaningful use of certified electronic health records by qualifying MAOs, MA EPs and MA-affiliated eligible hospitals that are administered under Part 495 subpart C.

(B) EHR payment adjustments for a failure to meet meaningful use requirements that are administered under Part 495 subpart C.

(iii) Coverage Gap Discount Program payments under § 423.2320.

(4) All incurred claims under this part for policies issued by one MA organization and later assumed by another MA organization under an assumptive or 100 percent indemnity reinsurance must be reported by the assuming organizations for the entire MLR reporting year during which the policies were assumed and no incurred claims under this part for that contract year must be reported by the ceding MA organization.

(d) *Allocation of expenses.* (1) *General requirements.* (i) Each expense must be included under only one type of expense, unless a portion of the expense fits under the definition of or criteria for one type of expense and the remainder fits into a different type of expense, in which case the expense must be pro-rated between types of expenses.

(ii) Expenditures that benefit multiple contracts, or contracts other than those being reported, including but not limited to those that are for or benefit self-funded plans, must be reported on a pro rata share.

(2) *Description of the methods used to allocate expenses.* (i) Allocation to each category must be based on a generally accepted accounting method that is expected to yield the most accurate results. Specific identification of an expense with an activity that is represented by one of the categories in § 422.2420(b) or (c) will generally be the most accurate method.

(ii) Shared expenses, including expenses under the terms of a management contract, must be apportioned pro rata to the contracts incurring the expense.

(iii)(A) Any basis adopted to apportion expenses must be that which is expected to yield the most accurate results and may result from special studies of employee activities, salary ratios, premium ratios or similar analyses.

(B) Expenses that relate solely to the operations of a reporting entity, such as personnel costs associated with the adjusting and paying of claims, must be borne solely by the reporting entity and are not to be apportioned to other entities within a group.

§ 422.2430 Activities that improve health care quality.

(a) *Activity requirements.* Activities conducted by an MA organization to improve quality must fall into one of the categories in paragraph (a)(1) of this section and meet all of the requirements in paragraph (a)(2) of this section.

(1) *Categories of quality improving activities.* The activity must be designed to achieve one or more of the following:

(i) To improve health outcomes through the implementation of activities such as quality reporting, effective case management, care coordination, chronic disease management, and medication and care compliance initiatives, including through the use of the medical homes model as defined for purposes of section 3602 of the Patient Protection and Affordable Care Act, for treatment or services under the plan or coverage.

(ii) To prevent hospital readmissions through a comprehensive program for hospital discharge that includes patient-centered education and counseling, comprehensive discharge planning, and post-discharge reinforcement by an appropriate health care professional.

(iii) To improve patient safety and reduce medical errors through the appropriate use of best clinical practices, evidence-based medicine, and health information technology under the plan or coverage.

(iv) To promote health and wellness.

(v) To enhance the use of health care data to improve quality, transparency, and outcomes and support meaningful use of health information technology. Such activities, such as Health Information Technology (HIT) expenses, are required to accomplish the activities that improve health care quality and that are designed for use by health plans, health care providers, or enrollees for the electronic creation, maintenance, access, or exchange of health information, and are consistent with meaningful use requirements, and which may in whole or in part improve quality of care, or provide the technological infrastructure to enhance current quality improving activities or make new quality improvement initiatives possible.

(2) The activity must be designed for all of the following:

(i) To improve health quality.

(ii) To increase the likelihood of desired health outcomes in ways that are capable of being objectively measured and of producing verifiable results and achievements.

(iii) To be directed toward individual enrollees or incurred for the benefit of specified segments of enrollees or provide health improvements to the population beyond those enrolled in coverage as long as no additional costs are incurred due to the non-enrollees.

(iv) To be grounded in evidence-based medicine, widely accepted best clinical practice, or criteria issued by recognized professional medical associations, accreditation bodies, government agencies or other nationally recognized health care quality organizations.

(b) *Exclusions.* Expenditures and activities that must not be included in quality improving activities include, but are not limited to, the following:

(1) Those that are designed primarily to control or contain costs.

(2) The pro rata share of expenses that are for lines of business or products other than those being reported, including but not limited to, those that are for or benefit self-funded plans.

(3) Those which otherwise meet the definitions for quality improving activities but which were paid for with grant money or other funding separate from premium revenue.

(4) Those activities that can be billed or allocated by a provider for care delivery and that are reimbursed as clinical services.

(5) Establishing or maintaining a claims adjudication system, including costs directly related to upgrades in health information technology that are designed primarily or solely to improve claims payment capabilities or to meet regulatory requirements for processing claims, including ICD–10 implementation costs in excess of 0.3 percent of total revenue under this part, and maintenance of ICD–10 code sets adopted in accordance with to the Health Insurance Portability and Accountability Act (HIPAA), 42 U.S.C. 1320d–2, as amended.

(6) That portion of the activities of health care professional hotlines that does not meet the definition of activities that improve health quality.

(7) All retrospective and concurrent utilization review.

(8) Fraud prevention activities.

(9) The cost of developing and executing provider contracts and fees associated with establishing or managing a provider network, including fees paid to a vendor for the same reason.

(10) Provider credentialing.

(11) Marketing expenses.

(12) Costs associated with calculating and administering individual enrollee or employee incentives.

(13) That portion of prospective utilization review that does not meet the definition of activities that improve health quality.

(14) Any function or activity not expressly permitted by CMS under this part.

§ 422.2440 Credibility adjustment.

(a) An MA organization may add a credibility adjustment to a contract's MLR if the contract's experience is partially credible, as determined by CMS.

(b) An MA organization may not add a credibility adjustment to a contract's MLR if the contract's experience is fully credible, as determined by CMS.

(c) For those contract years for which a contract has non-credible experience for their MLR, sanctions under § 422.2410(b) through (d) will not apply.

(d) CMS defines and publishes definitions of partial credibility, full credibility, and non-credibility and the credibility factors through the notice and comment process of publishing the Advance Notice and Final Rate Announcement.

§ 422.2450 [Reserved].

§ 422.2460 Reporting requirements.

For each contract year, each MA organization must submit a report to CMS, in a timeframe and manner specified by CMS, which includes but is not limited to the data needed by the MA organization to calculate and verify the MLR and remittance amount, if any, for each contract, such as incurred claims, total revenue, expenditures on quality improving activities, non-claims costs, taxes, licensing and regulatory fees, and any remittance owed to CMS under § 422.2410.

§ 422.2470 Remittance to CMS if the applicable MLR requirement is not met.

(a) *General requirement.* For each contract year, an MA organization must provide a remittance to CMS if the contract's MLR does not meet the minimum MLR requirement required by § 422.2410(b) of this subpart.

(b) *Amount of remittance.* For each contract that does not meet the MLR requirement for a contract year, the MA organization must remit to CMS the amount by which the MLR requirement exceeds the contract's actual MLR multiplied by the total revenue of the contract, as provided in § 422.2420(c), for the contract year.

(c) *Timing of remittance.* CMS deducts the remittance from plan payments in a timely manner after the MLR is reported, on a schedule determined by CMS.

(d) *Treatment of remittance.* Payment to CMS must not be included in the numerator or denominator of any year's MLR.

§ 422.2480 MLR review and non-compliance.

To ensure the accuracy of MLR reporting, CMS conducts selected reviews of reports submitted under § 422.2460 to determine that that the MLRs and remittance amounts under § 422.2410(b) and sanctions under § 422.2410(c) and (d), were accurately calculated, reported, and applied.

(a) The reviews include a validation of amounts included in both the numerator and denominator of the MLR calculation reported to CMS.

(b) MA organizations are required to maintain evidence of the amounts reported to CMS and to validate all data necessary to calculate MLRs.

(c)(1) Documents and records must be maintained for 10 years from the date such calculations were reported to CMS with respect to a given MLR reporting year.

(2) MA organizations must require any third party vendor supplying drug or medical cost contracting and claim adjudication services to the MA organization to provide all underlying data associated with MLR reporting to that MA organization in a timely manner, when requested by the MA organization, regardless of current contractual limitations, in order to validate the accuracy of MLR reporting.

(d) Reports submitted under § 422.2460, calculations, or any other MLR submission required by this subpart found to be materially incorrect or fraudulent—

(1) Is noted by CMS;

(2) Appropriate remittance amounts are recouped by CMS; and

(3) Sanctions may be imposed by CMS as provided in § 422.752.

PART 423—VOLUNTARY MEDICARE PRESCRIPTION DRUG BENEFIT

■ 5. The authority for part 423 continues to read as follows:

Authority: Secs. Sections 1102, 1106, 1860D–1 through 1860D–42, and 1871 of the Social Security Act (42 U.S.C. 1302, 1306, 1395w–101 through 1395w–152, and 1395hh).

■ 6. Section 423.509 is amended by adding paragraphs (a)(15) and (16) to read as follows:

§ 423.509 Termination of contract by CMS.

(a) * * *

(15) Has failed to report MLR data in a timely and accurate manner in accordance with § 423.2460.

(16) Has failed to have a minimum MLR per § 423.2410(d) for 5 consecutive contract years.

* * * * *

■ 7. Add subpart X to read as follows:

Subpart X—Requirements for a Minimum Medical Loss Ratio

Sec.

§ 423.2400 Basis and scope.

This subpart is based on section 1857(e)(4) of the Act, and sets forth medical loss ratio requirements for Part D sponsors, and financial penalties and sanctions against Part D sponsors when minimum medical loss ratios are not achieved by Part D sponsors.

§ 423.2401 Definitions.

Non-claims costs means those expenses for administrative services that are not—

(1) Incurred claims (as provided in § 423.2420(b)(2) through (b)(4));

(2) Expenditures on quality improving activities (as provided in § 423.2430);

(3) Licensing and regulatory fees (as provided in § 423.2420(c)(2)(i)); or

(4) State and Federal taxes and assessments (as provided in § 423.2420(c)(2)(ii) and (iii)).

§ 423.2410 General requirements.

(a) For contracts beginning in 2014 or subsequent contract years, a Part D sponsor (defined at § 423.4) is required to report an MLR for each contract under this part for each contract year.

(b) If CMS determines for a contract year that a Part D sponsor has an MLR for a contract that is less than 0.85, the Part D sponsor must remit to CMS an amount equal to the product of the following:

(1) The total revenue of the prescription drug plan for the contract year.

(2) The difference between 0.85 and the MLR for the contract year.

(c) If CMS determines that a Part D sponsor has an MLR for a contract that is less than 0.85 for 3 or more consecutive contract years, CMS does not permit the enrollment of new enrollees under the contract for coverage during the second succeeding contract year.

(d) If CMS determines that a Part D sponsor has an MLR for a contract that is less than 0.85 for 5 consecutive contract years, CMS does terminate the contract under the authority at § 423.509(a)(11) and (14) effective as of the second succeeding contract year.

§ 423.2420 Calculation of medical loss ratio.

(a) *Determination of the MLR.* (1) The MLR for each contract under this part is the ratio of the numerator (as defined in paragraph (b) of this section) to the denominator (as defined in paragraph (c) of this section). An MLR may be increased by a credibility adjustment according to the rules at § 423.2440.

(2) The MLR must reflect costs and revenues for benefits described at § 423.104(d) through (f). The MLR for MA–PD plans (defined at § 422.2) must also reflect costs and revenues for benefits described at § 422.100(c).

(b) *Determining the MLR numerator.* (1) For a contract year, the numerator of the MLR for a Part D prescription drug contract must equal the sum of paragraphs (b)(1)(i) through (iii) of this section and must be in accordance with paragraph (b)(1)(iv) of this section.

(i) Incurred claims for all enrollees, as defined in paragraphs (b)(2) through (4) of this section.

(ii) The amount of the reduction, if any, in the Part B premium for all MA plan enrollees under the contract for the contract year.

(iii) The expenditures under the contract for activities that improve health care quality, as defined in § 423.2430;

(iv) Incurred claims under this part for policies issued by one Part D sponsor and later assumed by another Part D sponsor under an assumptive or 100 percent indemnity reinsurance must be reported by the assuming organizations for the entire MLR reporting year during which the policies were assumed and no incurred claims under this part for that contract year must be reported by the ceding Part D sponsor.

(2) *Incurred claims for prescription drug costs.* Incurred claims must include the following:

(i) Drug costs that are actually paid (as defined in § 423.308) by the Part D sponsor.

(ii) Unpaid claims reserves for the current contract year, including claims reported in the process of adjustment.

(iii) Percentage withholds from payments made to contracted providers.

(iv) Claims incurred but not reported based on past experience, and modified to reflect current conditions such as changes in exposure, claim frequency or severity.

(v) Changes in other claims-related reserves.

(vi) Claims that are recoverable for anticipated coordination of benefits.

(vii) Claims payments recoveries received as a result of subrogation.

(viii) Claims payments recoveries received as a result of fraud reduction efforts not to exceed the amount of fraud reduction expenses.

(ix) Reserves for contingent benefits and the Part D claim portion of lawsuits.

(3) Adjustments that must be deducted from incurred claims include the following:

(i) Prescription drug rebates and other direct or indirect remuneration as defined in § 423.308 received by the Part D sponsor under the contract.

(ii) Overpayment recoveries received from providers.

(4) *Exclusions from incurred claims.* The following amounts must not be included in incurred claims:

(i) Non-claims costs, as defined in § 423.2401, which include the following:

(A) Amounts paid to third party vendors for secondary network savings.

(B) Amounts paid to third party vendors for any of the following:

(*1*) Network development.

(*2*) Administrative fees.

(*3*) Claims processing.

(*4*) Utilization management.

(C) Amounts paid, including amounts paid to a pharmacy, for professional or administrative services that do not represent compensation or reimbursement for covered services provided to an enrollee, such as the following:

(*1*) Medical record copying costs.

(*2*) Attorneys' fees.

(*3*) Subrogation vendor fees.

(*4*) Bona fide service fees.

(*5*) Compensation to any of the following:

(*i*) Paraprofessionals.

(*ii*) Janitors.

(*iii*) Quality assurance analysts.

(*iv*) Administrative supervisors.

(*v*) Secretaries to medical personnel.

(*vi*) Medical record clerks.

(ii) Amounts paid to CMS as a remittance under § 423.2410(b).

(c) *Determining the MLR denominator.* For a contract year, the denominator of the MLR for a Part D prescription drug contract must be in accordance with (c)(4) and equal the total revenue under the contract, as described in paragraph (c)(1) of this section, net of deductions described in

paragraph (c)(2) of this section, taking into account the exclusions described in paragraph and (c)(3) of this section, and be in accordance with (c)(4) of this section.

(1) *Total revenue* must be reported on a direct basis and means CMS' payments to the Part D sponsor for all enrollees under a contract, including the following:

(i) Payments under § 423.329(a)(1) and (2).

(ii) Payment adjustments resulting from reconciliation per § 423.329(c)(2)(ii).

(iii) All premiums paid by or on behalf of enrollees to the Part D sponsor as a condition of receiving coverage under a Part D plan, including CMS' payments for low income premium subsidies under § 422.304(b)(2).

(iv) All unpaid premium amounts that a Part D sponsor could have collected from enrollees in the Part D plan(s) under the contract.

(v) All changes in unearned premium reserves.

(vi) Payments under § 423.315(e).

(2) The following amounts must be deducted from total revenue in calculating the MLR:

(i) *Licensing and regulatory fees.* Statutory assessments to defray operating expenses of any state or federal department, such as the "user fee" described in section 1857(e)(2) of the Act, and examination fees in lieu of premium taxes as specified by state law.

(ii) *Federal taxes and assessments.* All federal taxes and assessments allocated to health insurance coverage.

(iii) *State taxes and assessments.* State taxes and assessments such as the following:

(A) Any industry-wide (or subset) assessments (other than surcharges on specific claims) paid to the state directly.

(B) Guaranty fund assessments.

(C) Assessments of state industrial boards or other boards for operating expenses or for benefits to sick employed persons in connection with disability benefit laws or similar taxes levied by States.

(D) State income, excise, and business taxes other than premium taxes.

(iv) *Community benefit expenditures.* Community benefit expenditures are payments made by a federal income tax-exempt Part D sponsor for community benefit expenditures as defined in paragraph (c)(2)(iii)(A) of this section, limited to the amount defined in paragraph (c)(2)(iii)(B) of this section, and allocated to a contract as required under paragraph (d)(1) of this section.

(A) Community benefit expenditures means expenditures for activities or programs that seek to achieve the objectives of improving access to health services, enhancing public health and relief of government burden.

(B) Such payment may be deducted up to the limit of either 3 percent of total revenue under this part or the highest premium tax rate in the state for which the Part D sponsor is licensed, multiplied by the Part D sponsor's earned premium for the contract.

(3) The following amounts must not be included in total revenue:

(i) The amount of unpaid premiums for which the Part D sponsor can demonstrate to CMS that it made a reasonable effort to collect, as required under § 423.44(d)(1)(i).

(ii) Coverage Gap Discount Program payments under § 423.2320.

(4) All incurred claims under this part for policies issued by one Part D sponsor and later assumed by another Part D sponsor under an assumptive or 100 percent indemnity reinsurance must be reported by the assuming organizations for the entire MLR reporting year during which the policies were assumed and no incurred claims under this part for that contract year must be reported by the ceding Part D sponsor.

(d) *Allocation of expenses.* (1) *General requirements.* (i) Each expense must be included under only one type of expense, unless a portion of the expense fits under the definition of or criteria for one type of expense and the remainder fits into a different type of expense, in which case the expense must be pro-rated between types of expenses.

(ii) Expenditures that benefit multiple contracts, or contracts other than those being reported, including but not limited to those that are for or benefit self-funded plans, must be reported on a pro rata share.

(2) *Description of the methods used to allocate expenses.* (i) Allocation to each category must be based on a generally accepted accounting method that is expected to yield the most accurate results.

(ii) Specific identification of an expense with an activity that is represented by one of the categories in § 423.2420(b) or (c) will generally be the most accurate method.

(ii) Shared expenses, including expenses under the terms of a management contract, must be apportioned pro rata to the entities incurring the expense.

(iii)(A) Any basis adopted to apportion expenses must be that which is expected to yield the most accurate results and may result from special studies of employee activities, salary ratios, premium ratios or similar analyses.

(B) Expenses that relate solely to the operations of a reporting entity, such as personnel costs associated with the adjusting and paying of claims, must be borne solely by the reporting entity and are not to be apportioned to other entities within a group.

§ 423.2430 Activities that improve health care quality.

(a) *Activity requirements.* Activities conducted by a Part D sponsor to improve quality fall into one of the categories in paragraph (a)(1) of this section and meet all of the requirements in paragraph (a)(2) of this section.

(1) *Categories of quality improving activities.* The activity must be designed to achieve one or more of the following:

(i) To improve health outcomes through the implementation of activities such as quality reporting, effective case management, care coordination, chronic disease management, and medication and care compliance initiatives, including through the use of the medical homes model as defined for purposes of section 3602 of the Patient Protection and Affordable Care Act, for treatment or services under the plan or coverage.

(ii) To prevent hospital readmissions through a comprehensive program for hospital discharge that includes patient-centered education and counseling, comprehensive discharge planning, and post-discharge reinforcement by an appropriate health care professional.

(iii) To improve patient safety and reduce medical errors through the appropriate use of best clinical practices, evidence-based medicine, and health information technology under the plan or coverage.

(iv) To promote health and wellness.

(v) To enhance the use of health care data to improve quality, transparency, and outcomes and support meaningful use of health information technology. Activities, such as Health Information Technology (HIT) expenses, are required to accomplish the activities that improve health care quality and that are designed for use by health plans, health care providers, or enrollees for the electronic creation, maintenance, access, or exchange of health information, and are consistent with meaningful use requirements, and which may in whole or in part improve quality of care, or provide the technological infrastructure to enhance current quality improving activities or make new quality improvement initiatives possible.

(2) The activity must be designed for all of the following:

(i) To improve health quality.

(ii) To increase the likelihood of desired health outcomes in ways that are capable of being objectively measured and of producing verifiable results and achievements.

(iii) To be directed toward individual enrollees or incurred for the benefit of specified segments of enrollees or provide health improvements to the population beyond those enrolled in coverage as long as no additional costs are incurred due to the non-enrollees.

(iv) To be grounded in evidence-based medicine, widely accepted best clinical practice, or criteria issued by recognized professional medical associations, accreditation bodies, government agencies or other nationally recognized health care quality organizations.

(b) *Exclusions.* Expenditures and activities that must not be included in quality improving activities include, but are not limited to, the following:

(1) Those that are designed primarily to control or contain costs.

(2) The pro rata share of expenses that are for lines of business or products other than those being reported, including but not limited to, those that are for or benefit self-funded plans.

(3) Those which otherwise meet the definitions for quality improving activities but which were paid for with grant money or other funding separate from premium revenue.

(4) Those activities that can be billed or allocated by a pharmacy for care delivery and that are reimbursed as clinical services.

(5) Establishing or maintaining a claims adjudication system, including costs directly related to upgrades in health information technology that are designed primarily or solely to improve claims payment capabilities or to meet regulatory requirements for processing claims, including ICD–10 implementation costs in excess of 0.3 percent of total revenue under this part, and maintenance of ICD–10 code sets adopted in accordance with the Health Insurance Portability and Accountability Act (HIPAA), 42 U.S.C. 1320d–2, as amended.

(6) That portion of the activities of health care professional hotlines that does not meet the definition of activities that improve health quality.

(7) All retrospective and concurrent utilization review.

(8) Fraud prevention activities.

(9) The cost of developing and executing pharmacy contracts and fees associated with establishing or managing a pharmacy network, including fees paid to a vendor for the same reason.

(10) Pharmacy network credentialing.

(11) Marketing expenses.

(12) Costs associated with calculating and administering individual enrollee or employee incentives.

(13) That portion of prospective utilization review that does not meet the definition of activities that improve health quality.

(14) Any function or activity not expressly permitted by CMS under this part.

§ 423.2440 Credibility adjustment.

(a) A Part D sponsor may add a credibility adjustment to a contract's MLR if the contract's experience is partially credible, as determined by CMS.

(b) A Part D sponsor may not add a credibility adjustment to a contract's MLR if the contract's experience is fully credible, as determined by CMS.

(c) For those contract years for which a contract has non-credible experience for their MLR, sanctions under § 423.2410(b) through (d) will not apply.

(d) CMS defines and publishes definitions of partial credibility, full credibility, and non-credibility and the credibility factors through the notice and comment process of publishing the Advance Notice and Final Rate Announcement.

§ 423.2450 [Reserved].

§ 423.2460 Reporting requirements.

(a) For each contract year, each Part D sponsor must submit a report to CMS, in a timeframe and manner specified by CMS, which includes but is not limited to the data needed by the Part D sponsor to calculate and verify the MLR and remittance amount, if any, for each contract, such as incurred claims, total revenue, costs for quality improving activities, non-claims costs, taxes, licensing and regulatory fees, and any remittance owed to CMS under § 423.2410.

(b) Total revenue reported as part of the MLR report must be net of all projected reconciliations.

(c) The MLR will be reported once, and will not be reopened as a result of any payment reconciliation processes.

§ 423.2470 Remittance to CMS if the applicable MLR requirement is not met.

(a) *General requirement.* For each contract year, a Part D sponsor must provide a remittance to CMS if the contract's MLR does not meet the minimum percentage required by § 423.2410(b).

(b) *Amount of remittance.* For each contract that does not meet MLR requirement for a contract year, the Part D sponsor must remit to CMS the amount by which the MLR requirement exceeds the contract's actual MLR multiplied by the total revenue of the contract, as provided in § 423.2420(c), for the contract year.

(c) *Timing of remittance.* CMS will deduct the remittance from plan payments in a timely manner after the MLR is reported, on a schedule determined by CMS.

(d) *Treatment of remittance.* Payment to CMS must not be included in the numerator or denominator of any year's MLR.

§ 423.2480 MLR review and non-compliance.

To ensure the accuracy of MLR reporting, CMS conducts selected reviews of reports submitted under § 423.2460 to determine that the MLRs and remittance amounts under § 423.2410(b) and sanctions under § 423.2410(c) and (d), were accurately calculated, reported, and applied.

(a) The reviews will include a validation of amounts included in both the numerator and denominator of the MLR calculation reported to CMS.

(b) Part D sponsors are required to maintain evidence of the amounts reported to CMS and to validate all data necessary to calculate MLRs.

(c)(1) Documents and records must be maintained for 10 years from the date such calculations were reported to CMS with respect to a given contract year.

(2) Part D sponsors must require any third party vendor supplying drug cost contracting and claim adjudication services to the Part D sponsors to provide all underlying data associated with MLR reporting to that Part D sponsor in a timely manner, when requested by the Part D sponsor, regardless of current contractual limitations, in order to validate the accuracy of MLR reporting.

(d) Reports submitted under § 423.2460, calculations, or any other MLR submission required by this subpart found to be materially incorrect or fraudulent—

(1) Are noted by CMS;

(2) Appropriate remittance amounts are recouped by CMS; and

(3) Sanctions may be imposed by CMS as provided in § 422.752.

(Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program)

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: December 28, 2012.

Marilyn Tavenner,

Acting Administrator, Centers for Medicare & Medicaid Services.

Approved: February 14, 2013.

Kathleen Sebelius,

Secretary, Department of Health and Human Services.

[FR Doc. 2013–03921 Filed 2–15–13; 4:15 pm]

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Part III

Environmental Protection Agency

40 CFR Part 52
State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–HQ–OAR–2012–0322; FRL–9782–2]

RIN 2060–AR68

State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA is proposing to take action on a petition for rulemaking filed by the Sierra Club with the EPA Administrator on June 30, 2011 (the Petition). The Petition includes interrelated requests concerning the treatment of excess emissions in state rules by sources during periods of startup, shutdown, or malfunction (SSM). The EPA is proposing to grant in part and to deny in part the request in the Petition to rescind its policy interpreting the Clean Air Act (CAA) to allow states to have appropriately drawn state implementation plan (SIP) provisions that provide affirmative defenses to monetary penalties for violations during periods of SSM. The EPA is also proposing either to grant or to deny the Petition with respect to the specific existing SIP provisions related to SSM in each of 39 states identified by the Petitioner as inconsistent with the CAA. Further, for each of those states where the EPA proposes to grant the Petition concerning specific provisions, the EPA also proposes to find that the existing SIP provision is substantially inadequate to meet CAA requirements and thus under CAA authority proposes a "SIP call." For those states for which the EPA proposes a SIP call, the EPA also proposes a schedule for the states to submit a corrective SIP revision. Finally, the EPA is also proposing to deny the request in the Petition that the EPA discontinue reliance on interpretive letters from states to clarify any potential ambiguity in SIP submissions, even in circumstances where the EPA may determine that this approach is appropriate and has adequately documented that approach in a rulemaking action. This action reflects the EPA's current SSM Policy for SIPs.

DATES: *Comments.* Comments must be received on or before March 25, 2013.

Public Hearing. If anyone contacts the EPA requesting a public hearing by March 11, 2013, we will hold a public hearing on March 12, 2013.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2012–0322, by one of the following methods:

- *http://www.regulations.gov:* Follow the online instructions for submitting comments.
- *Email: a-and-r-docket@epa.gov.*
- *Fax:* (202) 566–9744.
- *Mail:* Attention Docket ID No. EPA–HQ–OAR–2012–0322, U.S. Environmental Protection Agency, EPA West (Air Docket), 1200 Pennsylvania Avenue NW., Mail Code: 6102T, Washington, DC 20460. Please include a total of two copies.
- *Hand Delivery:* U.S. Environmental Protection Agency, EPA West (Air Docket), 1301 Constitution Avenue Northwest, Room 3334, Washington, DC 20004, Attention Docket ID No. EPA–HQ–OAR–2012–0322. 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–2012–0322. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *www.regulations.gov* Web site is an "anonymous access" system, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through *www.regulations.gov*, your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any CD you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, avoid any form of encryption, and be free of any defects or viruses. For additional information about the EPA's public docket visit the EPA Docket Center homepage at *www.epa.gov/epahome/dockets.htm.* For additional instructions on submitting comments, go to section I.C of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket. All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically at *www.regulations.gov* or in hard copy at the U.S. Environmental Protection Agency, Air Docket, EPA/DC, EPA West 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.

Public Hearing: If a public hearing is held, it will be held on March 12, 2013, at the EPA Ariel Rios East building, Room 1153, 1301 Constitution Avenue, Washington, DC 20460. The public hearing will convene at 9 a.m. (Eastern Standard Time) and continue until the later of 6 p.m. or 1 hour after the last registered speaker has spoken. People interested in presenting oral testimony or inquiring as to whether a hearing is to be held should contact Ms. Pamela Long, Air Quality Planning Division, Office of Air Quality Planning and Standards (C504–01), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711, telephone (919) 541–0641, fax number (919) 541–5509, email address *long.pam@epa.gov*, at least 5 days in advance of the public hearing (*see* **DATES**). People interested in attending the public hearing must also call Ms. Long to verify the time, date, and location of the hearing. The public hearing will provide interested parties the opportunity to present data, views, or arguments concerning the proposed action. The EPA will make every effort to accommodate all speakers who arrive and register. A lunch break is scheduled from 12:30 p.m. until 2 p.m. Because this hearing is being held at U.S. government facilities, individuals planning to attend the hearing should be prepared to show valid picture identification to the security staff in order to gain access to the meeting room. In addition, you will need to

obtain a property pass for any personal belongings you bring with you. Upon leaving the building, you will be required to return this property pass to the security desk. No large signs will be allowed in the building, cameras may only be used outside of the building, and demonstrations will not be allowed on federal property for security reasons. The EPA may ask clarifying questions during the oral presentations but will not respond to the presentations at that time. Written statements and supporting information submitted during the comment period will be considered with the same weight as oral comments and supporting information presented at the public hearing. If a hearing is held on March 12, 2013, written comments on the proposed rule must be postmarked by April 11, 2013. Commenters should notify Ms. Long if they will need specific equipment, or if there are other special needs related to providing comments at the hearing. The EPA will provide equipment for commenters to show overhead slides or make computerized slide presentations if we receive special requests in advance. Oral testimony will be limited to 5 minutes for each commenter. The EPA encourages commenters to provide the EPA with a copy of their oral testimony electronically (via email or CD) or in hard copy form. The hearing schedule, including lists of speakers, will be posted on the EPA's Web site at *www.epa.gov/air/urbanair/sipstatus/*. Verbatim transcripts of the hearings and written statements will be included in the docket for the rulemaking. The EPA will make every effort to follow the schedule as closely as possible on the day of the hearing; however, please plan for the hearing to run either ahead of schedule or behind schedule.

FOR FURTHER INFORMATION CONTACT: If you have questions concerning the public hearing, please contact Ms. Pamela Long, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Air Quality Planning Division, (C504–01), Research Triangle Park, NC 27711, telephone (919) 541–0641, fax number (919) 541–5509, email address: *long.pam@epa.gov* (preferred method for registering). Questions concerning this proposed rule should be addressed to Ms. Lisa Sutton, U.S. EPA, Office of Air Quality Planning and Standards, State and Local Programs Group, (C539–01), Research Triangle Park, NC 27711, telephone number (919) 541–3450, email at *sutton.lisa@epa.gov*.

SUPPLEMENTARY INFORMATION: For questions related to a specific SIP, please contact the appropriate EPA Regional Office:

EPA regional office	Contact for regional office (person, mailing address, telephone No.)	State
I	Alison Simcox, Environmental Scientist, EPA Region 1, 5 Post Office Square, Suite 100, Boston, MA 02109–3912, (617) 918–1684.	Connecticut, Massachusetts, Maine, New Hampshire, Rhode Island, and Vermont.
II	Paul Truchan, EPA Region 2, 290 Broadway, 25th Floor, New York, NY 10007–1866, (212) 637–3711.	New Jersey, New York, Puerto Rico, and Virgin Islands.
III	Harold Frankford, EPA Region 3, 1650 Arch Street, Philadelphia, PA 19103–2029, (215) 814–2108.	District of Columbia, Delaware, Maryland, Pennsylvania, Virginia, and West Virginia.
IV	Joel Huey, EPA Region 4, Atlanta Federal Center, 61 Forsyth Street SW., Atlanta, GA 30303–8960, (404) 562–9104.	Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, Soutn Carolina, and Tennessee.
V	Christos Panos, Air and Radiation Division (AR–18J), EPA Region 5, 77 West Jackson Boulevard, Chicago, IL 60604–3507, (312) 353–8328.	Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin.
VI	Alan Shar (6PD–L), EPA Region 6, Fountain Place 12th Floor, Suite 1200, 1445 Ross Avenue, Dallas, TX 75202–2733, (214) 665–6691.	Arkansas, Louisiana, New Mexico, Oklahoma, and Texas.
VII	Lachala Kemp, EPA Region 7, Air Planning and Development Branch, 11201 Renner Boulevard, Lenexa, KS 66219, (913) 551–7214. Alternate contact is Ward Burns, (913) 551–7960.	Iowa, Kansas, Missouri, and Nebraska.
VIII	Adam Clark, Air Quality Planning Unit (8P–AR) Air Program, Office of Partnership and Regulatory Assistance, EPA Region 8, 1595 Wynkoop Street, Denver, CO 80202–1129, (303) 312–7104.	Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming.
IX	Lisa Tharp, EPA Region 9, Air Division, 75 Hawthorne Street (AIR–8), San Francisco, CA 94105, (415) 947–4142.	Arizona; California; Hawaii and the Pacific Islands; Indian Country within Region 9 and Nevada.
X	Donna Deneen, Environmental Engineer, Office of Air, Waste and Toxics (AWT–107), EPA Region 10, 1200 Sixth Avenue, Suite 900, Seattle, WA 98101, (206) 553–6706.	Alaska, Idaho, Oregon, and Washington.

I. General Information

A. Does this action apply to me?

Entities potentially affected by this rule include states, U.S. territories, local authorities, and eligible tribes that are currently administering, or may in the future administer, the EPA-approved implementation plans ("air agencies").[1] The EPA's action on the Petition is potentially of interest to all such entities because the EPA is evaluating issues related to basic CAA requirements for SIPs. Through this rulemaking, the EPA is both clarifying and applying its interpretation of the CAA with respect to SIP provisions applicable to excess emissions during SSM events. In addition, the EPA may find specific SIP

[1] The EPA respects the unique relationship between the U.S. government and tribal authorities and acknowledges that tribal concerns are not interchangeable with state concerns. Under the CAA and EPA regulations, a tribe may, but is not required to, apply for eligibility to have a tribal implementation plan (TIP). For convenience, we refer to "air agencies" in this rulemaking collectively when meaning to refer in general to states, the District of Columbia, U.S. territories, local air permitting authorities, and eligible tribes that are currently administering, or may in the future administer, EPA-approved implementation plans. The EPA notes that the petition under evaluation does not identify any specific provisions related to tribal implementation plans. We therefore refer to "state" or "states" rather than "air agency" or "air agencies" when meaning to refer to one, some, or all of the 39 states identified in the Petition. We also use "state" or "states" rather than "air agency" or "air agencies" when quoting or paraphrasing the CAA or other document that uses that term even when the original referenced passage may have applicability to tribes as well.

provisions in states identified in the Petition to be substantially inadequate to meet CAA requirements, pursuant to CAA section 110(k)(5), and thus those states will potentially be affected by this rulemaking directly. For example, if a state's existing SIP provision allows an automatic exemption for excess emissions during periods of startup, shutdown, or malfunction, such that these excess emissions do not constitute a violation of the otherwise applicable emission limitations of the SIP, then the EPA may determine that the SIP provision is substantially inadequate because the provision is inconsistent with fundamental requirements of the CAA. This rule may also be of interest to the public and to owners and operators of industrial facilities that are subject to emission limits in SIPs, because it may require changes to state rules covering excess emissions. When finalized, this action will embody the EPA's updated SSM Policy for SIP provisions relevant to excess emissions during SSM events.

B. Where can I get a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of this proposal notice will also be available on the World Wide Web. Following signature by the EPA Assistant Administrator, a copy of this notice will be posted on the EPA's Web site, under SSM SIP Call 2013, at *www.epa.gov/air/urbanair/sipstatus*. In addition to this notice, other relevant documents are located in the docket, including a copy of the Petition and copies of each of the four guidance documents pertaining to excess emissions issued by the EPA in 1982, 1983, 1999, and 2001, which are discussed in more detail later in this proposal notice.

C. What should I consider as I prepare my comments?

1. *Submitting CBI.* Do not submit this information to the EPA through *www.regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in CD that you mail to the EPA, mark the outside of the CD as CBI and then identify electronically within the CD 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. Send or deliver information identified as CBI only to the following address: Roberto Morales, OAQPS Document Control Officer (C404–02), U.S. EPA, Research Triangle Park, NC 27711, Attention Docket ID No. EPA–HQ–OAR–2012–0322.

2. *Tips for preparing your comments.* When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date, and page number).
- Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

D. How is the preamble organized?

The information presented in this preamble is organized as follows:

E. What is the meaning of key terms used in this notice?

For the purpose of this notice, the following definitions apply unless the context indicates otherwise:

The terms *Act* or *CAA* mean or refer to the Clean Air Act.

The term *affirmative defense* means, in the context of an enforcement proceeding, a response or defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding. By demonstrating that the elements of an affirmative defense have been met, a source may avoid a civil penalty but cannot avoid injunctive relief.

The terms *air agency* and *air agencies* mean or refer to states, the District of Columbia, U.S. territories, local air permitting authorities with delegated authority from the state, and tribal authorities.

The term *automatic exemption* means a generally applicable provision in a SIP that would provide that if certain conditions existed during a period of excess emissions, then those exceedances would not be considered violations of the applicable emission limitations.

The term *director's discretion provision* means, in general, a regulatory provision that authorizes a state regulatory official unilaterally to grant exemptions or variances from applicable emission limitations or control measures, or to excuse noncompliance with applicable emission limitations or control measures, in spite of SIP provisions that would otherwise render such conduct by the source a violation.

The term *EPA* refers to the United States Environmental Protection Agency.

The term *excess emissions* means the emissions of air pollutants from a source that exceed any applicable SIP emission limitations.

The term *malfunction* means a sudden and unavoidable breakdown of process or control equipment.

The term *NAAQS* means national ambient air quality standard or standards. These are the national primary and secondary ambient air quality standards that the EPA establishes under CAA section 109 for criteria pollutants for purposes of protecting public health and welfare.

The term *Petition* refers to the petition for rulemaking titled, "Petition to Find Inadequate and Correct Several State Implementation Plans under Section 110 of the Clean Air Act Due to Startup, Shutdown, Malfunction, and/or Maintenance Provisions," filed by the Sierra Club with the EPA Administrator on June 30, 2011.

The term *Petitioner* refers to the Sierra Club.

The term *shutdown* means, generally, the cessation of operation of a source for any reason.

The term *SIP* means or refers to a State Implementation Plan. Generally, the State Implementation Plan is the collection of state statutes and regulations approved by the EPA pursuant to CAA section 110 that together provide for implementation, maintenance, and enforcement of a national ambient air quality standard (or any revision thereof) under section 109 for any air pollutant in each air quality control region (or portion thereof) within a state. In some parts of this notice, statements about SIPs in general also apply to tribal implementation plans in general even though not explicitly noted.

The term *SSM* refers to startup, shutdown, or malfunction at a source. It does not include periods of maintenance at such a source. An SSM event is a period of startup, shutdown, or malfunction during which there are exceedances of the applicable emission limitations and thus excess emissions.

The term *SSM Policy* refers to the cumulative guidance that EPA has issued concerning its interpretation of CAA requirements with respect to treatment of excess emissions during periods of startup, shutdown, and malfunction at a source. The most comprehensive statement of the EPA's SSM Policy prior to this proposed rulemaking is embodied in a 1999 guidance document discussed in more detail in this proposal. When finalized, this action will embody the EPA's updated SSM Policy for SIP provisions relevant to excess emissions during SSM events.

The term *startup* means, generally, the setting in operation of a source for any reason.

II. Overview of Proposed Rule

A. How is the EPA proposing to respond to the Petition?

The EPA is proposing to take action on a petition for rulemaking that the Sierra Club (the Petitioner) filed with the EPA Administrator on June 30, 2011 (the Petition). The Petition concerns how air agency rules in EPA-approved SIPs treat excess emissions during periods of startup, shutdown, or malfunction of industrial process or emission control equipment. Many of these rules were added to SIPs and

approved by the EPA in the years shortly after the 1970 amendments to the CAA, which for the first time provided for the system of clean air plans that were to be prepared by air agencies and approved by the EPA. At that time, it was widely believed that emission limitations set at levels representing good control of emissions during periods of normal operation could in some cases not be met with the same emission control strategies during periods of startup, shutdown, maintenance, or malfunction. Accordingly, it was common for state plans to include provisions for special, more lenient treatment of excess emissions during such periods. Many of these provisions took the form of absolute or conditional statements that excess emissions from a source, when they occur outside of the source's normal operations, were not to be considered violations of the air agency rules, *i.e.*, exemptions.

Excess emission provisions for startup, shutdown, maintenance, and malfunctions were often included as part of the original SIPs that the EPA approved in 1971 and 1972. In the early 1970s, because the EPA was inundated with proposed SIPs and had limited experience in processing them, not enough attention was given to the adequacy, enforceability, and consistency of these provisions. Consequently, many SIPs were approved with broad and loosely-defined provisions to control excess emissions. Starting in 1977, however, the EPA discerned and articulated to air agencies that exemptions for excess emissions during such periods were inconsistent with certain requirements of the CAA. The EPA also realized that such provisions allow opportunities for sources to repeatedly emit pollutants during such periods in quantities that could cause unacceptable air pollution in nearby communities with no legal pathway for air agencies, the EPA, or the courts to require the sources to make reasonable efforts to reduce these emissions. The EPA has been more careful after 1977 not to give new approval to SIP rules that are inconsistent with the CAA and has issued several guidance memoranda to advise states on how to avoid impermissible provisions [2] as they expand and revise their SIPs. The EPA has also found several SIPs to be deficient because of problematic SSM provisions and called upon the affected states to amend their SIPs. However, in light of the other priority work facing both air agencies and the EPA, the EPA has not to date initiated a broad effort to get all states to remove impermissible provisions from their SIPs and to adopt other, approvable approaches for addressing excess emissions when appropriate. Public interest groups, including the Petitioner, have sued the EPA in several state-specific cases concerning SIP issues, and they have been urging the EPA to give greater priority to addressing the issue of SSM provisions in SIPs. In one of these SIP cases, the EPA entered into a settlement agreement requiring it to respond to the Petition from the Sierra Club. A copy of the settlement agreement is provided in the docket for this rulemaking.[3]

As alluded to earlier in this notice, there are available CAA-consistent approaches that can be incorporated into SIPs to address excess emissions during SSM events. While automatic exemptions and director's discretion exemptions from otherwise applicable emission limitations are not consistent with the CAA, SIPs may include criteria and procedures for the use of enforcement discretion by air agency personnel and appropriately defined affirmative defenses. In this action, the EPA is articulating a policy that reflects this principle and is reviewing the SIPs from 39 states to determine whether specific provisions identified in the Petition are consistent with the EPA's SSM Policy and the CAA. In some cases, this review involves a close reading of the provision in the SIP and its context to discern whether it is in fact an exemption, a statement regarding enforcement discretion by the air agency, or an affirmative defense. Each state will ultimately decide how to address any SIP inadequacies identified by the EPA once the EPA takes final action. Recognizing that for some states, the EPA's response to this Petition entails reviewing SIP provisions that may date back several decades, the EPA will work closely with each of the affected states to develop approvable SIPs consistent with the guidance articulated in the final action. Section IX of this notice presents the EPA's analysis of each SIP provision at issue. The EPA's review also hinges on interpretation of several relevant sections of the CAA. While the EPA has already developed and has been implementing the SSM Policy that is based on its interpretation of the CAA, this action provides the EPA an opportunity to invite public comment on this SSM Policy and its basis in the CAA. To that end, this notice contains a detailed clarifying explanation of the SSM Policy (including proposed revisions to it). Also, supplementary to this notice, the EPA is providing a memorandum to summarize the legal and administrative context for the proposed action, and the EPA invites public comment on the memorandum, which is available in the docket for this rulemaking.[4] This notice, and the final notice for this action after considering public comment, will also clarify for the affected states how they can resolve the identified deficiencies in their SIPs, as well as provide all air agencies guidance and model language as they further develop their SIPs in the future.

In summary, the EPA proposes to agree with the Petitioner that many of the identified SIP provisions are not permissible under the CAA. However, in several cases we are proposing to find that an identified SIP provision is actually one of the permissible approaches. Of the 39 states covered by the Petition, the EPA is proposing to make SIP calls for 36 states.

The EPA is aware of other SSM-related SIP provisions that were not identified in the Petition but that may be inconsistent with the EPA's interpretation of the CAA. The EPA may address these other provisions later in a separate notice-and-comment action.

B. What did the Petitioner request?

The Petition includes three interrelated requests concerning the treatment in SIPs of excess emissions by sources during periods of startup, shutdown, or malfunction.

First, the Petitioner argued that SIP provisions providing an affirmative defense for monetary penalties for excess emissions in judicial proceedings are contrary to the CAA. Thus, the Petitioner advocated that the EPA should rescind its interpretation of the CAA expressed in the SSM Policy that allows appropriately drawn affirmative defense provisions in SIPs. The Petitioner made no distinction between affirmative defenses for excess emissions related to malfunction, startup, or shutdown. Further, the Petitioner requested that the EPA issue a SIP call requiring states to eliminate

[2] The term "impermissible provision" as used throughout this notice is generally intended to refer to a SIP provision identified by the Petitioner that the EPA believes to be inconsistent with requirements of the CAA. As described later in this notice (*see* section VIII.A), the EPA is proposing to find a SIP "substantially inadequate" to meet CAA requirements where the EPA determines that the SIP includes an impermissible provision.

[3] *See*, Settlement Agreement executed Nov. 30, 2011, to address a lawsuit filed by Sierra Club and WildEarth Guardians in the United States District Court for the Northern District of California: *Sierra Club et al.* v. *Jackson*, No. 3:10-cv-04060–CRB (N.D. Cal.).

[4] *See*, Memorandum, "Statutory, Regulatory, and Policy Context for this Rulemaking," Feb. 4, 2013.

all such affirmative defense provisions in existing SIPs. As explained later in this proposal, the EPA is proposing to grant in part and to deny in part this request. The EPA does not agree with the Petitioner that appropriately drawn affirmative defense provisions for violations due to excess emissions that result from malfunctions are contrary to the CAA, and thus the EPA is proposing to deny the request to revise its interpretation of the CAA concerning affirmative defenses for malfunctions. However, the EPA is proposing to revise its SSM Policy with respect to affirmative defenses for violations due to excess emissions that occur during startup and shutdown, in order to distinguish between planned events that are within the source's control and unplanned events that are not. The EPA believes that SIP provisions should encourage compliance during events that are within the source's control, and thus affirmative defenses for excess emissions during planned startup and shutdown are inappropriate, unlike those for excess emissions during malfunctions.

Second, the Petitioner argued that many existing SIPs contain impermissible provisions, including automatic exemptions from applicable emission limitations during SSM events, director's discretion provisions that provide discretionary exemptions from applicable emission limitations during SSM events, enforcement discretion provisions that appear to bar enforcement by the EPA or citizens for such excess emissions, and inappropriate affirmative defense provisions that are not consistent with the recommendations in the EPA's SSM Policy. The Petitioner identified specific provisions in SIPs of 39 states that it considered inconsistent with the CAA and explained the basis for its objections to the provisions. As explained later in this proposal, the EPA agrees with the Petitioner that some of these existing SIP provisions are legally impermissible and thus proposes to find such provisions "substantially inadequate" [5] to meet CAA requirements. Among the reasons for EPA's proposed action is to eliminate provisions that interfere with enforcement in a manner prohibited by the CAA. Simultaneously, the EPA proposes to issue a SIP call to the states in question requesting corrective SIP submissions to revise their SIPs accordingly. For the remainder of the identified provisions, however, the EPA disagrees with the contentions of the Petitioner and thus proposes to deny the Petition with respect to those provisions and to take no further action. The EPA's action on this portion of the Petition will assure that these SIPs comply with the fundamental requirements of the CAA with respect to the treatment of excess emissions during periods of startup, shutdown, or malfunction. The majority of the SIP calls that EPA is proposing in this action implement the EPA's longstanding interpretation of the CAA through multiple iterations of its SSM Policy. In a few instances, however, the EPA is also proposing a SIP call to address the issue of affirmative defenses during periods of planned startup and shutdown, because the EPA is revising its prior interpretation of the CAA to distinguish between violations due to excess emissions that occur during malfunctions and violations due to excess emissions that occur during planned startup and shutdown, which are modes of normal source operation.

Third, the Petitioner argued that the EPA should not rely on interpretive letters from states to resolve any ambiguity, or perceived ambiguity, in state regulatory provisions in SIP submissions. The Petitioner reasoned that all regulatory provisions should be clear and unambiguous on their face and that any reliance on interpretive letters to alleviate facial ambiguity in SIP provisions can lead to later problems with compliance and enforcement. Extrapolating from several instances in which the basis for the original approval of a SIP provision related to excess emissions during SSM events was arguably not clear, the Petitioner contended that the EPA should never use interpretive letters to resolve such ambiguities. As explained later in this proposal, the EPA acknowledges the concern of the Petitioner that provisions in SIPs should be clear and unambiguous. However, the EPA does not agree with the Petitioner that reliance on interpretive letters in a rulemaking context is never appropriate. Thus, the EPA is proposing to deny the request that actions on SIP submissions never rely on interpretive letters. Instead, the EPA explains how proper documentation of reliance on interpretive letters in notice-and-comment rulemaking nevertheless addresses the practical concerns of the Petitioner.

The EPA solicits comment on its proposed response to the overarching issues in the Petition, and in particular on its proposed action with respect to each of the specific existing SIP provisions identified in the Petition as inconsistent with the requirements of the CAA. Through this action on the Petition, the EPA is clarifying, restating, and revising its SSM Policy. When finalized, this action will embody the EPA's updated SSM Policy for SIP provisions relevant to excess emissions during SSM events.

C. To which air agencies does this proposed rulemaking apply and why?

In general, the proposal may be of interest to all air agencies because the EPA is clarifying, restating, and revising its longstanding SSM Policy with respect to what the CAA requires concerning SIP provisions relevant to excess emissions during periods of startup, shutdown, and malfunction. For example, the EPA is denying the Petitioner's request that the EPA rescind its interpretation of the CAA to allow appropriately drawn affirmative defense provisions applicable to malfunctions, as explained in EPA guidance documents on this topic. The EPA is clarifying or revising its prior guidance with respect to several issues in order to ensure that future SIP submissions, not limited to those that affected states make in response to this action, are fully consistent with the CAA. For example, the EPA is revising its prior guidance concerning whether the CAA allows affirmative defense provisions that apply during periods of planned startup and shutdown. This proposal also addresses the use of interpretive letters for purposes of EPA action on SIPs.

In addition, the proposal is directly relevant to the states with SIP provisions identified in the Petition that the Petitioner alleges are inconsistent with CAA requirements or with the EPA's guidance concerning SIP provisions relevant to excess emissions.

The EPA is proposing either to grant or to deny the Petition with respect to the specific existing SIP provisions in each of 39 states identified by the Petitioner as allegedly inconsistent with the CAA. The 39 states (comprising 46 state and local authorities and no tribal authorities) are listed in table 1, "List of States with SIP Provisions for Which the EPA Proposes Either to Grant or to Deny the Petition, in Whole or in Part." After evaluating the Petition, the EPA is proposing to grant the petition with respect to one or more provisions in 36 states of the 39 states listed, and these are the states for which the proposed action on petition, according to table 1, is either "Grant" or "Partially grant, partially deny." Conversely, the EPA is proposing to deny the petition with respect to all provisions that the Petitioner identified in 3 of the 39 states, and these (Idaho, Nebraska, and

[5] The term "substantially inadequate" is used in the CAA and is discussed in detail in section VIII.A of this notice.

Oregon) are the states for which the proposed action on petition, according to table 1, is "Deny."

For each of the states for which the EPA proposes to grant or partially to grant the Petition, the EPA proposes to find that one or more particular provisions in the state's existing SIP identified by the Petitioner are substantially inadequate to meet the requirements of the CAA. Thus, the EPA also proposes to promulgate a SIP call to each of those states, requiring the state to correct those particular SIP provisions, in accordance with the SIP call process of CAA section 110(k)(5). The SIP calls apply only to those specific provisions, and the scope of each of the SIP calls is limited to those provisions.

For each of the states for which the EPA proposes to deny or to partially deny the Petition, the EPA proposes to find that particular provisions in the existing SIP identified by the Petitioner are consistent with the requirements of the CAA and thus not substantially inadequate to meet the requirements pursuant to CAA section 110(k)(5). Thus, the EPA proposes to take no action with respect to those states for those particular SIP provisions.

TABLE 1—LIST OF STATES WITH SIP PROVISIONS FOR WHICH THE EPA PROPOSES EITHER TO GRANT OR TO DENY THE PETITION, IN WHOLE OR IN PART

EPA region	State	Proposed action on petition
I	Maine	Grant.
	New Hampshire	Partially grant, partially deny.
	Rhode Island	Grant.
II	New Jersey	Partially grant, partially deny.
III	Delaware	Grant.
	District of Columbia	Partially grant, partially deny.
	Virginia	Grant.
	West Virginia.	Grant.
IV	Alabama	Grant.
	Florida	Grant.
	Georgia	Grant.
	Kentucky	Grant.
	Mississippi	Grant.
	North Carolina	Grant.
	South Carolina	Partially grant, partially deny.
	Tennessee	Grant.
V	Illinois	Grant.
	Indiana	Grant.
	Michigan	Grant.
	Minnesota	Grant.
	Ohio	Partially grant, partially deny.
VI	Arkansas	Grant.
	Louisiana	Grant.
	New Mexico	Grant.
	Oklahoma	Grant.
VII	Iowa	Partially grant, partially deny.
	Kansas	Grant.
	Missouri	Partially grant, partially deny.
	Nebraska	Deny.
VIII	Colorado	Partially grant, partially deny.
	Montana	Grant.
	North Dakota	Grant.
	South Dakota	Grant.
	Wyoming	Grant.
IX	Arizona	Partially grant, partially deny.
X	Alaska	Grant.
	Idaho	Deny.
	Oregon	Deny.
	Washington	Grant.

For each state for which the proposed action on the Petition is either "Grant" or "Partially grant, partially deny," the EPA proposes to find that certain specific provisions in each state's SIP are substantially inadequate to meet CAA requirements for the reason that these provisions are inconsistent with the CAA with regard to how the state treats excess emissions from sources during periods of startup, shutdown, and malfunction. The EPA believes that certain specific provisions in these SIPs fail to meet fundamental statutory requirements intended to protect the NAAQS, prevention of significant deterioration (PSD) increments, and visibility. Equally importantly, the EPA believes that the same provisions may undermine the ability of states, the EPA, and the public to enforce emission limitations in the SIP that have been relied upon to ensure attainment or maintenance of the NAAQS or to meet other CAA requirements.

For each state for which the proposed action on the Petition is either "Grant" or "Partially grant, partially deny," the EPA is also proposing in this rulemaking to call for a SIP revision as necessary to correct the identified provisions. The SIP revisions that the EPA is proposing to require will rectify a number of different types of defects in existing SIPs, including automatic exemptions from emission limitations, impermissible director's discretion provisions, enforcement discretion provisions that purport to bar enforcement by the EPA or through a citizen suit, and affirmative defense provisions that are inconsistent with

CAA requirements. A corrective SIP revision addressing automatic or impermissible discretionary exemptions will ensure that excess emissions during periods of startup, shutdown, and malfunction are treated in accordance with CAA requirements. Similarly, a corrective SIP revision addressing ambiguity in who may enforce against violations of these emission limitations will also ensure that CAA requirements to provide for enforcement are met. A SIP revision to rectify deficiencies in affirmative defense provisions will assure that such defenses are only available when sources have met the criteria that justify their being shielded from monetary penalties in an enforcement action. The particular provisions for which the EPA is requiring SIP revisions are summarized in section IX of this notice. Many of these provisions were added to the respective SIPs many years ago and have not been the subject of action by the state or the EPA since.

D. What is the EPA proposing for any state that receives a finding of substantial inadequacy and a SIP call?

If the EPA finalizes a finding of substantial inadequacy and issues a SIP call for any state, the EPA's final action will establish a deadline by which the state must make a SIP submission to rectify the deficiency. Pursuant to CAA section 110(k)(5), the EPA has authority to set a SIP submission deadline up to 18 months from the date of the final finding of substantial inadequacy. Accordingly, the EPA is proposing that if it promulgates a final finding of substantial inadequacy and a SIP call for a state, the EPA will establish a date 18 months from the date of promulgation of the final finding for the state to respond to the SIP call. If, for example, the EPA's final findings are signed and disseminated in August 2013, then the SIP submission deadline for each of the states subject to the final SIP call would fall in February 2015. Thereafter, the EPA will review the adequacy of that new SIP submission in accordance with the CAA requirements of sections 110(a), 110(k), 110(l), and 193, including the EPA's interpretation of the CAA reflected in the SSM Policy as clarified and updated through this rulemaking. The EPA believes that states should be provided the maximum time allowable under CAA section 110(k)(5) in order to have sufficient time to make appropriate SIP revisions following their own SIP development process. Such a schedule will allow for the necessary SIP development process to correct the deficiencies yet still achieve the necessary SIP improvements as expeditiously as practicable.

E. What are potential impacts on affected states and sources?

The issuance of a SIP call would require an affected state to take action to revise its SIP. That action by the state may, in turn, affect sources as described below. The states that would receive a SIP call will in general have options as to exactly how to revise their SIPs. In response to a SIP call, a state retains broad discretion concerning how to revise its SIP, so long as that revision is consistent with the requirements of the CAA. Some provisions that may be identified in a final SIP call, for example an automatic exemption provision, would have to be removed entirely and an affected source could no longer depend on the exemption to avoid all liability for excess emissions. Some other provisions, for example a problematic enforcement discretion provision or affirmative defense provision, could either be removed entirely from the SIP or retained if revised appropriately, in accordance with the EPA's interpretation of the CAA as described in the EPA's SSM Policy. The EPA notes that if a state removes a SIP provision that pertains to the state's exercise of enforcement discretion, this removal would not affect the ability of the state to apply discretion in its enforcement program. It would make the exercise of such discretion case-by-case in nature.

In addition, affected states may choose to consider reassessing particular emission limitations, for example to determine whether those limits can be revised such that well-managed emissions during planned operations such as startup and shutdown would not exceed the revised emission limitation, while still protecting air quality. Such a revision of an emission limitation may need to be submitted as a SIP revision for EPA approval if the existing limit to be changed is already included in the SIP or if the existing SIP relies on the particular existing emission limit to meet a CAA requirement. In such instances, the EPA would review the SIP revision for consistency with all applicable CAA requirements. A state that chooses to revise particular emission limitations, in addition to removing the aspect of the existing provision that is inconsistent with CAA requirements, could include those revisions in the same SIP submission that addresses the SSM provisions identified in the SIP call, or it could submit them separately.

The implications for a regulated source in a given state, in terms of whether and how it would potentially have to change its equipment or practices in order to operate with emissions that comply with the revised SIP, will depend on the nature and frequency of the source's SSM events and how the state has chosen to revise the SIP to address excess emissions during SSM events. The EPA recognizes that after all the responsive SIP revisions are in place and are being implemented by the states, some sources may need to take steps to better control emissions so as to comply with emission limits continuously, as required by the CAA, or to increase durability of components and monitoring systems to detect and manage malfunctions promptly. If a state elects to have appropriately drawn affirmative defense provisions, however, such sources may not be liable for monetary penalties for any exceedances.

The EPA Regional Offices will work with states to help them understand their options and the potential consequences for sources as the states prepare their SIP revisions in response to the SIP calls.

F. What happens if an affected state fails to meet the SIP submission deadline?

If, in the future, the EPA finds that a state that is subject to a SIP call has failed to submit a complete SIP revision as required by the final rule, or the EPA disapproves such a SIP revision, then the finding or disapproval would trigger an obligation for the EPA to impose a federal implementation plan (FIP) within 24 months after that date. In addition, if a state fails to make the required SIP revision, or if the EPA disapproves the required SIP revision, then either event can also trigger mandatory 18-month and 24-month sanctions clocks under CAA section 179. The two sanctions that apply under CAA section 179(b) are the 2-to-1 emission offset requirement for all new and modified major sources subject to the nonattainment new source review program and restrictions on highway funding. More details concerning the timing and process of the SIP call, and potential consequences of the SIP call, are provided in section VIII.B of this notice.

G. What happens in an affected state in the interim period starting when the EPA promulgates the final SIP call and ending when the EPA approves the required SIP revision?

If the EPA issues a final SIP call to a state, that action alone will not cause

any automatic change in the legal status of the existing affected provision(s) in the SIP. During the time that the state takes to develop a SIP revision in accordance with the SIP call and the time that the EPA takes to evaluate and act upon the SIP revision pursuant to CAA section 110(k), the existing affected SIP provision(s) will remain in place. The EPA notes, however, that the state regulatory revisions that the state has adopted and submitted for SIP approval will most likely be already in effect at the state level during the pendency of the EPA's evaluation of and action upon the new SIP submission.

The EPA recognizes that in the interim period, there may continue to be instances of excess emissions that adversely impact attainment and maintenance of the NAAQS, interfere with PSD increments, interfere with visibility, and cause other adverse consequences as a result of the impermissible provisions. However, given the need to resolve these longstanding SIP deficiencies in a careful and comprehensive fashion, the EPA believes that providing sufficient time for these corrections to occur will ultimately be the best course to ensure the ultimate goal of eliminating the inappropriate SIP provisions and replacing them with provisions consistent with CAA requirements.

III. Statutory, Regulatory, and Policy Background

The Petition raised issues related to excess emissions from sources during periods of startup, shutdown, or malfunction, and to the correct approach to these excess emissions in SIPs. In this context, "excess emissions" are air emissions that exceed the otherwise applicable emission limitations in a SIP, *i.e.*, emissions that would be violations of such emission limitations. The question of how to address excess emissions correctly during startup, shutdown, and malfunction events has posed a challenge since the inception of the SIP program in the 1970s. The primary objective of state and federal regulators is to ensure that sources of emissions are subject to appropriate emission controls as necessary in order to attain and maintain the NAAQS, protect PSD increments, protect visibility, and meet other statutory requirements. Generally, this is achieved through enforceable emission limitations on sources that apply, as required by the CAA, continuously.

Several key statutory provisions of the CAA are relevant to the EPA's evaluation of the Petition. These provisions relate generally to the basic legal requirements for the content of SIPs, the authority and responsibility of air agencies to develop such SIPs, and the EPA's authority and responsibility to review and approve SIP submissions in the first instance, as well as the EPA's authority to require improvements to SIPs if the EPA later determines that to be necessary for a SIP to meet CAA requirements. In addition, the Petition raised issues that pertain to enforcement of provisions in a SIP. The enforcement issues relate generally to what constitutes a violation of an emission limitation in a SIP, who may seek to enforce against a source for that violation, and whether the violator should be subject to monetary penalties as well as other forms of judicial relief for that violation.

The EPA has a longstanding interpretation of the CAA with respect to the treatment of excess emissions during periods of startup, shutdown, or malfunction in SIPs. This statutory interpretation has been expressed, reiterated, and elaborated upon in a series of guidance documents issued in 1982, 1983, 1999, and 2001. In addition, the EPA has applied this interpretation in individual rulemaking actions in which the EPA: (i) Approved SIP submissions that were consistent with the EPA's interpretation;[6] (ii) disapproved SIP submissions that were not consistent with this interpretation;[7] (iii) itself promulgated regulations in FIPs that were consistent with this interpretation;[8] or (iv) issued a SIP call requiring a state to revise an impermissible SIP provision.[9]

The EPA's SSM Policy is a policy statement and thus constitutes guidance. As guidance, the SSM Policy does not bind states, the EPA, or other parties, but it does reflect the EPA's interpretation of the statutory requirements of the CAA. The EPA's evaluation of any SIP provision, whether prospectively in the case of a new provision in a SIP submission or retrospectively in the case of a previously approved SIP submission, must be conducted through a notice-and-comment rulemaking in which the EPA will determine whether or not a given SIP provision is consistent with the requirements of the CAA and applicable regulations.[10]

The Petition raised issues related to excess emissions from sources during periods of startup, shutdown, and malfunction, and the consequences of failing to address these emissions correctly in SIPs. In broad terms, the Petitioner expressed concerns that the exemptions for excess emissions and the other types of alleged deficiencies in existing SIP provisions "undermine the emission limits in SIPs and threaten states' abilities to achieve and maintain the NAAQS, thereby threatening public health and public welfare, which includes agriculture, historic properties and natural areas."[11] The Petitioner asserted that such exemptions for SSM events are "loopholes" that can allow dramatically higher amounts of emissions and that these emissions "can swamp the amount of pollutants emitted at other times."[12] In addition, the Petitioner argued that these automatic and discretionary exemptions, as well as other SIP provisions that interfere with the enforcement structure of the CAA, undermine the objectives of the CAA.

The EPA notes that the alleged SIP deficiencies are not legal technicalities. Compliance with the applicable requirements is intended to achieve the air quality protection and improvement purposes and objectives of the CAA. The EPA believes that the results of automatic and discretionary exemptions in SIPs, and of other provisions that interfere with effective enforcement of SIPs, are real-world consequences that adversely affect public health.

As described earlier in this notice, the EPA invites public comment on a memorandum that supplements this notice and provides a more detailed discussion of the statutory, regulatory and policy background for the EPA's proposed action. The memorandum can be found in the docket for this rulemaking.[13]

IV. Proposed Action in Response To Request To Rescind the EPA Policy Interpreting the CAA To Allow Appropriate Affirmative Defense Provisions

A. Petitioner's Request

The Petitioner's first request was for the EPA to rescind its SSM Policy

[6] *See*, "Approval and Promulgation of Implementation Plans; Texas; Excess Emissions During Startup, Shutdown, Maintenance, and Malfunction Activities," 75 FR 68989 (Nov. 10, 2010).

[7] *See*, "Approval and Promulgation of State Implementation Plans; Michigan," 63 FR 8573 (Feb. 20, 1998).

[8] *See*, "Federal Implementation Plan for the Billings/Laurel, MT, Sulfur Dioxide Area," 73 FR 21418 (Apr. 21, 2008).

[9] *See*, "Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision," 76 FR 21639 (Apr. 18, 2011).

[10] *See, generally*, *Catawba County, North Carolina et al.* v. *EPA*, 571 F.3d 20, 33–35 (DC Cir. 2009) (upholding the EPA's process for developing and applying its guidance to designations).

[11] Petition at 2.

[12] Petition at 12.

[13] *See*, Memorandum, "Statutory, Regulatory, and Policy Context for this Rulemaking," Feb. 4, 2013.

element interpreting the CAA to allow affirmative defense provisions in SIPs for excess emissions during SSM events.[14] Related to this request, the Petitioner also asked the EPA: (i) To find that SIPs containing an affirmative defense to monetary penalties for excess emissions during SSM events are substantially inadequate because they do not comply with the CAA; and (ii) to issue a SIP call pursuant to CAA section 110(k)(5) to require each such state to revise its SIP.[15] Alternatively, if the EPA denies these two related requests, the Petitioner requested the EPA: (i) To require states with SIPs that contain such affirmative defense provisions to revise them so that they are consistent with the EPA's 1999 SSM Guidance for excess emissions during SSM events; and (ii) to issue a SIP call pursuant to CAA section 110(k)(5) to states with provisions inconsistent with the EPA's interpretation of the CAA.[16] The EPA interprets this latter request to refer to the specific SIP provisions that the Petitioner identified in a separate section of the Petition, titled, "Analysis of Individual States' SSM Provisions," including specific existing affirmative defense provisions.

The Petitioner requested that the EPA rescind its SSM Policy element interpreting the CAA to allow SIPs to include affirmative defenses for violations due to excess emissions during any type of SSM events because the Petitioner contended there is no legal basis for the policy. Specifically, the Petitioner cited to two statutory grounds, CAA sections 113(b) and (e), related to the type of judicial relief available in an enforcement proceeding and to the factors relevant to the scope and availability of such relief, that the Petitioner claimed would bar the approval of any type of affirmative defense provision in SIPs.

In the Petitioner's view, the CAA "unambiguously grants jurisdiction to the district courts to determine penalties that should be assessed in an enforcement action involving the violation of an emissions limit."[17] The Petitioner first argued that in any judicial enforcement action in the district court, CAA section 113(b) provides that "such court shall have jurisdiction to restrain such violation, to require compliance, to assess such penalty, * * * and to award any other appropriate relief." The Petitioner reasoned that the EPA's SSM Policy is therefore fundamentally inconsistent with the CAA because it purports to remove the discretion and authority of the federal courts to assess monetary penalties for violations if a source is shielded from monetary penalties under an affirmative defense provision in the approved SIP.[18] The Petitioner concluded that the EPA's interpretation of the CAA in the SSM Policy element allowing any affirmative defenses is impermissible "because the inclusion of an affirmative defense provision in a SIP limits the courts' discretion—granted by Congress—to assess penalties for Clean Air Act violations."[19]

Second, in reliance on CAA section 113(e)(1), the Petitioner argued that in a judicial enforcement action in a district court, the statute explicitly specifies a list of factors that the court is to consider in assessing penalties.[20] That section provides that either the Administrator or the court:

> * * * shall take into consideration (in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence (including evidence other than the applicable test method), payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation.

The Petitioner argued that the EPA's SSM Policy authorizes states to create affirmative defense provisions with criteria for monetary penalties that are inconsistent with the factors that the statute specifies and that the statute explicitly directs courts to weigh in any judicial enforcement action. In particular, the Petitioner enumerated those factors that it alleges the EPA's SSM Policy totally omits: (i) The size of the business; (ii) the economic impact of the penalty on the business; (iii) the violator's full compliance history; (iv) the economic benefit of noncompliance; and (v) the seriousness of the violation. By specifying particular factors for courts to consider, the Petitioner reasoned, Congress has already definitively spoken to the question of what factors are germane in assessing monetary penalties under the CAA for violations. The Petitioner concluded that the EPA has no authority to allow a state to include an affirmative defense provision in a SIP with different criteria to be considered in awarding monetary penalties because "[p]reventing the district courts from considering these statutory factors is not a permissible interpretation of the Clean Air Act."[21] The Petitioner drew no distinction between affirmative defenses for unplanned events such as malfunctions and planned events such as startup and shutdown.

B. The EPA's Response

The EPA has considered the concerns raised by the Petitioner regarding the legal basis under the CAA for any form of affirmative defense for violations due to excess emissions as contemplated in the EPA's SSM Policy. The EPA does not agree with the Petitioner's overarching argument that CAA section 113 prohibits any affirmative defense provisions in SIPs. However, the EPA has evaluated the broader legal basis that supports affirmative defense provisions in general and the specific affirmative defense provisions identified in the Petition in particular. Although the Petitioner did not distinguish between affirmative defense provisions for unplanned events such as malfunctions and affirmative defense provisions for planned events such as startup and shutdown, the EPA's evaluation of the legal basis for affirmative defense provisions indicates that the SSM Policy should differentiate between unplanned and planned events. Accordingly, the EPA is proposing to deny the Petition in part with respect to affirmative defenses for malfunction events and to grant the Petition in part with respect to affirmative defenses for planned startup and shutdown events. To address this issue fully, it is necessary: (i) To explain the legal and policy basis for affirmative defenses for malfunction events; (ii) to explain why that basis would not extend to startup and shutdown events; and (iii) to explain why the Petitioner's arguments with respect to CAA section 113 do not preclude affirmative defense provisions for malfunction events but support the distinction between unplanned and planned events.

The EPA proposes to deny the Petition with respect to affirmative defense provisions in SIPs applicable to sources during malfunctions. The EPA's SSM Policy has long recognized that there may be limited circumstances in which excess emissions are entirely beyond the control of the owner or operator. Thus, the EPA believes that an appropriately drawn affirmative defense provision recognizes that, despite diligent efforts by sources, such circumstances may create difficulties in meeting a legally required emission limitation continuously and that

[14] Petition at 11.
[15] *Id.*
[16] Petition at 12.
[17] Petition at 10.
[18] *Id.*
[19] *Id.*
[20] Petition at 11.
[21] Petition at 11.

emission standards may be violated under limited circumstances beyond the control of the source.

In accordance with CAA section 302(k), SIPs must contain emission limitations that "limit the quantity, rate, or concentration of emissions of air pollutants on a continuous basis."[22] While "continuous" standards are required, there is also case law indicating that technology-based standards should account for the practical realities of technology. For example, in *Essex Chemical* v. *Ruckelshaus*, the court acknowledged that in setting standards under CAA section 111, "variant provisions" such as provisions allowing for upsets during startup, shutdown and equipment malfunction "appear necessary to preserve the reasonableness of the standards as a whole and that the record does not support the 'never to be exceeded' standard currently in force."[23] Though intervening case law and amendments to the CAA call into question the relevance of this line of cases today, they support the EPA's view that a system that incorporates some level of flexibility is reasonable and consistent with the overall intent of the CAA. An appropriately drawn affirmative defense provision simply provides for a defense to monetary penalties for violations that are proven to be beyond the control of the source. The EPA notes that the affirmative defense does not excuse a source from injunctive relief, *i.e.*, from being required to take further steps to prevent future upsets or malfunctions that cause harm to the public health. The EPA believes that affirmative defense provisions can supply flexibility both to ensure that emission limitations are "continuous" as required by CAA section 302(k), because any violations remain subject to a claim for injunctive relief, and to provide limited relief in actions for penalties for malfunctions that are beyond the control of the owner where the owner has taken necessary steps to minimize the likelihood and the extent of any such violation. This approach supports the reasonableness of the SIP emission limitations as a whole. SIP emission limitations must apply and be enforceable at all times. A narrow affirmative defense for malfunction events helps to meet this requirement by ensuring that even where there is a malfunction, the emission limitations are still applicable and enforceable through injunctive relief. Several courts have agreed with this approach.[24]

Because the Petitioner questioned the legal basis for affirmative defense provisions in SIPs, the EPA wants to reiterate the basis for its recommendations concerning such provisions. Starting with the 1982 SSM Guidance, the EPA has made a series of recommendations concerning how states might address violations of SIP provisions consistent with CAA requirements in the event of malfunctions. In the 1982 SSM Guidance, the EPA recommended the exercise of enforcement discretion. Subsequently, in the 1983 SSM Guidance, the EPA expanded on this approach by recommending that a state could elect to adopt SIP provisions providing parameters for the exercise of enforcement discretion by the state's personnel. In the 1999 SSM Guidance, the EPA recognized the use of an affirmative defense as a permissible method for addressing excess emissions that were beyond the control of the owner or operator of the source and recommended parameters that should be included as part of such an affirmative defense in order to ensure that it would be available only in certain narrow circumstances.

The EPA interprets the provisions in CAA section 110(a) to allow the use of narrowly tailored affirmative defense provisions in SIP provisions. In particular, CAA section 110(a) requires each state to have a SIP that provides for the attainment, maintenance, and enforcement of the NAAQS, protects PSD increments, protects visibility, and meets the other requirements of the CAA. These statutory provisions include the explicit requirements that SIPs contain emission limitations in accordance with section 110(a)(2)(A) and that these emission limitations must apply continuously in accordance with CAA section 302(k). The CAA is silent as to whether or not states may elect to create affirmative defense provisions in SIPs. In light of the ambiguity created by this silence, the EPA has interpreted the CAA to allow affirmative defense provisions in certain narrowly prescribed circumstances. While recognizing that there is some ambiguity in the statute, the EPA also recognizes that there are some limits imposed by the overarching statutory requirements such as the obligation that SIPs provide for the attainment and maintenance of the NAAQS. Thus, the EPA believes that in order for an affirmative defense provision to be consistent with the CAA, it: (i) Has to be narrowly drawn to address only those excess emissions that are unavoidable; (ii) cannot interfere with the requirement that the emission limitations apply continuously (*i.e.*, cannot provide relief from injunctive relief); and (iii) cannot interfere with the overarching requirements of the CAA, such as attaining and maintaining the NAAQS.[25]

The EPA believes this interpretation is reasonable because it does not interfere with the overarching goals of title I of the CAA, such as attainment and maintenance of the NAAQS, and at the same time recognizes that, despite best efforts of sources, technology is fallible. The EPA disagrees with the suggestion that an affirmative defense will encourage lax behavior by sources and, in fact, believes the opposite. The potential relief from monetary penalties for violations in many cases may serve as an incentive for sources to be more diligent to prevent and to minimize excess emissions in order to be able to qualify for the affirmative defense. An underlying premise of an affirmative defense provision for malfunctions is that the excess emissions are entirely beyond the control of the owner or operator of the source. First, a malfunction is a sudden and unavoidable event that cannot be foreseen or planned for. As explained in the 1999 SSM Guidance, the EPA considers malfunctions to be "sudden, unavoidable, and unpredictable in nature."[26] In order to establish an affirmative defense for a malfunction, the recommended criteria specify that the source, among other things, must have been appropriately designed, operated, and maintained to prevent such an event, and the source must have taken all practicable steps to prevent

[22] Court decisions confirm that this requirement for continuous compliance prohibits exemptions for excess emissions during SSM events. *See, e.g., Sierra Club* v. *EPA*, 551 F.3d 1019, 1021 (D.C. Cir. 2008); *US Magnesium, LLC* v. *EPA*, 690 F.3d 1157, 1170 (10th Cir. 2012).

[23] *See*, 486 F.2d 427, 433 (D.C. Cir. 1973); *Portland Cement Association* v. *Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973).

[24] *See, Luminant Generation Co.* v. *EPA*, 699 F.3d 427 (5th Cir. 2012) (upholding the EPA's approval of an affirmative defense applicable during malfunctions in a SIP submission as a permissible interpretation of the statute under *Chevron* step 2 analysis); *Mont. Sulphur & Chemical Co.* v. *EPA*, 666 F.3d 1174, 1191–93 (9th Cir. 2012) (upholding the EPA's creation of an affirmative defense applicable during malfunctions in a FIP); *Ariz. Public Service Co.* v. *EPA*, 562 F.3d 1116, 1130 (9th Cir. 2009) (upholding the EPA's creation of an affirmative defense applicable during malfunctions in a FIP).

[25] *See, e.g.*, "Approval and Promulgation of Implementation Plans; Texas; Excess Emissions During Startup, Shutdown, Maintenance, and Malfunction Activities; Notice of proposed rulemaking," 75 FR 26892 at 26895 (May 13, 2010). In this proposed rule, the EPA explained 12 specific considerations that justified the proposed approval of the affirmative defense for unplanned events in the state's SIP submission as consistent with the requirements of the CAA.

[26] *See*, 1999 SSM Guidance at Attachment p. 4.

and to minimize the excess emissions that result from the malfunction. Through the criteria recommended in the 1999 SSM Guidance for approvable affirmative defense provisions for malfunctions, the EPA reflected its view that approvable provisions should be narrowly drawn and should be restricted to events beyond the control of the owner or operator of the source.[27] The EPA recommends that states consider 10 specific criteria in such affirmative defense provisions.

Unlike the EPA's proposed response to the request to rescind its SSM Policy with respect to affirmative defenses for malfunctions, the EPA proposes to grant the Petition with respect to its interpretation of the CAA concerning affirmative defense for excess emissions during startup and shutdown events. Accordingly, the EPA is also proposing to issue a SIP call for SIP provisions identified in the Petition that provide an affirmative defense for excess emissions during planned events, such as startup and shutdown. The legal and factual rationale for an affirmative defense provision for malfunctions does not translate to planned events such as startup and shutdown. By definition, the owner or operator of a source can foresee and plan for startup and shutdown events. Because these events are planned and predictable, the EPA believes that air agencies should be able to establish, and sources should be able to comply with, the applicable emission limitations or other control measures during these periods of time. In addition, a source can be designed, operated, and maintained to control and to minimize emissions during such normal expected events. If sources in fact cannot meet the otherwise applicable emission limitations during planned events such as startup and shutdown, then an air agency can develop specific alternative requirements that apply during such periods, so long as they meet other applicable CAA requirements.

Providing an affirmative defense to sources for violations that they could reasonably anticipate and prevent is not consistent with the theory that supports allowing such affirmative defenses for malfunctions, *i.e.*, that where excess emissions are entirely beyond the control of the owner or operator of the source it is appropriate to provide limited relief to claims for monetary penalties. The EPA has previously made the distinction that excess emissions that occur during maintenance should not be accorded special treatment, because sources should be expected to comply with emission limitations during maintenance activities as they are planned and within the control of the source.[28] The EPA believes that same rationale applies to periods of startup and shutdown.[29]

The EPA acknowledges that its 1999 SSM Guidance explicitly recognized that states could elect to create affirmative defense provisions applicable to startup and shutdown events. However, the EPA has reevaluated the justification that could support an affirmative defense during these activities and now believes that the ability and obligation of sources to anticipate and to plan for routine events such as startup and shutdown negates the justification for relief from monetary penalties for violations during those events. Moreover, the EPA notes that the various criteria recommended for affirmative defenses for startup and shutdown to a large extent already mirrored those relevant for malfunctions, such as: (i) The event could not have been prevented through careful planning and design; (ii) the excess emissions were not part of a recurring pattern; and (iii) if the excess emissions resulted from bypassing a control measure, they were unavoidable to prevent loss of life, personal injury, or severe property damage.[30] As a practical matter, many startup and shutdown events that could have met these conditions recommended in the 1999 SSM Guidance are likely to have been associated with malfunctions, and the EPA explicitly stated that if the excess emissions "occur during routine startup or shutdown periods due to a malfunction, then those instances should be treated as malfunctions." The key distinction remains, however, that normal source operations such as startup and shutdown are planned and predictable events. For this reason, the EPA is proposing to revise its SSM Policy to reflect its interpretation of the CAA that affirmative defense provisions applicable during startup and shutdown are not appropriate.

Further support for distinguishing between malfunctions and planned events such as startup and shutdown is to be found in the Petitioner's argument that affirmative defense provisions in SIPs usurp the role of courts to decide liability and to assess penalties for violations under CAA section 113. The Petitioner views CAA sections 113(b) and 113(e) as statutory bars to any form of affirmative defense provision, regardless of the nature of the event. Rather than supporting the Petitioner's conclusion, however, the EPA believes that this argument illustrates why it is appropriate to allow affirmative defenses for malfunctions but not for planned events such as startup and shutdown.

At the outset, the EPA disagrees with the Petitioner's view that CAA section 113(b) explicitly precludes air agencies from adopting, and the EPA from approving, SIP emission limitations for sources that distinguish between conduct such that some violations should only be subject to injunctive relief rather than injunctive relief and monetary penalties. Section 110(a)(2)(A) of the CAA requires states to develop SIPs that "include enforceable emission limitations * * * as may be necessary or appropriate to meet the requirements of" the CAA. However, CAA section 302(k) defines "emission limitation" very broadly to require limits on "the quantity, rate, or concentration of emissions of air pollutants on a continuous basis." Significantly, the latter definition does not on its face preclude provisions devised by the state that may distinguish between violations based on the conduct of the source. The CAA is silent on whether or not a state may include an affirmative defense provision in its SIP. The EPA believes that the CAA thus provides states with discretion in developing plans that meet statutory and regulatory requirements, such as providing for attainment and maintenance of the NAAQS, as long as they are consistent with CAA requirements.[31]

The EPA believes that creating a narrowly tailored affirmative defense for malfunctions is within an air agency's

[27] *Id.* at 3–4.

[28] *See*, "Approval and Promulgation of Implementation Plans; Texas; Excess Emissions During Startup, Shutdown, Maintenance, and Malfunction Activities," 75 FR 68989 at 68992 (Nov. 10, 2010).

[29] *In Luminant Generation Co. v. EPA*, 699 F.3d 427 (5th Cir. 2012), the court upheld the EPA's disapproval of an affirmative defense provision in a SIP submission that pertained to "planned activities," which included startup, shutdown, and maintenance. The EPA disapproved this provision, in part because it provided an affirmative defense for maintenance. The court rejected challenges to the EPA's disapproval of this provision, holding that under *Chevron* step 2, the EPA's interpretation of the CAA was reasonable.

[30] *See*, 1999 SSM Guidance at Attachment 5–6.

[31] States have primary responsibility for developing SIPs in accordance with CAA section 107(a). An air agency's discretion to develop SIP provisions is not unbounded, however, and the EPA's responsibility under CAA section 110(k), section 110(l), and section 193, to review SIP submissions prospectively, and under CAA section 110(k)(5) retrospectively, is to determine whether the SIP provisions in fact meet all applicable statutory and regulatory requirements. Thus, for example, the EPA does not believe that an air agency has discretion to create an exemption for excess emissions during SSM events, because such exemption would conflict with fundamental CAA requirements for SIPs.

authority, and that approving such a provision to make it part of the SIP is within the EPA's authority. An affirmative defense provision can be a means of striking a reasonable balance between the requirements of the CAA and the realities and limits of technology. Air agencies and the EPA must ensure continuous compliance but also recognize that, despite diligent efforts by sources, there may be limited unforeseen and unavoidable circumstances that create difficulties in meeting applicable emission limitations continuously.

The EPA's SSM Policy recognizes an approach under which air agencies may, if they elect, create two tiers of liability for violations due to excess emissions during periods of malfunction: (i) A lesser level of liability for violations for which the source could only be subject to injunctive relief (where it could meet the requirements for an affirmative defense with respect to penalties); and (ii) a higher level of liability for violations for which the source could be subject to both injunctive relief and monetary penalties (where it could not meet the requirements for an affirmative defense with respect to penalties).

The EPA also disagrees with the Petitioner's argument that the inclusion of penalty factors in CAA section 113(e) is a statutory bar to all affirmative defense provisions in SIPs. The EPA believes that these statutory factors apply only for violations for which the regulations approved into the SIP contemplate monetary penalties. A court, in determining whether there is a violation of the SIP provision, and whether the source has met the conditions for an affirmative defense, cannot change the forms of relief for violations provided in the approved SIP. Approval of the regulation into the SIP by the EPA thus affects the availability of monetary penalties for the violation in the first instance. The EPA reiterates, however, that such a provision would not be consistent with the requirements of the CAA if it did not preserve the availability for injunctive relief in the event of violations. Failure to provide in a SIP provision for any form of enforcement for excess emissions during SSM events would be equivalent to the type of provision that excused excess emissions during malfunction from compliance with standards under CAA section 112 that the court rejected in *Sierra Club* v. *EPA*.[32] The EPA's longstanding position with regard to SIPs is that blanket exemptions from compliance are not consistent with the requirements such as attainment and maintenance of the NAAQS because they eliminate much of the incentive that sources would otherwise have to minimize the likelihood of violations and to minimize the extent of a violation once it occurs. Elimination of potential availability of injunctive relief for violations would be fundamentally inconsistent with the requirement that there may be enforcement to cause the installation of control measures, changes of operation, or other changes necessary at the source in order to bring the source into compliance with the applicable emission limitations to meet CAA requirements.

The EPA likewise disagrees with the Petitioner's claim that the elements for establishing an affirmative defense in a SIP provision supplant the mandatory factors that Congress provided for determining the amount of penalties to be assessed in CAA section 113(e). Under CAA section 110(a)(2), states have the responsibility to devise enforceable emission limitations for sources and to develop a program for their implementation and enforcement. The CAA does not require that air agencies treat all violations equally. In devising its SIP, an air agency has authority to determine what constitutes a violation and to distinguish between different types of violations, within the bounds allowed by the CAA and applicable regulations. As the EPA has long recognized in its SSM Policy, circumstances surrounding a given violation may justify distinguishing between those where injunctive relief is appropriate versus those where both injunctive relief and monetary penalties are appropriate. Providing an affirmative defense to monetary penalties in certain circumstances does not negate the factors that Congress provided in CAA section 113(e). In the event that a source violates its emission limitations and fails to meet the requirements of an available defense in the SIP, then it is the court that determines the level of monetary penalties appropriate using the statutory factors in CAA section 113(e).

The EPA notes that the provisions of CAA section 304 relevant to citizen enforcement provide additional support for the view that air agencies can determine that certain violations should not be subject to monetary penalties. Section 304(a) explicitly provides that the court in an enforcement proceeding has jurisdiction to enforce emission limits, to issue orders, "and to apply any appropriate civil penalties." The EPA believes that monetary penalties that might otherwise be an available response to a violation cannot be "appropriate" if an air agency has properly created an affirmative defense provision that eliminates such penalties for violations under specified circumstances in the SIP provision that is before the court. The mere fact that CAA section 113(b) includes penalties as a potential form of relief for violations in general does not mean that air agencies must construct SIP requirements that in all instances require monetary penalties.

As with CAA section 110(a) governing SIP provisions in general, neither CAA section 113(b) nor CAA 113(e) expressly addresses the availability of an affirmative defense. Thus, the EPA believes it is reasonable to interpret these specific provisions in light of the need to balance the requirement for continuous compliance with emission limitations in order to meet overarching goals of the statute such as attainment and maintenance of the NAAQS with the fact that even the most diligent source may not be able to meet emission limitations 100 percent of the time. The EPA has recognized that it is permissible for an air agency to provide narrowly drawn affirmative defense provisions in SIPs that provide relief from monetary penalties for violations that occur due to circumstances beyond the control of the source. When a source has been properly designed, operated, and maintained, and has taken action to prevent and to minimize the excess emissions, such relief may be warranted. Also, as with CAA section 110(a), the EPA does not believe that CAA section 113's silence with regard to affirmative defense provisions should be interpreted to allow broad use of such provisions during planned events that are within the control of the source. The enforcement provisions of the CAA must be read in light of the goals and purposes of the provisions with which they are meant to ensure compliance. As provided above, the EPA believes that the use of an affirmative defense is appropriate only in those narrow circumstances where it is necessary to harmonize the competing interests of the CAA regarding continuous compliance and the limits or fallibility of technology.

In summary, the EPA believes that the CAA provides air agencies in the first instance in their role as the developer of SIPs, and then the EPA in its role as approver of SIPs, some discretion in defining the substantive requirements that are necessary to attain and maintain the NAAQS, protect PSD increments, and protect visibility, or to meet other CAA requirements. Until the air agency takes action to create a SIP, or the EPA takes action to create a FIP, that imposes and defines the applicable emission

[32] 551 F.3d 1019, 1021 (D.C. Cir. 2008).

limitations, there is no standard for a source to violate and thus no conduct for which a court could assess any penalties. The EPA believes that the CAA allows air agencies (or the EPA when it is promulgating a FIP) in defining emission standards to define narrowly drawn affirmative defenses that provide limited relief from monetary penalties but not for injunctive relief in specified circumstances. The EPA emphasizes that affirmative defense provisions for malfunctions need to be appropriately and narrowly drawn, and thus the SSM Policy makes recommendations for the types of criteria that would make such a provision consistent with the requirements of the CAA.

For the foregoing reasons, the EPA is proposing to grant the Petition in part, and to deny the Petition in part, with respect to the Petitioner's request that the EPA rescind its SSM Policy interpreting the CAA to allow affirmative defense provisions in SIPs for excess emissions during SSM events. In addition, the EPA is proposing to grant the Petition in part, and to deny the Petition in part, with respect to the Petitioner's request that the EPA issue SIP calls for those affirmative defense provisions in specific SIP provisions identified in the Petition. The EPA requests comment on this proposed action. As discussed in section VII.B of this notice, the EPA is also restating its recommended criteria for approvable affirmative defenses for malfunctions in SIP provisions consistent with CAA requirements. Further, as discussed in section IX of this notice, the EPA is proposing to grant or to deny the Petition with respect to the specific SIP provisions identified by the Petitioner as inconsistent with the CAA.

V. Proposed Action in Response to Request for the EPA's Review of Specific Existing SIP Provisions for Consistency With CAA Requirements

A. Petitioner's Request

The Petitioner's second request was for the EPA to find that SIPs "containing an SSM exemption or a provision that could be interpreted to affect EPA or citizen enforcement are substantially inadequate to comply with the requirements of the Clean Air Act."[33] In addition, the Petitioner requested that if the EPA finds such defects in existing SIPs, the EPA "issue a call for each of the states with such a SIP to revise it in conformity with the requirements or otherwise remedy these defective SIPs."[34]

In support of this request, the Petitioner expressed concern that many SIPs contain provisions that are inconsistent with the requirements of the CAA. According to the Petitioner, these provisions fall into two general categories: (1) Exemptions for excess emissions by which such emissions are not treated as violations; and (2) enforcement discretion provisions that may be worded in such a way that a decision by the state not to enforce against a violation could be construed by a court to bar enforcement by the EPA under CAA section 113, or by citizens under CAA section 304.

First, the Petitioner expressed concern that many SIPs have either automatic or discretionary exemptions for excess emissions that occur during periods of startup, shutdown, or malfunction. Automatic exemptions are those that, on the face of the SIP provision, provide that any excess emissions during such events are not violations even though the source exceeds the otherwise applicable emission limitations. These provisions preclude enforcement by the state, the EPA, or citizens, because by definition these excess emissions are defined as not violations. Discretionary exemptions or, more correctly, exemptions that may arise as a result of the exercise of "director's discretion" by state officials, are exemptions from an otherwise applicable emission limitation that a state may grant on a case-by-case basis with or without any public process or approval by the EPA, but that do purport to bar enforcement by the EPA or citizens. The Petitioner argued that "[e]xemptions that may be granted by the state do not comply with the enforcement scheme of title I of the Act because they undermine enforcement by the EPA under section 113 of the Act or by citizens under section 304."

The Petitioner explained that all such exemptions are fundamentally at odds with the requirements of the CAA and with the EPA's longstanding interpretation of the CAA with respect to excess emissions in SIPs. SIPs are required to include emission limitations designed to provide for the attainment and maintenance of the NAAQS and for protection of PSD increments. The Petitioner emphasized that the CAA requires that such emission limitations be "continuous" and that they be established at levels that achieve sufficient emissions control to meet the required CAA objectives when adhered to by sources. Instead, the Petitioner contended, exemptions for excess emissions often result in real-world emissions that are far higher than the level of emissions envisioned and planned for in the SIP. Citing the EPA's own guidance and past administrative actions, the Petitioner explained that exemptions from otherwise applicable emission limitations can allow large amounts of additional emissions that are not accounted for in SIPs and that exemptions thus "create large loopholes to the Act's fundamental requirement that a SIP must provide for attainment and maintenance of the NAAQS and PSD increments."

Second, the Petitioner expressed concern that many SIPs have provisions that may have been intended to govern only the exercise of enforcement discretion by the state's own personnel but are worded in a way that could be construed to preclude enforcement by the EPA or citizens if the state elects not to enforce against the violation. The Petitioner contended that "any SIP provision that purports to vest the determination of whether or not a violation of the SIP has occurred with the state enforcement authority is inconsistent with the enforcement provisions of the Act." In support of this contention, the Petitioner quoted from the EPA's recent action to rectify such a provision in the Utah SIP:

> * * * SIP provisions that give exclusive authority to a state to determine whether an enforcement action can be pursued for an exceedance of an emission limit are inconsistent with the CAA's regulatory scheme. EPA and citizens, and any court in which they seek to file an enforcement claim, must retain the authority to independently evaluate whether a source's exceedance of an emission limit warrants enforcement action.[35]

After articulating these overarching concerns with existing SIP provisions, the Petitioner requested that the EPA evaluate specific SIP provisions identified in the separate section of the Petition titled, "Analysis of Individual States' SSM Provisions."[36] In that section, the Petitioner identified specific provisions in the SIPs of 39 states that the Petitioner believed to be inconsistent with the requirements of the CAA and explained in detail the basis for that belief. In the conclusion section of the Petition, the Petitioner

[33] Petition at 14.

[34] *Id.*

[35] *See,* "Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision; Notice of proposed rulemaking," 75 FR 70888 at 70892–93 (Nov. 19, 2010) (proposed SIP call, *inter alia,* to rectify an enforcement discretion provision that in fact appeared to bar enforcement by the EPA or citizens if the state decided not to enforce).

[36] Petition at 17.

listed the SIP provisions in each state for which it seeks a specific remedy.

B. The EPA's Response

In general, the EPA agrees with key statements of the Petitioner. The EPA's longstanding interpretation of the CAA is that automatic exemptions from emission limitations in SIPs are impermissible because they are inconsistent with the fundamental requirements of the CAA. The EPA has reiterated this point in its guidance documents and in rulemaking actions numerous times. The EPA has also acknowledged that it previously approved some SIP provisions that provide such exemptions in error and encouraged states to rectify them.[37]

The EPA also has a longstanding interpretation of the CAA that does not allow "director's discretion" provisions in SIPs if they provide unbounded discretion to allow what would amount to a case-specific revision of the SIP without meeting the statutory requirements of the CAA for SIP revisions. Moreover, the CAA would not allow approval of a SIP provision that provided director's discretion to create discretionary exemptions for violations when the CAA would not allow such exemptions in the first instance.

In addition, the EPA's longstanding interpretation of the CAA is that SIPs may contain provisions concerning "enforcement discretion" by the air agency's own personnel, but such provisions cannot bar enforcement by the EPA or through a citizen suit.[38] In the event such a provision could be construed by a court to preclude EPA or citizen enforcement, that provision would be at odds with fundamental requirements of the CAA pertaining to enforcement. Although the EPA does not agree with the Petitioner concerning all affirmative defense provisions in SIPs, the EPA does agree that such provisions have to meet CAA requirements.

The EPA also agrees that automatic exemptions, discretionary exemptions via director's discretion, ambiguous enforcement discretion provisions that may be read to preclude EPA or citizen enforcement, and inappropriate affirmative defense provisions can interfere with the overarching objectives of the CAA, such as attaining and maintaining the NAAQS, protection of PSD increments, and protection of visibility. Such provisions in SIPs can interfere with effective enforcement by air agencies, the EPA, and the public to assure that sources comply with CAA requirements, contrary to the fundamental enforcement structure provided in CAA sections 113 and 304.

The EPA's agreement on these broad principles, however, does not necessarily mean that the EPA agrees with the Petitioner's views as to each of the specific SIP provisions identified as problematic in the Petition. The EPA has undertaken a comprehensive review of those specific SIP provisions to determine whether they are consistent with CAA requirements, and if they are not consistent, whether the provisions are substantially inadequate to meet CAA requirements and thus warrant action to rectify.

The EPA has carefully evaluated the concerns expressed by the Petitioner with respect to each of the identified SIP provisions and has considered the specific remedy sought by the Petitioner. In many instances, the EPA tentatively concurs with the Petitioner's analysis of the provision in question and accordingly is proposing to grant the Petition with respect to that provision and simultaneously proposing to make a finding of substantial inadequacy and to issue a SIP call to rectify the SIP inadequacy. In other instances, however, the EPA tentatively disagrees with the Petitioner's analysis of the provision and thus is proposing to deny the Petition with respect to that provision and to take no further action.

The EPA's evaluation of each of the provisions identified in the Petition is summarized in section IX of this notice. For the reasons discussed in section IX of this notice, the EPA is proposing to grant the Petition in part, and to deny the Petition in part, with respect to the specific existing SIP provisions for which the Petitioner requested a remedy. The EPA requests comment on the proposed actions on these specific SIP provisions.

VI. Proposed Action in Response To Request That the EPA Limit SIP Approval to the Text of State Regulations and Not Rely Upon Additional Interpretive Letters From the State

A. Petitioner's Request

The Petitioner's third request was that when the EPA evaluates SIP revisions submitted by a state, the EPA should require "all terms, conditions, limitations and interpretations of the various SSM provisions to be reflected in the unambiguous language of the SIPs themselves."[39] The Petitioner expressed concern that the EPA has previously approved SIP submissions with provisions that "by their plain terms" do not appear to comply with the EPA's interpretation of CAA requirements embodied in the SSM Policy and has approved those SIP submissions in reliance on separate "letters of interpretation" from the state that construe the provisions of the SIP submission itself to be consistent with the SSM Policy.[40] Because of this reliance on interpretive letters, the Petitioner argued that "such constructions are not necessarily apparent from the text of the provisions and their enforceability may be difficult and unnecessarily complex and inefficient."[41]

In support of this request, the Petitioner alleged that past SIP approvals related to Oklahoma and Tennessee illustrate the practical problems that can arise from reliance on interpretive letters. With respect to Oklahoma, the Petitioner asserted that a 1984 approval of a SIP submission from that state addressing SSM provisions required two letters of interpretation from the state in order for the EPA to determine that the actual regulatory text in the SIP submission was sufficiently consistent with CAA requirements pertaining to SSM provisions.[42] The Petitioner conceded that the **Federal Register** notices for the proposed and final actions to approve the Oklahoma SIP submission did quote from the state's letters but expressed concern that those letters were not actually "promulgated as part of the Oklahoma SIP."

With respect to Tennessee, the Petitioner pointed to a more recent action concerning the redesignation of the Knoxville area to attainment for the 1997 8-hour ozone NAAQS.[43] In this action, the EPA evaluated whether the SIP for that state met requirements necessary for redesignation from nonattainment to attainment in accordance with CAA section 107(d)(3).[44] Again, the Petitioner noted that in order to complete that redesignation action, the EPA had to request that both the state and the local air planning officials confirm officially that the existing SIP provisions do not in fact provide an exemption for excess

[37] *See, e.g.*, 1982 SSM Guidance at 1.

[38] *See, e.g.*, 1983 SSM Guidance at Attachment p. 2.

[39] Petition at 16.

[40] Petition at 14.

[41] Petition at 15.

[42] *See*, "Revision to Oklahoma Regulation 1.5—Reports Required, Excess Emissions During Startup, Shutdown and Malfunction of Equipment," 49 FR 3084 (Jan. 25, 1984). At the time of the proposed and final action, the operative EPA guidance was the 1983 SSM Guidance.

[43] Petition at 15.

[44] *See*, "Redesignation of the Knoxville 1997 8-Hour Ozone Nonattainment Area to Attainment," 76 FR 12587 (Mar. 8, 2011).

emissions during SSM events and that the provisions should not be interpreted to do so. The implication of the Petitioner's observation is that if the SIP provisions had been clear and unambiguous in the first instance, interpretive letters would not have been necessary.

By contrast, the Petitioner pointed to the more recent SIP call action for Utah in which the EPA itself noted that it was unclear why the EPA had originally approved a particular SIP provision relevant to SSM events.[45] Specifically, the Petitioner quoted the EPA's own statement that "thirty years later, it is not clear how EPA reached the conclusion that exemptions granted by Utah would not apply as a matter of federal law or whether a court would honor EPA's interpretation * * *".[46] The Petitioner argued that this situation where the EPA itself was unable to ascertain why a SIP provision was previously approved as meeting CAA requirements illustrates the concern that "the state's interpretation of its regulations may (or may not) be known by parties attempting to enforce the SIP decades after the provisions were created."[47]

From these examples, the Petitioner drew the conclusion that reliance on letters of interpretation from the state, even if reflected in the **Federal Register** notice as part of the explicit basis for the SIP approval, is insufficient. The Petitioner argued that such interpretations, if they are not plain on the face of the state regulations themselves, should be set forth in the SIP as reflected in the Code of Federal Regulations. The Petitioner advocated that all parties should be able to rely on the terms of the SIP as reflected in the Code of Federal Regulations, or alternatively on the SIP as shown on an EPA Internet Web page, rather than having to rely on other interpretive letters that may be difficult to locate. The Petitioner's preferred approach, however, was that "all terms, conditions, limitations and interpretations of the various SSM provisions be reflected in the unambiguous language of the SIPs themselves."

B. The EPA's Response

The EPA agrees with the core principle advocated by the Petitioner, *i.e.*, that the language of regulations in SIPs that pertain to SSM events should be clear and unambiguous. This is necessary as a legal matter but also as a matter of fairness to all parties, including the regulated entities, the regulators, and the public. In some cases, the lack of clarity may be so significant that amending the regulation may be warranted to eliminate the potential for confusion or misunderstanding about applicable legal requirements that could interfere with compliance or enforcement. Indeed, as noted by the Petitioner, the EPA has requested that states clarify ambiguous SIP provisions when the EPA has subsequently determined that to be necessary.[48]

However, the EPA believes that the use of interpretive letters to clarify perceived ambiguity in the provisions in a SIP submission is a permissible, and sometimes necessary, approach under the CAA. Used correctly, and with adequate documentation in the **Federal Register** and the docket for the underlying rulemaking action, reliance on interpretive letters can serve a useful purpose and still meet the enforceability concerns of the Petitioner. Regulated entities, regulators, and the public can readily ascertain the existence of interpretive letters relied upon in the EPA's approval that would be useful to resolve any perceived ambiguity. By virtue of being part of the stated basis for the EPA's approval of that provision, the interpretive letters necessarily establish the correct interpretation of any arguably ambiguous SIP provision.

In addition, reliance on interpretive letters to address concerns about perceived ambiguity can often be the most efficient and timely way to resolve concerns about the correct meaning of regulatory provisions. Both air agencies and the EPA are required to follow time- and resource-intensive administrative processes in order to develop and evaluate SIP submissions. It is reasonable for the EPA to exercise its discretion to use interpretive letters to clarify concerns about the meaning of regulatory provisions, rather than to require air agencies to reinitiate a complete administrative process merely to resolve perceived ambiguity in a provision in a SIP submission.[49] In particular, the EPA considers this an appropriate approach where reliance on such an interpretive letter allows the air agency and the EPA to put into place SIP provisions that are necessary to meet important CAA objectives and for which unnecessary delay would be counterproductive. For example, where an air agency is adopting emission limitations for purposes of attaining the NAAQS in an area, a timely letter from the air agency clarifying that an enforcement discretion provision is applicable only to air agency enforcement personnel and has no bearing on enforcement by the EPA or the public could help the area reach attainment more expeditiously than requiring the air agency to undertake a time-consuming administrative process to make a minor change in the regulatory text.

Thus, to the extent that the Petitioner intended the Petition on this issue to be a request for the EPA never to use interpretive letters as part of the basis for approval of any SIP submission, the EPA disagrees with the Petitioner and accordingly is proposing to deny the request. The EPA notes that it is already the EPA's practice to assure that any interpretive letters are correctly and adequately reflected in the **Federal Register** and are included in the rulemaking docket for a SIP approval.

There are multiple reasons why the EPA does not agree with the Petitioner with respect to the alleged inadequacy of using interpretive letters to clarify specific ambiguities SIP regulations, provided this process is done correctly. First, under section 107(a), the CAA gives air agencies both the authority and the primary responsibility to develop SIPs that meet applicable statutory and regulatory requirements. However, the CAA generally does not specify exactly how air agencies are to meet the requirements substantively, nor does the CAA specify that air agencies must use specific regulatory terminology, phraseology, or format, in provisions submitted in a SIP submission. Air agencies each have their own requirements and practices with respect to rulemaking, making flexibility toward

[45] Petition at 15–16.

[46] *See*, "Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision; Notice of proposed rulemaking," 75 FR 70888 at 70890 (Nov. 19, 2010).

[47] Petition at 16. The Petitioner assumed that the original SIP action was one in which the EPA must have relied on an interpretive letter from the state as a basis for the prior SIP approval. In fact, however, the EPA recognized that the EPA statement in the prior final action approving the SIP revision in 1980 concerning federal law superseding incorrect state law embodied in the SIP was incorrect. Moreover, subsequent case law has illustrated that courts will not decide that CAA requirements automatically override existing SIP provisions, regardless of whether those SIP provisions met CAA requirements at the time of the approval or since. *See, Sierra Club, et al.* v. *Georgia Power Co.*, 443 F.3d 1346, 1354 (11th Cir. 2006).

[48] *See*, e.g., "Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision," 76 FR 21639 at 21648 (Apr. 18, 2011).

[49] CAA section 110(k) directs the EPA to act on SIP submissions and to approve those that meet statutory and regulatory requirements. Implicit in this authority is the discretion, through appropriate notice-and-comment rulemaking, to determine whether or not a given SIP provision meets such requirements, in reliance on the information that the EPA considers relevant for this purpose.

terminology on the EPA's part appropriate.

As a prime example relevant to the SSM issue, CAA section 110(a)(2)(A) requires that a state's SIP shall include "enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights) as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of" the CAA. Section 302(k) of the CAA further defines the term "emission limitation" in important respects but nevertheless leaves room for variations of approach:

> * * * a requirement established by the State or Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement related to the operation or maintenance of a source to assure continuous emissions reduction, and any design, equipment, work practice or operational standard promulgated under [the CAA].

Even this most basic requirement of SIPs, the inclusion of enforceable "emission limitations," allows air agencies discretion in how to structure or word the emission limitations, so long as the provisions meet fundamental legal requirements.[50] Thus, by the explicit terms of the statute and by design, air agencies generally have considerable discretion in how they elect to structure or word their state regulations submitted to meet CAA requirements in a SIP.

Second, under CAA section 110(k), the EPA has both the authority and the responsibility to assess whether a SIP submission meets applicable CAA and regulatory requirements. Given that air agencies have authority and discretion to structure or word SIP provisions as they think most appropriate so long as they meet CAA and regulatory requirements, the EPA's role is to evaluate whether those provisions in fact meet those legal requirements.[51] Necessarily, this process entails the exercise of judgment concerning the specific text of regulations, with regard both to content and to clarity. Because actions on SIP submissions are subject to notice-and-comment rulemaking, there is also the opportunity for other parties to identify SIP provisions that they consider problematic and to bring to the EPA's attention any concerns about ambiguity in the meaning of the SIP provisions under evaluation.

Third, careful review of regulatory provisions in a SIP submission can reveal areas of potential ambiguity. It is essential, however, that regulations are sufficiently clear that regulated entities, regulators, and the public can understand the SIP requirements. Where the EPA perceives ambiguity in draft SIP submissions, it endeavors to resolve those ambiguities through interactions with the air agency in question even in advance of the SIP submission. On occasion, however, there may still remain areas of regulatory ambiguity in a SIP submission's provisions that the EPA identifies, either independently or as a result of public comments on a proposed action, for which resolution is both appropriate and necessary as part of the rulemaking action.

In such circumstances, the ambiguity may be so significant as to require the air agency to revise the regulatory text in its SIP submission in order to resolve the concern. At other times, however, the EPA may determine that with adequate explanation from the state, the provision is sufficiently clear and complies with applicable CAA and regulatory requirements. In some instances, the air agency may supply that extra explanation in an official letter from the appropriate authority to resolve any potential ambiguity. When the EPA bases its approval of a SIP submission in reliance on the air agency's official interpretation of the provision, that reading is explicitly incorporated into the EPA's action and is memorialized as the proper intended reading of the provision.

For example, in the Knoxville redesignation action that the Petitioner noted, the EPA took careful steps to ensure that the perceived ambiguity was substantively resolved and fully reflected in the rulemaking record, i.e., through inclusion of the interpretive letters in the rulemaking docket, quoting relevant passages from the letters in the **Federal Register**, and carefully evaluating the areas of potential ambiguity in response to public comments on a provision-by-provision basis.

Finally, the EPA notes that while it is possible to reflect or incorporate interpretive letters in the regulatory text of the CFR, there is no requirement to do so in all actions and there are other ways for the public to have a clear understanding of the content of the SIP. First, for each SIP, the CFR contains a list or table of actions that reflects the various components of the approved SIP, including information concerning the submission of, and the EPA's action approving, each component. With this information, interested parties can readily locate the actual **Federal Register** notice in which the EPA will have explained the basis for its approval in detail, including any interpretive letters that may have been relied upon to resolve any potential ambiguity in the SIP provisions. With this information, the interested party can also locate the docket for the underlying rulemaking and obtain a copy of the interpretive letter itself. Thus, if there is any debate about the correct reading of the SIP provision, either at the time of the EPA's approval or in the future, it will be possible to ascertain the mutual understanding of the air agency and the EPA of the correct reading of the provision in question at the time the EPA approved it into the SIP. Most importantly, regardless of whether the content of the interpretive letter is reflected in the CFR or simply described in the **Federal Register** preamble accompanying the EPA's approval of the SIP submission, this mutual understanding of the correct reading of that provision upon which the EPA relied will be the reading that governs, should that later become an issue.

The EPA notes that the existence of, or content of, an interpretive letter that is part of the basis for the EPA's approval of a SIP submission is in reality analogous to many other things related to that approval. Not everything that may be part of the basis for the SIP approval in the docket, including the proposal or final preambles, the technical support documents, responses to comments, technical analyses, modeling results, or docket memoranda, will be restated *verbatim*, incorporated into, or referenced in the CFR. These background materials remain part of the basis for the SIP approval and remain available should they be needed for any purpose. To the extent that there is any question about the correct interpretation of an ambiguous provision in the future, an interested party will be able to access the docket to verify the correct meaning of SIP provisions.

With regard to the Petitioner's concern that either actual or alleged ambiguity in a SIP provision could impede an effective enforcement action, the EPA believes that its current process for evaluating SIP submissions and resolving potential ambiguities, including the reliance on interpretive

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[50] The EPA notes that notwithstanding discretion in wording in regulatory provisions, many words have specific recognized legal meaning whether by statute, regulation, case law, dictionary definition, or common usage. For example, the term "continuous" has a specific meaning that must be complied with substantively, however the state may elect to word its regulatory provisions.

[51] *See, e.g., Luminant Generation Co.* v. *EPA*, 699 F.3d 427 (5th Cir. 2012) (upholding the EPA's disapproval in part of affirmative defense provision with unclear regulatory text); *U S Magnesium, LLC* v. *EPA*, 690 F.3d 1157, 1170 (10th Cir. 2012) (upholding the EPA's issuance of a SIP call to clarify a provision that could be interpreted in a way inconsistent with CAA requirements).

letters in appropriate circumstances with correct documentation in the rulemaking action, minimizes the possibility for any such ambiguity in the first instance. To the extent that there remains any perceived ambiguity, the EPA concludes that regulated entities, regulators, the public, and ultimately the courts, have recourse to the administrative record to shed light on and resolve any such ambiguity as explained above.

For the foregoing reasons, the EPA is proposing to deny the Petition on this issue concerning reliance on interpretive letters in actions on SIP submissions. The EPA requests comment on this proposed action.

VII. Clarifications, Reiterations, and Revisions to the EPA's SSM Policy

A. Applicability of Emission Limitations During Periods of Startup and Shutdown

The EPA's evaluation of the Petition indicates that there is a need to clarify the SSM Policy with respect to excess emissions that occur during periods of planned startup and shutdown or other planned events. The significant number of SIP provisions identified in the Petition that create automatic or discretionary exemptions from emission limitations during startup and shutdown suggests that there may be a misunderstanding concerning whether the CAA permits such exemptions. Although the EPA's stated position on this issue has been consistent since 1977, ambiguity in some statements in the EPA's guidance documents may have left the misimpression that such exemptions are consistent with the requirements of the CAA. Recent court decisions have indicated that such exemptions for excess emissions during periods of startup and shutdown are not in fact permissible under the CAA. Thus, in acting upon the Petition the EPA is clarifying its interpretation of the requirements of the CAA to forbid exemptions from otherwise applicable emission limitations for excess emissions during planned events such as startup and shutdown in SIP provisions.

The EPA believes that any misimpression that exemptions for excess emissions are permissible during planned events such as startup and shutdown may have begun with a statement in the 1983 SSM Guidance. In this guidance, the EPA distinguished between excess emissions during unforeseeable events like malfunctions and foreseeable events like startup and shutdown. In drawing distinctions between these broad categories of events, the EPA stated:

> Startup and shutdown of process equipment are part of the normal operation of a source and should be accounted for in the planning, design and implementation of operating procedures for the process and control equipment. Accordingly, it is reasonable to expect that careful and prudent planning and design will eliminate violations of emission limitations during such periods. However, for a few sources there may exist infrequent short periods of excess emissions during startup and shutdown which cannot be avoided. Excess emissions during these infrequent short periods *need not be treated as violations* providing the source adequately shows that the excess could not have been prevented through careful planning and design and that bypassing of control equipment was unavoidable to prevent loss of life, personal injury, or severe property damage (emphasis added).[52]

The phrase "need not be treated as violations" may have been misunderstood to be a statement that the CAA would allow SIP provisions that provide an exemption for the resulting excess emissions, thereby defining the excess emissions as not a violation of the applicable emission limitations. The EPA did not intend to suggest that SIP provisions that included an actual exemption for excess emissions during startup and shutdown events would be consistent with the CAA; the EPA made this statement in the context of whether air agencies should exercise enforcement discretion and more specifically whether air agencies could elect to have SIP provisions that embodied their own exercise of enforcement discretion in such circumstances. As with any such SIP provisions addressing parameters of the air agency's own exercise of enforcement discretion, that exercise of discretion cannot purport to bar enforcement by the EPA or through a citizen suit for excess emissions that must be treated as violations to meet CAA requirements. Thus, the use of the phrase "need not be treated as violations" was at a minimum confusing because it seemed to go to the definition of what could constitute a "violation" in a SIP provision rather than to whether the air agency might or might not elect to exercise enforcement discretion in such circumstances.

The EPA believes that additional confusion may have resulted from ambiguity in the 1999 SSM Guidance. That document contained an entire section devoted to "source category specific rules for startup and shutdown." In explaining its intentions in providing that section of the guidance, the EPA stated:

> Finally, EPA is clarifying how excess emissions that occur during periods of startup and shutdown should be addressed. In general, because excess emissions that occur during these periods are reasonably foreseeable, they *should not be excused*. However, EPA recognizes that, for some source categories, even the best available emissions control systems might not be consistently effective during startup or shutdown periods. [For certain sources in certain areas] these technological limitations *may be addressed in the underlying standards themselves through narrowly-tailored SIP revisions* that take into account the potential impacts on ambient air quality caused by the inclusion of these allowances (emphasis added).[53]

The phrase "may be addressed * * * in narrowly-tailored SIP revisions" may have been misunderstood to suggest that the CAA would allow SIP provisions that provide an actual exemption for the resulting excess emissions and thus not treat the emissions as a violation of the applicable emission limitations. The EPA did not intend to suggest that an exemption would be permissible; the EPA intended to suggest that the air agency might elect to design special emission limitations or other control measures that applied to the sources in question during startup and shutdown, as indicated by the earlier phrase that the excess emissions "should not be excused."

In addition, Section III.A of the 1999 SSM Guidance recommended very specific criteria that air agencies should consider including as part of any SIP provision that was intended to apply to sources during startup and shutdown in lieu of the otherwise applicable emission limitations.[54] In order to revise the otherwise applicable emission limitation in the SIP, the EPA recommended that in order to be approvable (*i.e.*, meet CAA requirements), the new special requirements applicable to the source during startup and shutdown should be narrowly tailored and take into account considerations such as the technological limitations of the specific source category and the control technology that is feasible during startup and shutdown. However, the 1999 SSM Guidance should have been clearer that the SIP revisions under discussion could not create an exemption for emissions during startup and shutdown, but rather specific emission limitations or control measures that would apply during those periods. Also unstated but implicit was the requirement that any such SIP

[52] *See*, 1983 SSM Guidance at Attachment p. 3.

[53] *See*, 1999 SSM Guidance at 3.

[54] *See*, 1999 SSM Guidance at Attachment 3–4.

revision that would alter the existing applicable emission limitations for a source during startup and shutdown would be subject to the same requirements as any other SIP submission, *i.e.*, compliance with CAA sections 110(a), 110(k), 110(l), 193, and any other CAA provision substantively germane to the SIP revision.

The EPA concludes that the CAA does not allow SIP provisions that include exemptions from emission limitations during planned events such as startup and shutdown. Instead, the CAA would allow special emission limitations or other control measures or control techniques that are designed to minimize excess emissions during startup and shutdown. The EPA continues to recommend the seven specific criteria enumerated in Section III.A of the Attachment to the 1999 SSM Guidance as appropriate considerations for SIP provisions that apply to startup and shutdown. These criteria are:

(1) The revision must be limited to specific, narrowly defined source categories using specific control strategies (e.g., cogeneration facilities burning natural gas and using selective catalytic reduction);

(2) Use of the control strategy for this source category must be technically infeasible during startup or shutdown periods;

(3) The frequency and duration of operation in startup or shutdown mode must be minimized to the maximum extent practicable;

(4) As part of its justification of the SIP revision, the state should analyze the potential worst-case emissions that could occur during startup and shutdown;

(5) All possible steps must be taken to minimize the impact of emissions during startup and shutdown on ambient air quality;

(6) At all times, the facility must be operated in a manner consistent with good practice for minimizing emissions, and the source must have used best efforts regarding planning, design, and operating procedures to meet the otherwise applicable emission limitation; and

(7) The owner or operator's actions during startup and shutdown periods must be documented by properly signed, contemporaneous operating logs, or other relevant evidence.

The EPA's evaluation of the Petition also indicates that there is a need to reiterate the SSM Policy with respect to excess emissions that occur during other periods of normal source operation in addition to during periods of startup and shutdown. A number of SIP provisions identified in the Petition create automatic or discretionary exemptions from otherwise applicable emission limitations during periods such as "maintenance," "load change," "soot blowing," "on-line operating changes," or other similar normal modes of operation. Like startup and shutdown, the EPA considers all of these to be phases of normal operation at a source, for which the source can be designed, operated, and maintained in order to meet the applicable emission limitations and during which a source should be expected to control and minimize emissions. Accordingly, exemptions for emissions during these periods of normal source operation are not consistent with CAA requirements. Excess emissions during planned and predicted periods should be treated as violations of the applicable emission limitations.

B. Affirmative Defense Provisions During Periods of Malfunction

The EPA's evaluation of the Petition indicates that it would be helpful to reiterate the SSM Policy with respect to affirmative defense provisions that would be consistent with CAA requirements for malfunctions. Many of the specific SIP provisions identified in the Petition may have been intended to operate as affirmative defenses, but nevertheless they have significant deficiencies. In particular, many of the SIP provisions at issue stipulate that if the source meets the conditions specified, then the excess emissions would not be considered violations for any purpose, not merely with respect to monetary penalties. This is contrary to the EPA's interpretation of the CAA. In addition, many of the SIP provisions identified in the Petition that resemble affirmative defense provisions do not have sufficiently robust criteria to assure that the affirmative defense is available only for events that are entirely beyond the control of the owner or operator of the source and events where the owner or operator of the sources has made all practicable efforts to comply.

After consideration of the issues raised by the Petition and the wide variety of existing SIP provisions the Petitioner alleged are deficient, the EPA wants to reiterate the criteria that it considers appropriate for approvable affirmative defense provisions in SIPs. In addition, to provide a clear illustration of regulatory text that embodies these criteria effectively, the EPA also wishes to provide an example of the regulatory provisions that the EPA employs in its own regulations to serve this purpose effectively and consistently with CAA requirements.

The criteria that the EPA recommends for approvable affirmative defense provisions for excess emissions for malfunctions consistent with CAA requirements remain essentially the same as stated in the 1999 SSM Guidance.[55] We repeat them here. Most importantly, a valid affirmative defense for excess emissions due to a malfunction can only be effective with respect to monetary penalties, not with respect to potential injunctive relief. Second, the affirmative defense should be limited only to malfunctions that are sudden, unavoidable, and unpredictable. Third, a valid affirmative defense provision must provide that the defendant has the burden of proof to demonstrate all of the elements of the defense to qualify. This demonstration has to occur in a judicial or administrative proceeding where the merits of the affirmative defense are independently and objectively evaluated. The specific criteria that the EPA recommends for an affirmative defense provision for malfunctions to be consistent with CAA requirements are:

(1) The excess emissions were caused by a sudden, unavoidable breakdown of technology, beyond the control of the owner or operator;

(2) The excess emissions (a) did not stem from any activity or event that could have been foreseen and avoided, or planned for, and (b) could not have been avoided by better operation and maintenance practices;

(3) To the maximum extent practicable the air pollution control equipment or processes were maintained and operated in a matter consistent with good practice for minimizing emissions;

(4) Repairs were made in an expeditious fashion when the operator knew or should have known that applicable emission limitations were being exceeded. Off-shift labor and overtime must have been utilized, to the extent practicable, to ensure that such repairs were made as expeditiously as practicable;

(5) The amount and duration of the excess emissions (including any bypass) were minimized to the maximum extent practicable during periods of such emissions;

(6) All possible steps were taken to minimize the impact of the excess emissions on ambient air quality;

(7) All emission monitoring systems were kept in operation if at all possible;

(8) The owner or operator's actions in response to the excess emissions were documented by properly signed,

[55] *See*, 1999 SSM Guidance at Attachment 3–4.

contemporaneous operating logs, or other relevant evidence;

(9) The excess emissions were not part of a recurring pattern indicative of inadequate design, operation, or maintenance; and

(10) The owner or operator properly and promptly notified the appropriate regulatory authority.

One refinement to these recommendations from the 1999 SSM Guidance that should be highlighted is the EPA's view concerning whether affirmative defenses should be provided in the SIP in the case of geographic areas and pollutants "where a single source or small group of sources has the potential to cause an exceedance of the NAAQS or PSD increments." The EPA believes that such affirmative defenses may be permissible if there is no "potential" for exceedances. Such provisions may also be permissible if the affirmative defense alternatively requires the source to make an affirmative after-the-fact showing that the excess emissions that resulted from the violations did not in fact cause an exceedance of the NAAQS or PSD increments. The EPA has previously approved such provisions as meeting CAA requirements on a case-by-case basis in specific actions on SIP submissions, and in this action proposes to continue that approach under proper facts and circumstances.

In addition to the foregoing criteria for appropriate affirmative defense provisions, the EPA also recommends that air agencies consider the following regulatory language that the EPA is currently using for affirmative defense provisions when it issues new National Emissions Standards for Hazardous Air Pollutants (NESHAP) for purposes of CAA section 112.[56] Air agencies may wish to adapt this sample regulatory text for their own affirmative defense provisions in SIPs.

§ 63.456 Affirmative defense for violation of emission standards during malfunction.

In response to an action to enforce the standards set forth in §§ 63.443(c) and (d), 63.444(b) and (c), 63.445(b) and (c), 63.446(c), (d), and (e), 63.447(b) or § 63.450(d), the owner or operator may assert an affirmative defense to a claim for civil penalties for violations of such standards that are caused by malfunction, as defined at 40 CFR 63.2. Appropriate penalties may be assessed, however, if the owner or operator fails to meet the burden of proving all of the requirements in the affirmative defense. The affirmative defense shall not be available for claims for injunctive relief.

(a) To establish the affirmative defense in any action to enforce such a standard, the owner or operator must timely meet the reporting requirements in paragraph (b) of this section, and must prove by a preponderance of evidence that:

(1) The violation:

(i) Was caused by a sudden, infrequent, and unavoidable failure of air pollution control equipment, process equipment, or a process to operate in a normal or usual manner; and

(ii) Could not have been prevented through careful planning, proper design, or better operation and maintenance practices; and

(iii) Did not stem from any activity or event that could have been foreseen and avoided, or planned for; and

(iv) Was not part of a recurring pattern indicative of inadequate design, operation, or maintenance; and

(2) Repairs were made as expeditiously as possible when a violation occurred. Off-shift and overtime labor were used, to the extent practicable to make these repairs; and

(3) The frequency, amount and duration of the violation (including any bypass) were minimized to the maximum extent practicable; and

(4) If the violation resulted from a bypass of control equipment or a process, then the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage; and

(5) All possible steps were taken to minimize the impact of the violation on ambient air quality, the environment, and human health; and

(6) All emissions monitoring and control systems were kept in operation if at all possible, consistent with safety and good air pollution control practices; and

(7) All of the actions in response to the violation were documented by properly signed, contemporaneous operating logs; and

(8) At all times, the affected source was operated in a manner consistent with good practices for minimizing emissions; and

(9) A written root cause analysis has been prepared, the purpose of which is to determine, correct, and eliminate the primary causes of the malfunction and the violation resulting from the malfunction event at issue. The analysis shall also specify, using best monitoring methods and engineering judgment, the amount of any emissions that were the result of the malfunction.

(b) *Report.* The owner or operator seeking to assert an affirmative defense shall submit a written report to the Administrator with all necessary supporting documentation, [showing] that it has met the requirements set forth in paragraph (a) of this section. This affirmative defense report shall be included in the first periodic compliance [report], deviation report, or excess emission report otherwise required after the initial occurrence of the violation of the relevant standard (which may be the end of any applicable averaging period). If such compliance [report], deviation report, or excess emission report is due less than 45 days after the initial occurrence of the violation, the affirmative defense report may be included in the second compliance [report], deviation report, or excess emission report due after the initial occurrence of the violation of the relevant standard. (Punctuation adjusted)

The EPA notes that this example regulatory text has some features that are not explicitly among the criteria recommended for SIP provisions in the SSM Policy, such as the requirement for a "root cause analysis" in subsection (a)(9) and an affirmative requirement to report the malfunction to the regulator by a set date and in a particular report, rather than merely a general duty to report the malfunction event to the regulator. The EPA considers such features useful because they serve important purposes related to the analysis, documentation, and memorialization of the facts concerning the malfunction, thereby facilitating better evaluation of the events and better evaluation of the source's qualification for the affirmative defense. The EPA believes that these specific features would be very useful and thus recommends that they be included in SIP provisions for affirmative defenses. However, these features need not be required, so long as the SIP provision otherwise provides that the owner or operator of the source will: (i) Bear the burden of proof to establish that the elements of the affirmative defense have been met; and (ii) properly and promptly notify the appropriate regulatory authority about the malfunction.

The EPA also wants to reiterate its views concerning appropriate affirmative defense provisions as they relate to malfunctions that occur during planned startup and shutdown and as they relate to startup and shutdown that occur as the result of or part of a malfunction. With respect to malfunctions that happen to occur during planned startup or shutdown, as the EPA articulated in the 1999 SSM Guidance, the excess emissions that occur as a result of the malfunction may be addressed by an appropriately drawn affirmative defense provision consistent with the recommended criteria for such provisions.[57] By definition, the malfunction would have been sudden, unavoidable, and unpredictable, and the source could not have precluded the event by better source design, operation and maintenance. The EPA interprets the CAA to allow narrowly drawn affirmative defense provision in SIPs in such circumstances.

Another question is how to treat the excess emissions that occur during a startup or shutdown that is necessitated

[56] *See*, "National Emission Standards for Hazardous Air Pollutants From the Pulp and Paper Industry," final rule, 77 FR 55698 (Sept. 11, 2012). Parameters for the affirmative defense are provided at p. 55712.

[57] *See*, 1999 SSM Guidance at attachment p. 6.

by the malfunction and are thus potentially components of the malfunction event. The EPA believes that drawing the distinction between what is directly caused by the malfunction itself and what is indirectly caused by the malfunction as a part of non-routine startup and shutdown must always be a case-specific enquiry, dependent upon the facts and circumstances of the specific event. It is foreseeable that a shutdown necessitated by a malfunction could be considered part of the malfunction event with the appropriate demonstration of the need to shut down differently than during a routine shutdown, during which a source should be expected to comply with applicable emission limitations. It is possible, however, that a routine shutdown may be achievable following a malfunction event, and a source should be expected to strive for this result. With respect to startups after a malfunction event, the EPA believes that such startups should not be considered part of the malfunction, because startups are within the control of the source. Malfunctions should have been resolved prior to startup, and the source should be designed, operated, and maintained so that it would meet emission limitations during startups. As a general matter, the EPA does not anticipate that there would be startups that would follow a malfunction that should be considered part of the malfunction event, but in this action the EPA is requesting that commenters address this issue if there could be circumstances that would justify such treatment.

Finally, the EPA reiterates that an affirmative defense provision in a SIP cannot extend to direct federal regulations such as New Source Performance Standards (NSPS) or NESHAP that the air agency may elect to adopt into its SIP, or to incorporate by reference into its SIP in order to receive delegation of federal authority. To the extent that any affirmative defense is warranted during malfunctions for these technology-based standards, the federal standards contained in the EPA's regulations already specify the appropriate affirmative defense. No additional or different affirmative defense provision applicable through a SIP provision would be warranted or appropriate.

C. Affirmative Defense Provisions During Periods of Startup and Shutdown

The EPA's evaluation of the Petition indicates that revisions to the SSM Policy are necessary with respect to affirmative defense provisions during startup and shutdown periods. In the 1999 SSM Guidance, the EPA explicitly discussed the possibility of affirmative defenses in the context of startup and shutdown, and provided recommended criteria to ensure that any such affirmative defense provisions in a SIP submission would be appropriately narrowly drawn to comply with CAA requirements. As with affirmative defense provisions for malfunctions, the EPA then believed that achieving a balance between the requirement of the statute for emission limitations that apply continuously and the possibility that not all sources can comply 100 percent of the time justified such affirmative defenses during startup and shutdown as a means of providing some flexibility while still supporting the overall objectives of the CAA.

Review of the Petition and reconsideration of this question in light of recent case law concerning emission limitations and affirmative defenses has caused the EPA to alter its view on the appropriateness of affirmative defenses applicable to planned events such as startup and shutdown. The EPA believes that sources should be designed, maintained, and operated in order to comply with applicable emission limitations during normal operations. By definition, planned events such as startup and shutdown are phases of normal source operation. Because these events are modes of normal operation, the EPA believes that sources should be expected to comply with applicable emission limitations during such events.

Unlike malfunctions, startup and shutdown are not unexpected events and are not events that are beyond the control of the owner or operator of the source. Also unlike malfunctions, it is possible for the source to anticipate the amount of emissions during startup and shutdown, to take appropriate steps to limit those emissions as needed, and to remain in continuous compliance. In the event that a source in fact cannot comply with the otherwise applicable emission limitations during normal modes of source operation due to technological limitations, then it may be appropriate for the state to provide special emission limitations or control measures that apply to the source during startup and shutdown.

The EPA acknowledges that the availability of an affirmative defense for planned startup and shutdown as contemplated in the 1999 SSM Guidance may have provided extra incentive for sources to take extra precautions to minimize emissions during startup and shutdown in order to be eligible for the affirmative defense in the event of a violation. However, sources should not need extra incentive to comply during normal modes of operation such as startup and shutdown, as they should be designed, operated, and maintained in order to comply with applicable emission limitations at all times, and certainly during planned and predictable events. By logical extension, the theory that an affirmative defense should be available during planned startup and shutdown could apply to all phases of normal source operation, which would not be appropriate.

The EPA believes that providing affirmative defenses for violations that occur as a result of planned events within the control of the owner or operator of the source is inconsistent with the requirements of CAA sections 113 and 304, which provide for potential civil penalties for violations of SIP requirements. The distinction that makes affirmative defenses appropriate for malfunctions is that by definition those events are unforeseen and could not have been avoided by the owner or operator of the source, and the owner or operator of the source will have taken steps to prevent the violation and to minimize the effects of the violation after it occurs. In such circumstances, the EPA interprets the CAA to allow narrowly drawn affirmative defense provisions that may shield owners or operators of sources from civil penalties, when their conduct justifies this relief.

Such is not the case with planned and predictable events, such as startup and shutdown, during which the owners or operators of sources should be expected to comply with applicable emission limitations and should not be accorded relief from civil penalties if they fail to do so. Providing an affirmative defense for monetary penalties for violations that result from planned events is inconsistent with the basic premise that the excess emissions were beyond the control of the owner or operator of the source and thus is diametrically opposed to the intended purpose of such an affirmative defense to encourage better compliance even by sources for which 100-percent compliance is not possible. The EPA notes that enforcement discretion may still be warranted in such circumstances, but the elimination of potential civil penalties is not appropriate. For these reasons, the EPA is proposing to rescind its prior interpretation of the CAA that would

allow affirmative defense provisions during planned startup and shutdown.[58]

D. Relationship Between SIP Provisions and Title V Regulations

The EPA's review of the Petition has highlighted an area of potential ambiguity or conflict between the SSM Policy applicable to SIP provisions and the EPA's regulations applicable to title V permit provisions. The EPA has promulgated regulations in 40 CFR part 70 applicable to state operating permit programs and in 40 CFR part 71 applicable to federal operating permit programs.[59] Under each set of regulations, the EPA has provided that permits may contain, at the permitting authority's discretion, an "emergency provision."[60] The relationship between such an "emergency provision" in a permit applicable to a source and the SIP provisions applicable to the same source with respect to excess emissions during a malfunction event warrants explanation.

The regulatory parameters applicable to such emergency provisions in operating permits are the same for both state operating permit programs regulations and the federal operating permit program regulations. The definition of emergency is identical in the regulations for each program:

> An "emergency" means any situation arising from sudden and reasonably unforeseeable events beyond the control of the source, including acts of God, which situation requires immediate corrective action to restore normal operation, and that causes the source to exceed a technology-based emission limitation under the permit, due to unavoidable increases in emissions attributable to the emergency. An emergency shall not include noncompliance to the extent caused by improperly designed equipment, lack of preventative maintenance, careless or improper operation or operator error.[61]

Thus, the definition of "emergency" in these title V regulations is similar to the concept of "malfunctions" in the EPA's SSM Policy for SIP provisions, but it uses somewhat different terminology concerning the nature of the event and restricts the qualifying exceedances to "technology-based" emission limitations.[62] Some SIP provisions may also be "technology-based" emission limitations and thus this terminology in the operating permit regulations may engender some potential inconsistency with the SSM Policy.

If there is an emergency event meeting the regulatory definition, then the EPA's regulations for operating permits provide that the source can assert an "affirmative defense" to enforcement for noncompliance with technology-based standards during the emergency event. In order to establish the affirmative defense, the regulations place the burden of proof on the source to demonstrate through specified forms of evidence that:

(i) An emergency occurred and that the permittee can identify the cause(s) of the emergency;

(ii) The permitted facility was at the time being properly operated;

(iii) During the period of the emergency the permittee took all reasonable steps to minimize levels of emissions that exceeded the emission standards, or other requirements in the permit; and

(iv) The permittee submitted notice of the emergency to the permitting authority within 2 working days of the time when emission limitations were exceeded due to the emergency. This notice fulfills the requirement of either paragraph 40 CFR 70.6(a)(3)(iii)(B) or 40 CFR 71.6(a)(3)(iii)(B). This notice must contain a description of the emergency, any steps taken to mitigate emissions, and corrective actions taken.[63]

The Petitioner did not directly request that the EPA evaluate the existing regulatory provisions applicable to operating permits in 40 CFR part 70 and 40 CFR part 71, and the EPA is not revising those provisions in this action. However, the Petitioner did identify a number of specific SIP provisions that indirectly relate to this issue because the state may have modeled its SIP provision, at least in part, on the EPA's operating permit regulations.[64] In those instances, the state in question presumably intended to create an affirmative defense applicable during malfunctions appropriate for SIP provisions, but by using the terminology used in the operating permit regulations, the state has created provisions that are not permissible in SIPs.

The elements for the affirmative defense in the title V permit regulations are similar to the criteria recommended in the SSM Policy for SIP provisions applicable to malfunctions. However, the elements for the affirmative defense provisions in operating permits do not explicitly include some of the criteria that the EPA believes are necessary in order to make such a provision appropriate in a SIP provision. For example, the EPA recommends that approvable SIP provisions include an affirmative duty for the source to establish that the malfunction was "not part of a recurring pattern indicative of inadequate design, operation, or maintenance."[65] In addition, the regulations applicable to operating permits use somewhat different terminology for the elements of the defense, such as providing that the emergencies were "sudden and reasonably unforeseeable events beyond the control of the source," whereas the EPA's SSM Policy describes malfunctions as events that "did not stem from any activity or event that could have been foreseen and avoided, or planned for."[66] Again, the use of somewhat different terminology about the elements the source must establish in order to qualify for an affirmative defense may engender some potential inconsistency with the EPA's SSM Policy.

Although the differing regulatory terminology with respect to the nature of the event or the elements necessary to establish an affirmative defense may not ultimately be significant in practical application in a given enforcement action, there are two additional ways in which incorporation of the text of the regulatory provisions in 40 CFR 70.6(g) and 40 CFR 71.6(g) into a SIP is potentially more directly in conflict with the SSM Policy. First, these provisions do not explicitly limit the affirmative defense only to civil penalties available under the CAA for violations of emission limitations. Each provision states only that an

[58] In accordance with CAA section 113(e), sources retain the ability to seek lower monetary penalties through the factors provided for consideration in administrative or judicial enforcement proceedings. In this context, for example, a violating source could argue that factors such as good faith efforts to comply should reduce otherwise applicable statutory penalties.

[59] *See*, 40 CFR sections 70.1–70.12; 40 CFR sections 71.1–71.27.

[60] *See*, 40 CFR 70.6(g); 40 CFR 71.6(g). The EPA also notes that states are not required to adopt the "emergency provision" contained in 40 CFR 70.6(g) into their state operating permit programs, and many states have chosen not to do so. *See, e.g.*, "Clean Air Act Full Approval of Partial Operating Permit Program; Allegheny County; Pennsylvania; Direct final rule," 66 FR 55112 at 55113 (Nov. 1, 2001).

[61] *See*, 40 CFR 70.6(g)(1); 40 CFR 71.6(g)(1).

[62] 1999 SSM Guidance at Attachment p. 1 and footnote 6. The term "malfunction" means "a sudden and unavoidable breakdown of process or control equipment." The malfunction events that may be suitable for an affirmative defense are those that are "caused by circumstances entirely beyond the control of the owner or operator." The EPA notes that by definition emergencies do not include normal source operation such as startup, shutdown, or maintenance.

[63] 40 CFR 70.6(g)(3); 40 CFR 71.6(g)(3).

[64] *See, e.g.*, Petition at 24. The Petitioner identified a provision in the Arkansas SIP that appears to be closely modeled on 40 CFR 70.6(g).

[65] 1999 SSM Guidance at Attachment pp. 3–4.

[66] 1999 SSM Guidance at Attachment p. 3.

"emergency constitutes an affirmative defense to an action brought for noncompliance" if the source proves that it meets the conditions for the affirmative defense.[67] Given this lack of an explicit limitation, it could be argued that SIP provisions that copy the wording of 40 CFR 70.6(g) and 40 CFR 71.6(g) are not limited to civil penalties.[68] Such a reading would be inconsistent with the EPA's view that affirmative defenses in SIP provisions are only consistent with the CAA if they apply to civil penalties and not to injunctive relief. The EPA believes it is essential for SIPs to ensure that injunctive relief is available should a court determine that such relief is necessary to prevent excess emissions in the future.

Second, these operating permit regulatory provisions state that they are "in addition to any emergency or upset provision contained in any applicable requirement."[69] The EPA's view is that federal technology-based standards already include the appropriate affirmative defense provisions, if any, and that creation of additional affirmative defenses via a SIP provision is impermissible.[70] Thus, SIP provisions that add to or alter the terms of any federal technology-based standards would be substantially inadequate to meet CAA requirements.[71]

In this action, the EPA is taking action to evaluate the specific SIP provisions identified in the Petition and is proposing to make a finding of substantial inadequacy and to issue a SIP call for those SIP provisions that include features that are inappropriate for SIPs, regardless of whether those provisions contain terms found in other regulations. First, consistent with its longstanding interpretation of the CAA with respect to SIP requirements, the EPA believes that approvable affirmative defenses in a SIP provision can only apply to civil penalties, not to injunctive relief. Second, approvable affirmative defenses in a SIP provision should reflect the recommended criteria in the EPA's SSM Policy to assure that sources only assert affirmative defenses in appropriately narrow circumstances. Third, approvable affirmative defenses in a SIP provision cannot operate to create different or additional defenses from those that are provided in underlying federal technology-based emission limitations, such as NSPS or NESHAP. SIPs are comprised of emission limitations that are intended to provide for attainment and maintenance of the NAAQS, protection of PSD increments, protection of visibility, and other CAA objectives. Thus, the EPA believes that only narrowly drawn affirmative defense provisions, as recommended in its SSM Policy, are consistent with these overarching SIP requirements of the CAA.

E. Intended Effect of the EPA's Action on the Petition

As in the 2001 SSM Guidance, the EPA is endeavoring to be particularly clear about the intended effect of its proposed action on the Petition, of its proposed clarifications and revisions to the SSM Policy, and ultimately of its final action on the Petition.

First, the EPA only intends its actions on the larger policy or legal issues raised by the Petitioner to inform the public of the EPA's current views on the requirements of the CAA with respect to SIP provisions related to SSM events. Thus, for example, the EPA's proposed disapproval of the Petitioner's request that the EPA disallow all affirmative defense provisions for excess emissions during malfunctions is intended to convey that the EPA has not changed its views that such provisions can be consistent with CAA requirements for SIPs with respect to malfunctions. In this fashion, the EPA's action on the Petition provides updated guidance relevant to future SIP actions.

Second, the EPA only intends its actions on the specific existing SIP provisions identified in the Petition to be applicable to those provisions. The EPA does not intend its action on those specific provisions to alter the current status of any other existing SIP provisions relating to SSM events. The EPA must take later rulemaking actions, if necessary, in order to evaluate any comparable deficiencies in other existing SIP provisions that may be inconsistent with the requirements of the CAA. Again, however, the EPA's actions on the Petition provide updated guidance on the types of SIP provisions that it believes would be consistent with CAA requirements in future rulemaking actions.

Third, the EPA does not intend its action on the Petition to affect existing permit terms or conditions regarding excess emissions during SSM events that reflect previously approved SIP provisions. In the event that the EPA finalizes a proposed finding of substantial inadequacy and a SIP call for a given state, the state will have time to revise its SIP in response to the SIP call through the necessary state and federal administrative process. Thereafter, any needed revisions to existing permits will be accomplished in the ordinary course as the state issues new permits or reviews and revises existing permits. The EPA does not intend the issuance of a SIP call to have automatic impacts on the terms of any existing permit.

Fourth, the EPA does not intend its action on the Petition to alter the emergency defense provisions at 40 CFR 70.6(g) and 40 CFR 71.6(g), *i.e.*, the title V regulations pertaining to "emergency provisions" permissible in title V operating permits. The EPA's regulations applicable to title V operating permits may only be changed through appropriate rulemaking procedures and existing permit terms may only be changed through established permitting processes.

Fifth, the EPA does not intend its interpretations of the requirements of the CAA in this action on the Petition to be legally dispositive with respect to any particular current enforcement proceedings in which a violation of SIP emission limitations is alleged to have occurred. The EPA handles enforcement matters by assessing each situation, on a case-by-case basis, to determine the appropriate response and resolution. For purposes of alleged violations of SIP provisions, however, the terms of the applicable SIP provision will continue to govern until that provision is revised following the appropriate process for SIP revisions, as required by the CAA.

Finally, the EPA does intend that the final notice for this action after considering public comments will embody its most current SSM Policy, reflecting the EPA's interpretation of CAA requirements applicable to SIP provisions related to excess emissions during SSM events. In this regard, the EPA is proposing to add to and clarify its prior statements in the 1999 SSM Guidance and to make the specific

[67] 40 CFR 70.6(g)(2); 40 CFR 71.6(g)(2).

[68] Because title V requires that a source have a permit that "assure[s] compliance with applicable [CAA] requirements," CAA section 504(a), it follows that the title V emergency provision itself can best be read to provide only an affirmative defense against civil penalties and not against injunctive relief. *See also,* "National Emission Standards for Hazardous Air Pollutant Emissions for Primary Lead Processing; Final Rule," 76 FR 70834 at 70838/2 (Nov. 15, 2011) (explaining why limiting affirmative defenses to civil penalties conforms with the purposes of the CAA and existing case law).

[69] 40 CFR 70.6(g)(5); 40 CFR 71.6(g)(5).

[70] 1999 SSM Guidance at Attachment p. 3, footnote 6. The EPA explained that to the extent a state elected to include federal technology-based standards into its SIP, such as NSPS or NESHAPs, the standards should not deviate from those standards as promulgated. Because the EPA has already taken into account technological limitations in setting the standards, additional exemptions or affirmative defenses would be inappropriate.

[71] *See,* "Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision," 74 FR 21639 (Apr. 18, 2011) (the EPA issued a SIP call because, *inter alia,* the SIP provision applied to NSPS and NESHAP); *US Magnesium, LLC* v. *EPA,* 690 F.3d 1157 (10th Cir. 2012) (upholding the SIP call).

changes to that guidance as discussed in this action. Thus, the final notice for this action will constitute the EPA's SSM Policy on a going-forward basis.

VIII. Legal Authority, Process, and Timing for SIP Calls

A. SIP Call Authority Under Section 110(k)(5)

1. General Statutory Authority

The CAA provides a mechanism for the correction of flawed SIPs, under CAA section 110(k)(5), which provides:

> (5) Calls for plan revisions
> Whenever the Administrator finds that the applicable implementation plan for any area is substantially inadequate to attain or maintain the relevant national ambient air quality standards, to mitigate adequately the interstate pollutant transport described in section [176A] of this title or section [184] of this title, or to otherwise comply with any requirement of [the Act], the Administrator shall require the State to revise the plan as necessary to correct such inadequacies. The Administrator shall notify the State of the inadequacies and may establish reasonable deadlines (not to exceed 18 months after the date of such notice) for the submission of such plan revisions.

By its explicit terms, this provision authorizes the EPA to find that a state's existing SIP is "substantially inadequate" to meet CAA requirements and, based on that finding, to "require the State to revise the [SIP] as necessary to correct such inadequacies." This type of action is commonly referred to as a "SIP call."[72]

Significantly, CAA section 110(k)(5) explicitly authorizes the EPA to issue a SIP call "whenever" the EPA makes a finding that the existing SIP is substantially inadequate, thus providing authority for the EPA to take action to correct existing inadequate SIP provisions even long after their initial approval, or even if the provisions only become inadequate due to subsequent events.[73] The statutory provision is worded in the present tense, giving the EPA authority to rectify any deficiency in a SIP that currently exists, regardless of the fact that the EPA previously approved that particular provision in the SIP and regardless of when that approval occurred.

It is also important to emphasize that CAA section 110(k)(5) expressly directs the EPA to take action if the SIP provision is substantially inadequate not just for purposes of attainment or maintenance of the NAAQS, but also for purposes of "any requirement" of the CAA. The EPA interprets this reference to "any requirement" of the CAA on its face to authorize reevaluation of an existing SIP provision for compliance with those statutory and regulatory requirements that are germane to the SIP provision at issue. Thus, for example, a SIP provision that is intended to be an "emission limitation" for purposes of a nonattainment plan for purposes of the 1997 $PM_{2.5}$ NAAQS must meet various applicable statutory and regulatory requirements, including requirements of CAA section 110(a)(2)(A) such as enforceability, the definition of the term "emission limitation" in CAA section 302(k), the level of emissions control required to constitute a "reasonably available control measure" in CAA section 172(c)(1), and the other applicable requirements of the implementation regulations for the 1997 $PM_{2.5}$ NAAQS. Failure to meet any of those applicable requirements could constitute a substantial inadequacy suitable for a SIP call, depending upon the facts and circumstances. By contrast, that same SIP provision should not be expected to meet specifications of the CAA that are completely irrelevant for its intended purpose, such as the unrelated requirement of CAA section 110(a)(2)(G) that the state have general legal authority comparable to CAA section 303 for emergencies.

Use of the term "any requirement" in CAA section 110(k)(5) also reflects the fact that SIP provisions could be substantially inadequate for widely differing reasons. One provision might be substantially inadequate because it fails to prohibit emissions that contribute to violations of the NAAQS in downwind areas many states away. Another provision, or even the same provision, could be substantially inadequate because it also infringes on the legal right of members of the public who live adjacent to the source to enforce the SIP. Thus, the EPA has previously interpreted CAA section 110(k)(5) to authorize a SIP call to rectify SIP inadequacies of various kinds, both broad and narrow in terms of the scope of the SIP revisions required.[74] On its face, CAA section 110(k)(5) authorizes the EPA to take action with respect to SIP provisions that are substantially inadequate to meet any CAA requirements, including requirements relevant to the proper treatment of excess emissions during SSM events.

An important baseline question is whether a given deficiency renders the SIP provision "substantially inadequate." The EPA notes that the term "substantially inadequate" is not defined in the CAA. Moreover, CAA section 110(k)(5) does not specify a particular form of analysis or methodology that the EPA must use to evaluate SIP provisions for substantial inadequacy. Thus, under *Chevron* step 2, the EPA is authorized to interpret this provision reasonably, consistent with the provisions of the CAA. In addition, the EPA is authorized to exercise its discretion in applying this provision to determine whether a given SIP provision is substantially inadequate. To the extent that the term "substantially inadequate" is ambiguous, the EPA believes that it is reasonable to interpret the term in light of the specific purposes for which the SIP provision at issue is required, and thus whether the provision meets the fundamental CAA requirements applicable to such a provision.

The EPA does not interpret CAA section 110(k)(5) to require a showing that the effect of a SIP provision that is facially inconsistent with CAA

[72] The EPA also has other discretionary authority to address incorrect SIP provisions, such as the authority in CAA section 110(k)(6) for the EPA to correct errors in prior SIP approvals. The authority in CAA section 110(k)(5) and CAA section 110(k)(6) can sometimes overlap and offer alternative mechanisms to address problematic SIP provisions. In this instance, the EPA believes that the mechanism provided by CAA section 110(k)(5) is the better approach, because using the mechanism of the CAA section 110(k)(6) error correction would eliminate the affected emission limitations from the SIP, potentially leaving no emission limitation in place, whereas the mechanism of the CAA section 110(k)(5) SIP call will keep the provisions in place during the pendency of the state's revision of the SIP and the EPA's action on that revision. In the case of provisions that include impermissible automatic exemptions or discretionary exemptions, the EPA believes that retention of the existing SIP provision is preferable to the absence of the provision in the interim.

[73] *See, e.g., Michigan* v. *EPA*, 213 F.3d 663 (D.C. Cir. 2000) (upholding the "NO_x SIP Call" to states requiring revisions to previously approved SIPs with respect to ozone transport and section 110(a)(2)(D)(i)(I)); "Action to Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call; Final Rule," 75 FR 77698 (Dec. 13, 2010) (the EPA issued a SIP call to 13 states because the endangerment finding for GHGs meant that these previously approved SIPs were substantially inadequate because they did not provide for the regulation of GHGs in the PSD permitting programs of these states as required by CAA section 110(a)(2)(C) and section 110(a)(2)(J)); "Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision," 74 FR 21639 (Apr. 18, 2011) (the EPA issued a SIP call to rectify SIP provisions dating back to 1980).

[74] *See, e.g.*, "Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone," 63 FR 57356 (Oct. 27, 1998) (the EPA issued a SIP call to 23 states requiring them to rectify the failure to address interstate transport of pollutants as required by section 110(a)(2)(D)); "Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision," 74 FR 21639 (Apr. 18, 2011) (the EPA issued a SIP call to one state requiring it to rectify several very specific SIP provisions).

requirements is causally connected to a particular adverse impact. For example, the plain language of CAA section 110(k)(5) does not require direct causal evidence that excess emissions have occurred during a specific malfunction at a specific source and have literally caused a violation of the NAAQS in order to conclude that the SIP provision is substantially inadequate.[75] A SIP provision that purports to exempt a source from compliance with applicable emission limitations during SSM events, contrary to the requirements of the CAA for continuous emission limitations, does not become legally permissible merely because there is not definitive evidence that any excess emissions have resulted from the exemption and have literally caused a specific NAAQS violation.[76]

Similarly, the EPA does not interpret CAA section 110(k)(5) to require direct causal evidence that a SIP provision that improperly undermines enforceability of the SIP has resulted in a specific failed enforcement attempt by any party. A SIP provision that has the practical effect of barring enforcement by the EPA or through a citizen suit, either because it would bar enforcement if an air agency elects to grant a discretionary exemption or to exercise its own enforcement discretion, is inconsistent with fundamental requirements of the CAA.[77] Such a provision also does not become legally permissible merely because there is not definitive evidence that the state's action literally undermined a specific attempted enforcement action by other parties. Indeed, the EPA notes that these impediments to effective enforcement likely have a chilling effect on potential enforcement in general. The possibility for effective enforcement of emission limitations in SIPs is itself an important principle of the CAA, as embodied in CAA sections 113 and 304.

The EPA's interpretation of CAA section 110(k)(5) is that the fundamental integrity of the CAA's SIP process and structure are undermined if emission limitations relied upon to meet CAA requirements related to protection of public health and the environment can be violated without potential recourse. For example, the EPA does not believe that it is authorized to issue a SIP call to rectify an impermissible automatic exemption provision only after a violation of the NAAQS has occurred, or only if that NAAQS violation can be directly linked to the excess emissions that resulted from the impermissible automatic exemption by a particular source on a particular day. If the SIP contains a provision that is inconsistent with fundamental requirements of the CAA, that renders the SIP provision substantially inadequate.

The EPA notes that CAA section 110(k)(5) can also be an appropriate tool to address ambiguous SIP provisions that could be read by a court in a way that would violate the requirements of the CAA. For example, if an existing SIP provision concerning the state's exercise of enforcement discretion is sufficiently ambiguous that it could be construed to preclude enforcement by the EPA or through a citizen suit if the state elects to deem a given SSM event not a violation, then that could render the provision substantially inadequate by interfering with the enforcement structure of the CAA.[78] If a court could construe the ambiguous SIP provision to bar enforcement, the EPA believes that it may be appropriate to take action to eliminate that uncertainty by requiring the state to revise the ambiguous SIP provision. Under such circumstances, it may be appropriate for the EPA to issue a SIP call to assure that the SIP provisions are sufficiently clear and consistent with CAA requirements on their face.[79]

In this instance, the Petition raised questions concerning the adequacy of existing SIP provisions that pertain to the treatment of excess emissions during SSM events. The SIP provisions identified by the Petitioner generally fall into four major categories: (i) Automatic exemptions; (ii) exemptions as a result of director's discretion; (iii) provisions that appear to bar enforcement by the EPA or through a citizen suit if the state decides not to enforce through exercise of enforcement discretion; and (iv) affirmative defense provisions that appear to be inconsistent with the CAA and the EPA's SSM Policy. The EPA believes that each of these types of SIP deficiency potentially justifies a SIP call pursuant to CAA section 110(k)(5), if the SIP provision is as the Petitioner describes it.

2. Substantial Inadequacy of Automatic Exemptions

The EPA believes that SIP provisions that provide an automatic exemption from otherwise applicable emission limitations are substantially inadequate to meet CAA requirements. A typical SIP provision that includes an impermissible automatic exemption would provide that a source has to meet a specific emission limitation, except during startup, shutdown, and malfunction, and by definition any excess emissions during such events would not be violations and thus there could be no enforcement based on those excess emissions. The EPA's interpretation of CAA requirements for SIP provisions has been reiterated multiple times through the SSM Policy and actions on SIP submissions that pertain to this issue. The EPA's longstanding view is that SIP provisions that include automatic exemptions for excess emissions during SSM events, such that the excess emissions during those events are not considered violations of the applicable emission limitations, do not meet CAA requirements. Such exemptions undermine the protection of the NAAQS and PSD increments and fail to meet other fundamental requirements of the CAA.

The EPA interprets CAA sections 110(a)(2)(A) and 110(a)(2)(C) to require that SIPs contain "emission limitations" to meet CAA requirements. Pursuant to CAA section 302(k), those emission

[75] *See, U S Magnesium, LLC* v. *EPA*, 690 F.3d 1157 (10th Cir. 2012) (upholding the EPA's interpretation of section 110(k)(5) to authorize a SIP call when the SIP provisions are inconsistent with CAA requirements).

[76] The EPA notes that the GHG SIP call did not require "proof" that the failure of a state to address GHGs in a given PSD permit "caused" particularized environmental impacts; it was sufficient that the state's SIP fails to meet the current fundamental legal requirements for regulation of GHGs in accordance with the CAA. *See*, "Action to Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call; Final Rule," 75 FR 77698 (Dec. 13, 2010).

[77] *See*, "Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision," 74 FR 21639 at 21641 (Apr. 18, 2011); *see also, U S Magnesium, LLC* v. *EPA*, 690 F.3d 1157, 1168 (10th Cir. 2012) (upholding the EPA's interpretation of section 110(k)(5) to authorize a SIP call when the state's SIP provision worded so that state decisions whether a given excess emissions event constituted a violation interfered with enforcement by the EPA or citizens for such event).

[78] Courts have on occasion interpreted SIP provisions to limit the EPA's enforcement authority as a result of ambiguous SIP provisions. *See*, e.g., *U.S.* v. *Ford Motor Co.* 736 F.Supp. 1539 (W.D. Mo. 1990) and *U.S.* v. *General Motors Corp.*, 702 F. Supp. 133 (N.D. Texas 1988) (the EPA could not pursue enforcement of SIP emission limitations where states had approved alternative emission limitations under procedures the EPA had approved in the SIP); *Florida Power & Light Co.* v. *Costle*, 650 F.2d 579, 588 (5th Cir. 1981) (the EPA to be accorded no discretion in interpreting state law). The EPA does not agree with the holdings of these cases, but they illustrate why it is reasonable to eliminate any uncertainty about enforcement authority by requiring a state to remove or revise a SIP provision that could be read in a way inconsistent with the requirements of the CAA.

[79] *See, U S Magnesium, LLC* v. *EPA*, 690 F.3d 1157, 1170 (10th Cir. 2012) (upholding the EPA's use of SIP call authority in order to clarify language in the SIP that could be read to violate the CAA, even if a court has not yet interpreted the language in that way).

limitations must be "continuous." Automatic exemptions from otherwise applicable emission limitations thus render those limits less than continuous as required by CAA sections 110(a)(2)(A) and 110(a)(2)(C), thereby inconsistent with a fundamental requirement of the CAA and thus substantially inadequate as contemplated in CAA section 110(k)(5).

This inadequacy has far-reaching impacts. For example, air agencies rely on emission limitations in SIPs in order to provide for attainment and maintenance of the NAAQS. These emission limitations are basic building blocks for SIPs, often used by air agencies to meet various requirements including: (i) In the estimates of emissions for emissions inventories; (ii) in the determination of what level of emissions meets various statutory requirements such as "reasonably available control measures" in nonattainment SIPs or "best available retrofit technology" in regional haze SIPs; and (iii) in critical modeling exercises such as attainment demonstration modeling for nonattainment areas or increment use for PSD permitting purposes. All of these uses typically assume continuous source compliance with applicable emission limitations.

Because the NAAQS are not directly enforceable against individual sources, air agencies rely on the adoption and enforcement of these generic and specific emission limits in SIPs in order to provide for attainment and maintenance of the NAAQS, protection of PSD increments, protection of visibility, and other CAA requirements. Automatic exemption provisions for excess emissions eliminate the possibility of enforcement for what would otherwise be clear violations of the relied-upon emission limitations and thus eliminate any opportunity to obtain injunctive relief that may be needed to protect the NAAQS or meet other CAA requirements. Likewise, the elimination of any possibility for penalties for what would otherwise be clear violations of the emission limitations, regardless of the conduct of the source, eliminates any opportunity for penalties to encourage appropriate design, operation, and maintenance of sources and efforts by source operators to prevent and to minimize excess emissions in order to protect the NAAQS or to meet other CAA requirements. Removal of this monetary incentive to comply with the SIP reduces a source's incentive to design, operate, and maintain its facility to meet emission limitations at all times.

3. Substantial Inadequacy of Director's Discretion Exemptions

The EPA believes that SIP provisions that allow discretionary exemptions from otherwise applicable emission limitations are substantially inadequate to meet CAA requirements for the same reasons as automatic exemptions, but for additional reasons as well. A typical SIP provision that includes an impermissible "director's discretion" component would purport to authorize air agency personnel to modify existing SIP requirements under certain conditions, *e.g.*, to grant a variance from an otherwise applicable emission limitation if the source could not meet the requirement in certain circumstances.[80] If such provisions are sufficiently specific, provide for sufficient public process, and are sufficiently bounded, so that it is possible to anticipate at the time of the EPA's approval of the SIP provision how that provision will actually be applied and the potential adverse impacts thereof, then such a provision might meet basic CAA requirements. In essence, if it is possible to anticipate and evaluate in advance how the exercise of enforcement discretion could impact compliance with other CAA requirements, then it may be possible to determine in advance that the pre-authorized exercise of director's discretion will not interfere with other CAA requirements, such as providing for attainment and maintenance of the NAAQS. Most director's discretion-type provisions cannot meet this basic test.

Unless it is possible at the time of the approval of the SIP provision to anticipate and analyze the impacts of the potential exercise of the director's discretion, such provisions functionally could allow *de facto* revisions of the approved provisions of the SIP without complying with the process for SIP revisions required by the CAA. Sections 110(a)(1) and (2) of the CAA impose procedural requirements on states that seek to amend SIP provisions. The elements of CAA section 110(a)(2) and other sections of the CAA, depending upon the subject of the SIP provision at issue, impose substantive requirements that states must meet in a SIP revision. Section 110(i) of the CAA prohibits modification of SIP requirements for stationary sources by either the state or the EPA, except through specified processes.[81] Section 110(k) of the CAA imposes procedural and substantive requirements on the EPA for action upon any SIP revision. Sections 110(l) and 193 of the CAA both impose additional procedural and substantive requirements on the state and the EPA in the event of a SIP revision. Chief among these many requirements for a SIP revision would be the necessary demonstration that the SIP revision in question would not interfere with any requirement concerning attainment and reasonable further progress or "any other applicable requirement of" the CAA to meet the requirements of CAA section 110(l).

Congress presumably imposed these many explicit requirements in order to assure that there is adequate public process at both the air agency and federal level for any SIP revision, and to assure that any SIP revision meets the applicable substantive requirements of the CAA. Although no provision of the CAA explicitly addresses whether a "director's discretion" provision is acceptable by name, the EPA interprets the statute to prohibit such provisions unless they would be consistent with the statutory and regulatory requirements that apply to SIP revisions.[82] A SIP provision that

[80] The EPA notes that problematic "director's discretion" provisions are not limited only to those that purport to authorize alternative emission limitations from those required in a SIP. Other problematic director's discretion provisions could include those that purport to provide for discretionary changes to other substantive requirements of the SIP, such as applicability, operating requirements, recordkeeping requirements, monitoring requirements, test methods, and alternative compliance methods.

[81] Section 110(i) of the Act states that "no order, suspension, plan revision or other action modifying any requirement of an applicable implementation plan may be taken with respect to any stationary source by the State or by the Administrator" except in compliance with the CAA's requirements for promulgation or revision of a plan, with limited exceptions. *See, e.g.*, "Approval and Disapproval and Promulgation of Air Quality Implementation Plans; Colorado; Revisions to Regulation 1; Notice of proposed rulemaking," 75 FR 42342 at 42344 (July 21, 2010) (proposing to disapprove "director discretion" provisions as inconsistent with CAA requirements and noting that "[s]ection 110(i) specifically prohibits States, except in certain limited circumstances, from taking any action to modify any requirement of a SIP with respect to any stationary source, except through a SIP revision"), finalized as proposed at 76 FR 4540 (Jan. 26, 2011); "Corrections to the California State Implementation Plan," 69 FR 67062 at 67063 (Nov. 16, 2004) (noting that "a state-issued variance, though binding as a matter of State law, does not prevent EPA from enforcing the underlying SIP provisions unless and until EPA approves that variance as a SIP revision"); *Industrial Environmental Association v. Browner*, No. 97–71117 at p. 2 (9th Cir. May 26, 2000) (noting that the EPA has consistently treated individual variances granted under state variance provisions as "modifications of the SIP requiring independent EPA approval").

[82] *See, e.g.*, EPA's implementing regulations at 40 CFR 51.104(d) ("In order for a variance to be considered for approval as a revision to the [SIP], the State must submit it in accordance with the requirements of this section") and 51.105 ("Revisions of a plan, or any portion thereof, will not be considered part of an applicable plan until

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purports to give broad and unbounded director's discretion to alter the existing legal requirements of the SIP with respect to meeting emission limitations would be tantamount to allowing a revision of the SIP without meeting the applicable procedural and substantive requirements for such a SIP revision.

For this reason, the EPA has long discouraged the creation of new SIP provisions containing an impermissible director's discretion feature and has also taken actions to remove existing SIP provisions that it had previously approved in error.[83] In recent years, the EPA has also recommended that if an air agency elects to have SIP provisions that contain a director's discretion feature consistent with CAA requirements, then the provisions must be structured so that any resulting variances or other deviations from the SIP requirements have no federal law validity, unless and until the EPA specifically approves that exercise of the director's discretion as a SIP revision. Barring such a later ratification by the EPA through a SIP revision, the exercise of director's discretion is only valid for state (or tribal) law purposes and would have no bearing in the event of an action to enforce the provision of the SIP as it was originally approved by the EPA.

The EPA's evaluation of the specific SIP provisions of this type identified in the Petition indicates that none of them provide sufficient process or sufficient bounds on the exercise of director's discretion to be permissible. Most on their face would allow potentially limitless exemptions with potentially dramatic adverse impacts inconsistent with the objectives of the CAA. More importantly, however, each of the identified SIP provisions goes far beyond the limits of what might theoretically be a permissible director's discretion provision by authorizing state personnel to create case-by-case exemptions from the applicable emission limitations from the requirements of the SIP for excess emissions during SSM events. Given that the EPA interprets the CAA not to allow exemptions from SIP emission limitations for excess emissions during SSM events in the first instance, it follows that providing such exemptions through the mechanism of director's discretion provision is also not permissible and compounds the problem.

As with automatic exemptions for excess emissions during SSM events, a provision that allows discretionary exemptions would not meet the statutory requirements of CAA sections 110(a)(2)(A) and 110(a)(2)(C) that require SIPs to contain "emission limitations" to meet CAA requirements. Pursuant to CAA section 302(k), those emission limitations must be "continuous." Discretionary exemptions from otherwise applicable emission limitations render those limits less than continuous, as is required by CAA sections 110(a)(2)(A) and 110(a)(2)(C), and thereby inconsistent with a fundamental requirement of the CAA and thus substantially inadequate as contemplated in section CAA 110(k)(5). Such exemptions undermine the objectives of the CAA such as protection of the NAAQS and PSD increments, and they fail to meet other fundamental requirements of the CAA.

In addition, discretionary exemptions undermine effective enforcement of the SIP by the EPA or through a citizen suit, because often there may have been little or no public process concerning the exercise of director's discretion to grant the exemptions, or easily accessible documentation of those exemptions, and thus even ascertaining the possible existence of such *ad hoc* exemptions will further burden parties who seek to evaluate whether a given source is in compliance or to pursue enforcement if it appears that the source is not. Where there is little or no public process concerning such *ad hoc* exemptions, or inadequate access to relevant documentation of those exemptions, enforcement by the EPA or through a citizen suit may be severely compromised. As explained in the 1999 SSM Guidance, the EPA does not interpret the CAA to allow SIP provisions that would allow the exercise of director's discretion concerning violations to bar enforcement by the EPA or through a citizen suit. The exercise of director's discretion to exempt conduct that would otherwise constitute a violation of the SIP would interfere with effective enforcement of the SIP. Such provisions are inconsistent with and undermine the enforcement structure of the CAA provided in CAA sections 113 and 304, which provide independent authority to the EPA and citizens to enforce SIP provisions, including emission limitations. Thus, SIP provisions that allow discretionary exemptions from applicable SIP emission limitations through the exercise of director's discretion are substantially inadequate to comply with CAA requirements as contemplated in CAA section 110(k)(5).

4. Substantial Inadequacy of Improper Enforcement Discretion Provisions

The EPA believes that SIP provisions that pertain to enforcement discretion but could be construed to bar enforcement by the EPA or through a citizen suit if the air agency declines to enforce are substantially inadequate to meet CAA requirements. A typical SIP provision that includes an impermissible enforcement discretion provision specifies certain parameters for when air agency personnel should pursue enforcement action, but is worded in such a way that the air director's decision defines what constitutes a "violation" of the emission limitation for purposes of the SIP, *i.e.*, by defining what constitutes a violation, the air agency's own enforcement discretion decisions are imposed on the EPA or citizens.[84]

The EPA's longstanding view is that SIP provisions cannot enable an air agency's decision concerning whether or not to pursue enforcement to bar the ability of the EPA or the public to enforce applicable requirements.[85] Such enforcement discretion provisions in a SIP would be inconsistent with the enforcement structure provided in the CAA. Specifically, the statute provides explicit independent enforcement authority to the EPA under CAA section 113 and to citizens under CAA section 304. Thus, the CAA contemplates that the EPA and citizens have authority to pursue enforcement for a violation even if the air agency elects not to do so. The EPA, citizens, and any court in which they seek to pursue an enforcement claim for violation of SIP requirements must retain the authority to evaluate independently whether a source's violation of an emission limitation

such revisions have been approved by the Administrator in accordance with this part.").

[83] *See, e.g.*, "Approval and Disapproval and Promulgation of Air Quality Implementation Plans; Colorado; Revisions to Regulation 1," 76 FR 45411 (Jan. 26, 2011) (partial disapproval of SIP submission based on inclusion of impermissible director's discretion provisions); "Correction of Implementation Plans; American Samoa, Arizona, California, Hawaii, and Nevada State Implementation Plans; Notice of proposed rulemaking," 61 FR 38664 (July 25, 1996) (proposed SIP correction to remove, pursuant to CAA section 110(k)(6), several variance provisions from American Samoa, Arizona, California, Hawaii, and Nevada SIPs), finalized at 62 FR 34641 (June 27, 1997); "Approval and Promulgation of Implementation Plans; Corrections to the Arizona and Nevada State Implementation Plans," 74 FR 57051 (Nov. 3, 2009) (direct final rulemaking to remove, pursuant to CAA section 110(k)(6), variance provisions from Arizona and Nevada SIPs).

[84] *See, e.g.*, "Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision," 75 FR 71888 at 70892 (Nov. 19, 2010). The SIP provision at issue provided that information concerning a malfunction "shall be used by the executive secretary in determining whether a violation has occurred and/or the need of further enforcement action." This SIP language appeared to give the state official exclusive authority to determine whether excess emissions constitute a violation.

[85] *See*, 1999 SSM Guidance at 3.

warrants enforcement action. Potential for enforcement by the EPA or through a citizen suit provides an important safeguard in the event that the air agency lacks resources or ability to enforce violations and provides additional deterrence. Accordingly, a SIP provision that operated to eliminate the authority of the EPA or the public to pursue enforcement actions because the air agency elects not to, would undermine the enforcement structure of the CAA and would thus be substantially inadequate to meet fundamental requirements in CAA sections 113 and 304.

5. Substantial Inadequacy of Deficient Affirmative Defense Provisions

The EPA believes that SIP provisions that provide inappropriate affirmative defenses for excess emissions during SSM events are substantially inadequate to meet CAA requirements. A typical SIP provision that includes an impermissible affirmative defense provision could contain several deficiencies simultaneously, even though it may superficially resemble such a defense and actually contain the term "affirmative defense." There are a number of ways in which such provisions can be deficient, including: (i) Extending the affirmative defense to injunctive relief; (ii) not including sufficient criteria to make the affirmative defense appropriately narrow; (iii) imposing the affirmative defense provision on federal technology-based emission limitations in the SIP; and (iv) providing an affirmative defense to startup, shutdown, or other planned and routine modes of source operation.

First, the EPA interprets the CAA to allow only those affirmative defense provisions that provide a potential for relief from civil penalties and not those that provide relief from injunctive relief as well. As explained in more detail in section IV of this notice, the EPA interprets the provisions of CAA section 110(a) to allow affirmative defenses only in certain narrow circumstances, as a means of balancing the obligations of sources to meet emission limitations continuously as required by CAA section 302(k) with the practical reality that despite the most diligent of efforts, a source may violate emission standards under certain limited circumstances beyond the source's control. For sources that meet the conditions for an affirmative defense, the EPA believes that it is appropriate to provide relief only from monetary penalties. This limitation assures that the EPA and air agencies remain able to meet fundamental CAA requirements such as attainment and maintenance of the NAAQS, protection of PSD increments, protection of visibility, and other CAA requirements.

By contrast, because SIP provisions are intended to meet fundamental CAA objectives including attainment and maintenance of the NAAQS, it would be inappropriate to eliminate the availability of injunctive relief for violations, in order to ensure that the necessary emissions reductions could be obtained through changes at the source or in source operation should that be necessary. In this way, the EPA believes that affirmative defense provisions applicable only to monetary penalties can meet the requirements of CAA sections 110(a) and 302(k) and the enforcement structure provided in CAA sections 113 and 304. Failure to preserve the availability of injunctive relief for violations would thus be substantially inadequate to meet CAA requirements.

Second, the EPA interprets the CAA to allow only those affirmative defense provisions that are narrowly drawn to provide relief under appropriate circumstances where the event was entirely beyond the control of the owner or operator of the source and for which the source must have taken all practicable steps to prevent and to minimize the excess emissions that result from the event. Through the criteria in the 1999 SSM Guidance, the EPA has recommended the conditions that it considers appropriate for an approvable SIP provision in order to ensure that the affirmative defense is available to sources that warrant relief from monetary penalties otherwise required by the CAA. Affirmative defense provisions that are consistent with these criteria would be appropriately narrowly drawn. Affirmative defense provisions that do not address these criteria adequately, however, would potentially shield a source from CAA statutory penalties in circumstances that are not warranted.

For example, an affirmative defense provision that did not impose a burden upon the source to establish that the violation was not the result of an event that could have been prevented through proper maintenance would not serve to encourage better maintenance. Similarly, an affirmative defense provision that failed to impose a burden upon the source to establish that it took all possible steps to minimize the effect of the violation on ambient air quality, the environment, and human health, would not serve to encourage diligence in rectifying the malfunction as quickly and effectively as possible. By addressing the recommended criteria adequately, a state can develop a narrow provision that appropriately balances the requirement for continuous compliance against the reality that there may be limited circumstances beyond the source's control that justify relief from monetary penalties. The EPA believes that failure to have an affirmative defense provision that is sufficiently narrowly drawn would fail to meet the requirements of CAA sections 110(a) and 302(k) and the enforcement structure provided in CAA sections 113 and 304. Failure to have a sufficiently narrow affirmative defense would thus be substantially inadequate to meet CAA requirements.

Third, the EPA interprets the CAA to preclude SIP provisions that would create affirmative defense provisions applicable to federal regulations that an air agency may have copied into its SIP or incorporated by reference in order to take credit for resulting emissions reductions for SIP planning purposes or to receive delegation of federal authority, such as NSPS or NESHAP. To the extent that any affirmative defense appropriate for these technology-based standards is warranted, the federal standards contained in the EPA's regulations already specify the appropriate affirmative defense. Creating affirmative defenses that do not exist in such federal technology-based standards, or providing different affirmative defenses in addition to those that do exist, would be inappropriate. Similarly, reliance on inappropriate affirmative defenses in the context of PSD permitting or nonattainment New Source Review (NSR) permitting programs could likewise be problematic.

Fourth, the EPA interprets the CAA to allow only affirmative defense provisions that are available for events that are entirely beyond the control of the owner or operator of the source. Thus, an affirmative defense may be appropriate for events like malfunctions, which are sudden and unavoidable events that cannot be foreseen or planned for. The underlying premise for an affirmative defense provision is that the source is properly designed, operated, and maintained, and could not have taken action to prevent the exceedance. Because the qualifying source could not have foreseen or prevented the event, the affirmative defense is available to provide relief from monetary penalties that could result from an event beyond the control of the source.

The legal and factual basis that supports the concept of an affirmative defense for malfunctions does not support providing and an affirmative defense for normal modes of operation

like startup and shutdown. Such events are planned and predictable. The source should be designed, operated, and maintained to comply with applicable emission limitations. Because startup and shutdown periods are part of a source's normal operations, the same approach to compliance with, and enforcement of, applicable emission limitations during those periods should apply as otherwise applies during a source's normal operations. If justified, the state can develop special emission limitations or control measures that apply during startup and shutdown if the source cannot meet the otherwise applicable emission limitations in the SIP.

Even if a source is a suitable candidate for distinct SIP emission limitations during startup and shutdown, however, that does not justify the creation of an affirmative defense in the case of excess emissions during such periods. Because these events are planned, the EPA believes that sources should be able to comply with applicable emission limitations during these periods of time. To provide an affirmative defense for violations that occur during planned and predictable events for which the source should have been expected to comply is tantamount to providing relief from civil penalties for a planned violation. The EPA believes that affirmative defense provisions that include periods of normal source operation that are within the control of the owner or operator of the source, such as planned startup and shutdown, would be inconsistent with the requirements of CAA sections 110(a) and 302(k) and the enforcement structure provided in CAA sections 113 and 304. An affirmative defense provision that expands the availability of the defense to planned events such as startup and shutdown would thus be substantially inadequate to meet CAA requirements.

B. SIP Call Process Under Section 110(k)(5)

Section 110(k)(5) of the CAA provides the EPA with authority to determine whether a SIP is substantially inadequate to attain or maintain the NAAQS or otherwise comply with any requirement of the CAA. Where the EPA makes such a determination, the EPA then has a duty to issue a SIP call.

In addition to providing general authority for a SIP call, CAA section 110(k)(5) sets forth the process and timing for such an action. First, the statute requires the EPA to notify the state of the final finding of substantial inadequacy. The EPA typically provides notice to states by a letter from the Assistant Administrator for the Office of Air and Radiation to the appropriate state officials in addition to publication of the final action in the **Federal Register**.

Second, the statute requires the EPA to establish "reasonable deadlines (not to exceed 18 months after the date of such notice)" for the state to submit a corrective SIP submission to eliminate the inadequacy in response to the SIP call. The EPA proposes and takes comment on the schedule for the submission of corrective SIP revisions in order to ascertain the appropriate timeframe, depending on the nature of the SIP inadequacy.

Third, the statute requires that any finding of substantial inadequacy and notice to the state be made public. By undertaking a notice-and-comment rulemaking, the EPA assures that the air agency, affected sources, and members of the public all are adequately informed and afforded the opportunity to participate in the process. Through this proposal notice and the later final notice, the EPA intends to provide a full evaluation of the issues raised by the Petition and to use this process as a means of giving clear guidance concerning SIP provisions relevant to SSM events that are consistent with CAA requirements.

If the state fails to submit the corrective SIP revision by the deadline that the EPA finalizes as part of the SIP call, CAA section 110(c) authorizes the EPA to "find[] that [the] State has failed to make a required submission."[86] Once the EPA makes such a finding of failure to submit, CAA section 110(c)(1) requires the EPA to "promulgate a Federal implementation plan at any time within 2 years after the [finding] * * * unless the State corrects the deficiency, and [the EPA] approves the plan or plan revision, before [the EPA] promulgates such [FIP]." Thus, if the EPA finalizes a SIP call and then finds that the air agency failed to submit a complete SIP revision that responds to the SIP call, or if the EPA disapproves such SIP revision, then the EPA will have an obligation under CAA section 110(c)(1) to promulgate a FIP no later than 2 years from the date of the finding or the disapproval, if the deficiency has not been corrected before that time.[87]

The finding of failure to submit a revision in response to a SIP call, or the EPA's disapproval of that corrective SIP revision, can also trigger sanctions under CAA section 179. If a state fails to submit a complete SIP revision that responds to a final SIP call, CAA section 179(a) provides for the EPA to issue a finding of state failure. Such a finding starts mandatory 18-month and 24-month sanctions clocks. The two sanctions that apply under CAA section 179(b) are the 2-to-1 emission offset requirement for all new and modified major sources subject to the nonattainment new source review program and restrictions on highway funding. However, section 179 leaves it to the EPA to decide the order in which these sanctions apply. The EPA issued an order of sanctions rule in 1994 but did not specify the order of sanctions where a state fails to submit or submits a deficient SIP revision in response to a SIP call.[88] As the EPA has done in other SIP calls, the EPA proposes that the 2-to-1 emission offset requirement will apply for all new sources subject to the nonattainment new source review program 18 months following such finding or disapproval unless the state corrects the deficiency before that date. The EPA proposes that the highway funding restrictions sanction will also apply 24 months following such finding or disapproval unless the state corrects the deficiency before that date. The EPA is proposing that the provisions in 40 CFR 52.31 regarding staying the sanctions clock and deferring the imposition of sanctions would also apply.

Mandatory sanctions under CAA section 179 generally apply only in nonattainment areas. By its definition, the emission offset sanction applies only in areas required to have a part D NSR program, typically areas designated nonattainment. Section 179(b)(1) expressly limits the highway funding restriction to nonattainment areas. Additionally, the EPA interprets the section 179 sanctions to apply only in the area or areas of the state that are subject to or required to have in place the deficient SIP and for the pollutant or pollutants the specific SIP element addresses. For example, if the deficient provision applies statewide and applies for all NAAQS pollutants, then the mandatory sanctions would apply in all areas designated nonattainment for all NAAQS within the state. In this case, the EPA will evaluate the geographic scope of potential sanctions at the time it makes a final determination whether the state's SIP is substantially inadequate and issues a SIP call, as this

[86] CAA section 110(c)(1)(A).

[87] The 2-year deadline does not necessarily apply to FIPs following disapproval of a tribal implementation plan.

[88] *See*, "Selection of Sequence of Mandatory Sanctions for Findings Made Pursuant to Section 179 of the Clean Air Act," 59 FR 39832 (Aug. 4, 1994), codified at 40 CFR 52.31.

may vary depending upon the provisions at issue.

C. SIP Call Timing Under Section 110(k)(5)

If the EPA finalizes a proposed finding of substantial inadequacy and a proposed SIP call for any state, CAA section 110(k)(5) requires the EPA to establish a SIP submission deadline by which the state must make a SIP submission to rectify the identified deficiency. Pursuant to CAA section 110(k)(5), the EPA has authority to set a SIP submission deadline up to 18 months from the date of the final finding of inadequacy.

The EPA is proposing that if it promulgates a final finding of inadequacy and a SIP call for a state, the EPA will establish a date 18 months from the date of promulgation of the final finding for the state to respond to the SIP call. If, for example, the EPA's final findings are signed and disseminated in August 2013, then the SIP submission deadline for each of the states subject to the final SIP call would fall in February 2015. Thereafter, the EPA will review the adequacy of that new SIP submission in accordance with the CAA requirements of sections 110(a), 110(k), 110(l), and 193, including the EPA's interpretation of the CAA reflected in the SSM Policy as clarified and updated through this rulemaking.

The EPA is proposing the maximum time permissible under the CAA for a state to respond to a SIP call. The EPA believes that it is appropriate to provide states with the maximum time allowable under CAA section 110(k)(5) in order to allow states sufficient time to make SIP revisions following their own SIP development process. The EPA considers this a reasonable time period for the affected states to revise their state regulations, provide for public input, process the SIP revision through the state's own procedures, and submit the SIP revision to the EPA. Such a schedule will allow for the necessary SIP development process to correct the deficiencies, yet still achieve the necessary SIP improvements as expeditiously as practicable. The EPA acknowledges that the longstanding existence of many of the provisions at issue, such as automatic exemptions for SSM events, may have resulted in undue reliance on them as a compliance mechanism by some sources. As a result, development of appropriate SIP revisions may entail reexamination of the applicable emission limitations themselves, and this process may require the maximum time allowed by the CAA. Nevertheless, the EPA encourages the affected states to make the necessary revisions in as timely a fashion as possible and encourages the states to work with the respective EPA Regional Office as they develop the SIP revisions.

The EPA notes that the SIP calls that it is proposing for affected states in this action would be narrow and apply only to the specific SIP provisions determined to be inconsistent with the requirements of the CAA. To the extent that a state is concerned that elimination of a particular aspect of an existing emission limitation, such as an impermissible exemption, will render that emission limitation more stringent than the state originally intended and more stringent than needed to meet the CAA requirements it was intended to address, the EPA anticipates that the state will revise the emission limitation accordingly, but without the impermissible exemption or other feature that necessitated the SIP call.

Finally, the EPA notes that its authority under CAA section 110(k)(5) does not extend to requiring a state to adopt a particular control measure in its SIP in response to the SIP call. Under principles of cooperative federalism, the CAA vests air agencies with substantial discretion to develop SIP provisions, so long as the provisions meet the legal requirements and objectives of the CAA.[89] Thus, the issuance of a SIP call should not be misconstrued as a directive to the state in question to adopt a particular control measure. The EPA is merely proposing to require that affected states make a SIP revision to remove or revise existing SIP provisions that fail to comply with fundamental requirements of the CAA. The states retain discretion to remove or revise those provisions as they determine best, so long as they bring their SIPs into compliance with the requirements of the CAA.[90]

[89] *See, Virginia, et al. v. EPA*, 108 F.3d 1397 (D.C. Cir. 1997) (SIP call remanded and vacated because, *inter alia*, the EPA had issued a SIP call that required states to adopt a particular control measure for mobile sources).

[90] Notwithstanding the latitude states have in developing SIP provisions, the EPA is required to assure that states meet the basic legal criteria for SIPs. *See, Michigan, et al. v. EPA*, 213 F.3d 663, 686 (D.C. Cir. 2000) (upholding NO_X SIP call because, *inter alia*, the EPA was requiring states to meet basic legal requirement that SIPs comply with section 110(a)(2)(D), not dictating the adoption of a particular control measure).

IX. What is the EPA proposing for each of the specific SIP provisions identified in the petition?

A. Overview of the EPA's Evaluation of Specific SIP Provisions

In reviewing the Petitioner's concerns with respect to the specific SIP provisions identified in the Petition, the EPA notes that most of the provisions relate to a small number of common issues. As the EPA acknowledges in section II.A of this notice, many of these provisions are as old as the original SIPs that the EPA approved in the early 1970s, when the states and the EPA had limited experience in evaluating the provisions' adequacy, enforceability, and consistency with CAA requirements.

In some instances the EPA does not agree with the Petitioner's reading of the provision in question, or with the Petitioner's conclusion that the provision is inconsistent with the requirements of the CAA. However, given the common issues that arise in the Petition for multiple states, there are some overarching conceptual points that merit discussion in general terms before delving into the facts and circumstances of the specific SIP provisions in each state. The EPA solicits comment on all aspects of this proposal.

1. Automatic Exemption Provisions

A significant number of provisions identified by the Petitioner pertain to existing SIP provisions that create automatic exemptions for excess emissions during periods of startup, shutdown, or malfunction. Occasionally, these provisions also pertain to exemptions for excess emission that occur during maintenance, load change, or other types of normal source operation. These provisions typically provide that a source subject to a specific SIP emission limitation is exempted from compliance during startup, shutdown, and malfunction, so that the excess emissions are defined as not violations. Often, these provisions are artifacts of the early phases of the SIP program, approved before state and EPA regulators recognized the implications of such exemptions. Whatever the genesis of these existing SIP provisions, however, these automatic exemptions from emission limitations are not consistent with the CAA, as the EPA has stated in its SSM Policy since at least 1982.

After evaluating the Petition, the EPA proposes to determine that a number of states have existing SIP provisions that create impermissible automatic exemptions for excess emissions during

malfunctions or during startup, shutdown, or other types of normal source operation. In those instances where the EPA agrees that a SIP provision identified by the Petitioner contains such an exemption contrary to the requirements of the CAA, the EPA is proposing to grant the Petition and accordingly to issue a SIP call to the appropriate state.

2. Director's Discretion Exemption Provisions

Another category of problematic SIP provision identified by the Petitioner is exemptions for excess emissions that, while not automatic, are exemptions for such emissions granted at the discretion of state regulatory personnel. In some cases, the SIP provision in question may provide some minimal degree of process and some parameters for the granting of such discretionary exemptions, but the typical provision at issue allows state personnel to decide unilaterally and without meaningful limitations that what would otherwise be a violation of the applicable emission limitation is instead exempt. Because the state personnel have the authority to decide that the excess emissions at issue are not a violation of the applicable emission limitation, such a decision would transform the violation into a non-violation, thereby barring enforcement by the EPA or others.

The EPA refers to this type of provision as a "director's discretion" provision, and the EPA interprets the CAA generally to forbid such provisions in SIPs because they have the potential to undermine fundamental statutory objectives such as the attainment and maintenance of the NAAQS and to undermine effective enforcement of the SIP. As discussed in sections VIII.A and IX of this notice, unbounded director's discretion provisions purport to allow unilateral revisions of approved SIP provisions without meeting the applicable statutory substantive and procedural requirements for SIP revisions. The specific SIP provisions at issue in the Petition (*see* section IX of this notice) are especially inappropriate because they purport to allow discretionary creation of case-by-case exemptions from the applicable emission limitations, when the CAA does not permit any such exemptions in the first instance. The practical impact of such provisions is that in effect they transform an enforcement discretion decision by the state (e.g., that the excess emission from a given SSM event should be excused for some reason) into an exemption from compliance that also prevents enforcement by the EPA or through a citizen suit. The EPA's longstanding SSM Policy has interpreted the CAA to preclude SIP provisions in which a state's exercise of its own enforcement discretion bars enforcement by the EPA or through a citizen suit. Where the EPA agrees that a SIP provision identified by the Petitioner contains such a discretionary exemption contrary to the requirements of the CAA, the EPA is proposing to grant the Petition and to call for the state to rectify the problem.

3. State-Only Enforcement Discretion Provisions

The Petitioner identified existing SIP provisions in many states that ostensibly pertain to parameters for the exercise of enforcement discretion by state personnel for violations due to excess emissions during SSM events. The EPA's SSM Policy has consistently encouraged states to utilize traditional enforcement discretion within appropriate bounds for such violations and, in the 1982 SSM Guidance, explicitly recommended criteria that states might consider in the event that they elected to formalize their enforcement discretion with provisions in the SIP. The intent has been that such enforcement discretion provisions in a SIP would be "state-only," meaning that the provisions apply only to the state's own enforcement personnel and not to the EPA or to others.

The EPA has determined that a number of states have SIP provisions that, when evaluated carefully, could reasonably be construed to allow the state to make enforcement discretion decisions that would purport to foreclose enforcement by the EPA under CAA section 113 or by citizens under section 304. In those instances where the EPA agrees that a specific provision could have the effect of impeding adequate enforcement of the requirements of the SIP by parties other than the state, the EPA is proposing to grant the Petition and to take action to rectify the problem. By contrast, where the EPA's evaluation indicates that the existing provision on its face or as reasonably construed could not be read to preclude enforcement by parties other than the state, the EPA is proposing to deny the Petition, and the EPA is taking comment on this issue in particular to assure that the state and the EPA have a common understanding that the provision does not have any impact on potential enforcement by the EPA or through a citizen suit. This process should serve to ensure that there is no misunderstanding in the future that the correct reading of the SIP provision would not bar enforcement by the EPA or through a citizen suit when the state elected to exercise its own enforcement discretion.

The EPA notes that another method by which to eliminate any potential ambiguity about the meaning of these enforcement discretion provisions would be for the state to revise its SIP to remove the provisions. Because these provisions are only applicable to the state, the EPA's current view is that they need not be included within the SIP. Thus, the EPA supports states that elect to revise their SIPs to remove these provisions to avoid any unnecessary confusion.

4. Adequacy of Affirmative Defense Provisions

In addition to its overarching request that the EPA revise its interpretation of the CAA and forbid any form of affirmative defense, the Petitioner also identified specific existing affirmative defense provisions in SIPs that the Petitioner contended are not consistent with the EPA's SSM Policy. In general, these provisions are structured as affirmative defense provisions, but the Petitioner expressed concern that they fail to address some or all of the criteria for such provisions that the EPA recommended in the 1999 SSM Guidance.

In reviewing the claims of the Petitioner with respect to this type of alleged SIP inadequacy, the EPA is reevaluating each of the challenged affirmative defense provisions on the merits to determine whether it provides the types of assurances that the EPA has recommended as necessary to meet CAA requirements. As the SSM Policy is guidance, it does not require any particular approach, but it does reflect the EPA's interpretation of the CAA with respect to what could constitute an acceptable affirmative defense provision. For each of these provisions identified by the Petitioner, the EPA proposes to grant or to deny the Petition, based on the EPA's evaluation as to whether the provision at issue provides adequate criteria to provide only a narrow affirmative defense for sources under certain circumstances consistent with the overarching CAA objectives, such as attaining and maintaining the NAAQS.[91] In addition, as discussed in section VII.C of this

[91] By definition, an affirmative defense provision in a SIP provides a source with a defense to assert in an enforcement proceeding. The source has the ability to establish whether or not it has met the legal and factual parameters for such affirmative defense, and that question will be decided by the trier of fact in the proceeding. The relevant circumstances in such a proceeding would thus include issues relevant to the parameters for affirmative defense provisions, as enumerated in section VII.B of this notice.

notice, the EPA is also proposing to grant the Petition with respect to any identified provision that creates an affirmative defense applicable during planned startup and shutdown events, because such provisions are not consistent with the requirements of the CAA.

5. Affirmative Defense Provisions Applicable to a "Source or Small Group of Sources"

The Petitioner specifically objected to existing provisions in SIPs for a few states that allow an affirmative defense for certain categories of sources to be based on an after-the-fact showing that the excess emissions during a particular SSM event did not cause a violation of the NAAQS or PSD increments. The Petitioner argued that these affirmative defense provisions are inconsistent with the CAA and with the EPA's own recommendations for affirmative defenses in the SSM Policy, because the provisions provide the possibility for an affirmative defense to be used by sources that would fall into the category of "a source or small group of sources that has the potential to cause an exceedance of the NAAQS or PSD increments."[92]

The EPA acknowledges that its 1999 SSM Guidance recommended against affirmative defense provisions in SIPs for sources that have the potential, either individually or in small groups, to have excess emissions during SSM events that could cause a violation of the NAAQS or PSD increments. The EPA recommended that states utilize an enforcement discretion approach, rather than create an affirmative defense provision, for such sources. However, the EPA's SSM Policy is guidance, and the facts and circumstances of a particular situation may justify adopting a different approach. The EPA has evaluated each of the affirmative defense provisions identified by the Petitioner on the facts and circumstances of the particular provision. For each of these provisions, the EPA proposes to grant or to deny the Petition, based on an evaluation of whether the specific provision at issue in an individual SIP contains adequate criteria to achieve the objective of providing only a narrow affirmative defense for sources under certain circumstances consistent with the overarching CAA objectives, such as attaining and maintaining the NAAQS. The criteria that the EPA recommends for an affirmative defense provision for malfunctions to be consistent with CAA requirements are restated in this notice at section VII.B, which also highlights EPA's view concerning case-by-case approval of affirmative defenses in the case of geographic areas and pollutants "where a single source or small group of sources has the potential to cause an exceedance of the NAAQS or PSD increments."

B. Affected States in EPA Region 1

1. Maine

a. Petitioner's Analysis

The Petitioner first objected to a specific provision in the Maine SIP that provides an exemption for certain boilers from otherwise applicable SIP visible emission limits during startup and shutdown (06–096–101 Me. Code R. § 3).[93] The provision exempts violations of the otherwise applicable SIP emission limitations for boilers over a certain rated input capacity "during the first 4 hours following the initiation of cold startup or planned shutdown." The Petitioner recognized that this provision might operate as an affirmative defense because the exemption is only available once the person claiming an "exemption" establishes that the facility was being run to minimize emissions. The provision does not make clear who is authorized to determine whether the visible emission limits apply. The Petitioner argued that one plausible interpretation of this provision is that state officials are "authorized to decide that the exemption applies and therefore preclude enforcement by the EPA and by citizens."[94] The Petitioner argued that such an interpretation of this provision precluding enforcement by the EPA or citizens, both for civil penalties and injunctive relief, is forbidden by the EPA's interpretation of the CAA. Accordingly, the Petitioner requested that this provision be eliminated from the SIP.

Second, the Petitioner objected to a provision that empowers the state to "exempt emissions occurring during periods of unavoidable malfunction or unplanned shutdown from civil penalty under section 349, subsection 2" (06–096–101 Me. Code R. § 4). The Petitioner noted that the provision "clearly provides an exemption at the discretion of the department."[95] The Petitioner argued that such a provision provides exemptions from the otherwise applicable SIP emission limitations, and such exemptions are inconsistent with the requirements of the CAA and the EPA's SSM Policy. Further, the Petitioner argued that the provision precludes enforcement by the EPA or citizens, both for civil penalties and injunctive relief, and that the EPA's interpretation of the CAA would forbid such a provision.

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations, whether automatic or through the exercise of a state official's discretion. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitation must be considered violations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that the excess emissions during startup, shutdown, or malfunctions are not violations of the applicable emission limitations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. The EPA believes that inclusion of such an exemption in 06–096–101 Me. Code R. § 3 from the otherwise applicable SIP emission limitation for violations during the first 4 hours following cold startup or planned shutdown of boilers with a rated input capacity of more than 200 million BTU per hour is a substantial inadequacy and renders this specific SIP provision impermissible.

With respect to the Petitioner's concern that this exemption could preclude enforcement by the EPA or citizens, the EPA agrees that this is one of the critical reasons why such a provision is impermissible under the CAA. By having a SIP provision that defines what would otherwise be violations of the applicable emission limitations as non-violations, the state has effectively negated the ability of the EPA or the public to enforce against those violations.

The EPA also believes that even if 06–096–101 Me. Code R. § 3 is interpreted to allow the source to make the required demonstration only in the context of an enforcement proceeding, the conditions set forth in the provision do not render it an acceptable affirmative defense provision. As explained in sections IV and VII.C of this notice, the EPA believes that affirmative defenses are only permissible under the CAA in the

[92] *See*, 1999 SSM Guidance at 4, and Attachment at 2, 3, and 5. Footnote 2 to that document articulates the reasoning behind the EPA's recommendation against such provisions, at least for some sources and for some NAAQS.

[93] Petition at 43–44.

[94] Petition at 44.

[95] Petition at 44.

case of events that are beyond the control of the source, *i.e.*, malfunctions. Affirmative defense provisions are not appropriate in the case of planned source actions, such as cold startup or planned shutdown, because sources should be expected to comply with applicable emission limitations during those normal planned and predicted modes of source operation.

Finally, the EPA believes that 06–096–101 Me. Code R. § 4 is impermissible under the CAA as interpreted in the EPA's SSM Policy as an unbounded director's discretion provision. The provision authorizes a state official "to exempt emissions occurring during periods of unavoidable malfunction or unplanned shutdown from civil penalty under section 349, subsection 2." Although the reference to section 349, subsection 2 is to a Maine state penalty provision, the EPA believes that the provision is unclear as written. This provision could be read to mean that once the state official has exempted excess emissions during malfunctions from otherwise applicable SIP limitations, those excess emissions are not subject to any penalties, including penalties under CAA section 113. As discussed in section VII.A of this notice, such director's discretion provisions are impermissible. Such an interpretation would make the state official the unilateral arbiter of whether the excess emissions in a given event constitute a violation, which could preclude enforcement by the EPA or the public who might disagree about whether enforcement action is warranted. Most importantly, however, the provision may be read to authorize the state official to create an exemption from the emission limitation, and such an exemption is impermissible in the first instance. The EPA believes that inclusion of an unbounded director's discretion provision in 06–096–101 Me. Code R. § 4 is thus a substantial inadequacy and renders this specific SIP provision impermissible for this reason.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to 06–096–101 Me. Code R. § 3. The EPA believes that this provision allows for exemptions from the otherwise applicable SIP emission limitations, and that such exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs as required by sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, by creating these impermissible exemptions, the state has defined violations in a way that would interfere with effective enforcement by the EPA and the public for excess emissions during these events as provided in CAA sections 113 and 304. Even if the EPA were to consider 06–096–101 Me. Code R. § 3 to provide an affirmative defense rather than an automatic exemption, the provision is not a permissible affirmative defense provision consistent with the requirements of the CAA as interpreted in the EPA's recommendations in the EPA's SSM Policy.

The EPA also proposes to grant the Petition with respect to 06–096–101 Me. Code R. § 4. The EPA believes that this provision, as written, applies only to state penalties. However, the EPA is concerned that the provision could cause confusion among the public, the regulated community, and the courts, who might interpret the provision as applying to both state and federal penalties. Of course, such an interpretation would seem to allow for exemptions from otherwise applicable emission limitations through a state official's unilateral exercise of unbounded discretionary authority and therefore be inconsistent with the fundamental requirements of the CAA with respect to SIPs and SIP revisions. To avoid any such misunderstanding, the EPA is proposing to find that these provisions are substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to these provisions.

2. New Hampshire

a. Petitioner's Analysis

The Petitioner objected to two generally applicable provisions in the New Hampshire SIP that allow emissions in excess of otherwise applicable SIP emission limitations during "malfunction or breakdown of any component part of the air pollution control equipment."[96] The Petitioner argued that the challenged provisions provide an automatic exemption for excess emissions during the first 48 hours when any component part of air pollution control equipment malfunctions (N.H. Code R. Env-A 902.03) and further provide that "[t]he director may * * * grant an extension of time or a temporary variance" for excess emissions outside of the initial 48-hour time period (N.H. Code R. Env-A 902.04). The Petitioner argued that N.H. Code R. Env-A 902.03 is an impermissible automatic exemption because it "provides that if certain conditions existed during a period of excess emissions, then those exceedances would not be considered violations."[97] The Petitioner argued that such exemptions are inconsistent with the requirements of the CAA and the EPA's SSM Policy. The Petitioner argued that the CAA and the EPA's interpretation of the CAA in the SSM Policy require that all such excess emissions be treated as violations. The Petitioner further argued that both N.H. Code R. Env-A 902.03 and N.H. Code R. Env-A 902.04 appear "to authorize the division to allow [exemptions], which could be interpreted to preclude enforcement by EPA or citizens"[98] for the excess emissions that would otherwise be violations of applicable SIP emission limitations.

Second, the Petitioner objected to two specific provisions in the New Hampshire SIP which provide source-specific exemptions for periods of startup for "any process, manufacturing and service industry" (N.H. Code R. Env-A 1203.05) and for pre-June 1974 asphalt plants during startup, provided they are at 60-percent opacity for no more than 3 minutes (N.H. Code R. Env-A 1207.02).[99] The Petitioner recognized that EPA permits source category-specific emission limitations for startup and shutdown if certain conditions are met. The Petitioner argued, however, that "[o]f the seven criteria EPA considers adequate to justify a source specific emission limit during startup and shutdown, section 1207.02 arguably meets only one of them and section 1203.05 meets none at all."[100] The Petitioner thus requested that EPA require New Hampshire to remove both provisions from the SIP.

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations, whether automatic or through the exercise of a state official's discretion. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitation must be considered violations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that the excess emissions during startup, shutdown, or malfunctions are not violations are inconsistent with the

[96] Petition at 52–53.

[97] Petition at 52.

[98] Petition at 53.

[99] Petition at 52–53.

[100] Petition at 53.

fundamental requirements of the CAA with respect to emission limitations in SIPs. The first provision identified by the Petitioner, N.H. Code R. Env-A 902.03, explicitly states that "increased emissions shall be allowed" during "malfunction or breakdown of any component part of the air pollution control equipment." The third provision identified by the Petitioner, N.H. Code R. Env-A 1203.05, provides that applicable SIP emission limitations apply "for any process, manufacturing and service industry" "[e]xcept during periods of start-ups and warm-ups." Both of these provisions allow automatic exemptions during periods of startup from otherwise applicable SIP emission limitations for excess emissions and thus are inconsistent with the requirements of the CAA as interpreted in the EPA's SSM Policy. The EPA believes that inclusion of such exemptions from otherwise applicable SIP emission limitations in these provisions is a substantial inadequacy and renders these SIP provisions impermissible.

Similarly, N.H. Code R. Env-A 1203.05 does not appear to comply with the Act's requirements for source category-specific rules for startup and shutdown as interpreted in the EPA's SSM Policy. N.H. Code R. Env-A 1203.05 establishes a visible emissions limit for "any process, manufacturing and service industry" but further states that this limit does not apply during startups. Automatic exemptions from otherwise applicable SIP emission limitations for excess emissions during periods of startup are not permissible under the CAA. As discussed in section VII.A of this notice, states may elect to develop alternative emission limitations or other forms of enforceable control measures or techniques that apply during startup or shutdown, but exemptions for excess emissions during such periods are inconsistent with the fundamental requirements of the CAA.

Similarly, N.H. Code R. Env-A 1207.02 provided an alternate opacity limit, "60 percent opacity, No. 3 on the Ringelmann Smoke Chart," for pre-June 1974 asphalt plants during startups. The EPA believes that this alternate emissions limit does not meet the elements of the EPA's SSM Policy interpreting the CAA for establishing source-specific startup and shutdown alternative limits. However, after the Petitioner filed its Petition, the EPA acted on a SIP revision from New Hampshire correcting N.H. Code R. Env-A 1207.02 and renaming that provision as N.H. Code R. Env-A 2703.02. The N.H. Code R. Env-A 2703.02, as rewritten and submitted by New Hampshire, corrected the deficiencies identified by the Petitioner and removed the alternative limitations applicable during startups for pre-June 1974 asphalt plants. The EPA approved New Hampshire's SIP revision with respect to N.H. Code R. Env-A 2703.02 on August 22, 2012.[101] Thus, the Petitioner's objection to this provision is moot.

Finally, the EPA believes that N.H. Code R. Env-A 902.04 is impermissible under the CAA as interpreted in the EPA's SSM Policy, because it includes an unbounded director's discretion provision. The provision authorizes a state official to grant "an extension of time" to the time-limited exemption provided by N.H. Code R. Env-A 902.03 or a "temporary variance" to an applicable SIP emission limitation during malfunctions of air pollution control equipment. This provision could be read to mean that once the state official has granted a time extension or temporary variance for excess emissions during malfunctions from otherwise applicable SIP limitations, those excess emissions are not violations. As discussed in section VII.A of this notice, such director's discretion provisions are impermissible. Such an interpretation would make the state official the unilateral arbiter of whether the excess emissions in a given event constitute a violation, which could preclude enforcement by the EPA or the public who might disagree about whether enforcement action is warranted. Most importantly, however, the provision may be read to authorize the state official to create an exemption from the emission limitation, and such an exemption is impermissible in the first instance. The EPA believes that inclusion of an unbounded director's discretion provision in N.H. Code R. Env-A 902.03 is thus a substantial inadequacy and renders this specific SIP provision impermissible for this reason.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to N.H. Code R. Env-A 902.03 and N.H. Code R. Env-A 1203.05. The EPA believes that both of these provisions allow for automatic exemptions from otherwise applicable emission limitations and that such outright exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs as required by sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, by creating these impermissible exemptions, the state has defined violations in a way that would interfere with effective enforcement by the EPA and citizens for excess emissions during these events as provided in CAA sections 113 and 304. For these reasons, the EPA is proposing to find that these provisions are substantially inadequate to meet CAA requirements and thus is proposing to issue a SIP call with respect to these provisions.

The EPA proposes to grant the Petition with respect to N.H. Code R. Env-A 902.04. The EPA believes that this provision allows for exemptions from otherwise applicable emission limitations through a state official's unilateral exercise of discretionary authority that is unbounded. Such provisions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs as required by sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). For these reasons, the EPA is proposing to find that this provision is substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to this provision.

The EPA proposes to deny the Petition with respect to N.H. Code R. Env-A 1207.02. New Hampshire has corrected the inadequacy identified by the Petitioner, and the EPA approved the SIP revision. Therefore, the Petitioner's objection is moot.

3. Rhode Island

a. Petitioner's Analysis

The Petitioner objected to a generally applicable provision in the Rhode Island SIP that allows for a case-by-case petition procedure whereby a source can obtain a variance from state personnel under R.I. Gen. Laws § 23–23–15 to continue to operate during a malfunction of its control equipment that lasts more than 24 hours, if the source demonstrates that enforcement would constitute undue hardship without a corresponding benefit (25–4–13 R.I. Code R. § 16.2).[102] [103] The Petitioner argued that if the state grants the source's petition and provides a variance allowing the source to continue to operate, the facility could be excused from compliance with otherwise applicable SIP emission limitations

[101] *See*, 77 FR 50561 at 50608.

[102] Petition at 63–65.

[103] The EPA notes that the Petitioner also identified several additional provisions, 25–4–13 R.I. Code R. §§ 13.4.4(a), 27.2.3 and 25–4–39 R.I. Code R. §§ 39.5.4, 39.7.5(a), 39.7.6(b), 39.7.7(e), 39.7.8(f), 39.7.9(e), 39.7.11(c)(2), that it alleged are inconsistent with the CAA and the EPA's SSM Policy. However, the Petitioner did not request that the EPA address those provisions in its remedy request, and thus the EPA is not addressing those provisions in this action. The EPA may elect to evaluate those provisions in a later action.

during malfunction periods. The Petitioner argued that this provision could be read to preclude enforcement by the EPA or citizens in the event that the state elects not to treat the event as a violation of SIP emission limitations. Thus, the Petitioner argued, the provision is inconsistent with the CAA and the EPA's SSM Policy because it allows the state to make a unilateral decision that the excess emissions were not a violation and thus purports to bar enforcement for the excess emissions by the EPA and citizens.

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations, whether automatic or through the exercise of a state official's discretion. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitation must be considered violations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that excess emissions during malfunctions are not violations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs.

The EPA believes that 25–4–13 R.I. Code R. § 16.2 is impermissible under the CAA as interpreted in the EPA's SSM Policy, due to an insufficiently bounded director's discretion provision. The provision specifies a mechanism for a variance to be granted "[i]n the event that the malfunction of an air pollution control system is expected or may reasonably be expected to continue for longer than 24 hours." This provision could be read to mean that once a state official has exempted excess emissions during malfunctions from otherwise applicable SIP limitations, those excess emissions are not violations. As discussed in section VII.A of this notice, such director's discretion provisions are impermissible. Such an interpretation would make the state official the unilateral arbiter of whether the excess emissions in a given event constitute a violation, which could preclude enforcement by the EPA or the public who might disagree about whether enforcement action is warranted. Most importantly, however, the provision may be read to authorize the state official to create an exemption from the emission limitation, and such an exemption is impermissible in the first instance. The EPA believes that inclusion of an insufficiently bounded director's discretion provision in 25–4–13 R.I. Code R. § 16.2 is thus a substantial inadequacy and renders this specific SIP provision impermissible for this reason.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to 25–4–13 R.I. Code R. § 16.2. The EPA believes that this provision allows for exemptions from otherwise applicable emission limitations through a state official's unilateral exercise of discretionary authority that is insufficiently bounded. Such provisions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs as required by sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). For these reasons, the EPA is proposing to find that this provision is substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to this provision.

C. Affected States in EPA Region II

1. New Jersey

a. Petitioner's Analysis

The Petitioner objected to two specific provisions in the New Jersey SIP that allow for automatic exemptions for excess emissions during emergency situations.[104] The Petitioner objected to the first provision because it provides industrial process units that have the potential to emit sulfur compounds an exemption from the otherwise applicable sulfur emission limitations where "[t]he discharge from any stack or chimney [has] the sole function of relieving pressure of gas, vapor or liquid under abnormal emergency conditions" (N.J. Admin. Code 7:27–7.2(k)(2)). The Petitioner argued that such an exemption is inconsistent with the requirements of the CAA and the EPA's SSM Policy. The Petitioner argued that the CAA and the EPA's interpretation of the CAA in the SSM Policy require that all such excess emissions be treated as violations.

The Petitioner objected to the second provision because it provides electric generating units (EGUs) an exemption from the otherwise applicable NO_X emission limitations when the unit is operating at "emergency capacity," also known as a "MEG alert," which is statutorily defined as a period in which one or more EGUs is operating at emergency capacity at the direction of the load dispatcher in order to prevent or mitigate voltage reductions or interruptions in electric service, or both (N.J. Admin. Code 7:27–19.1). The Petitioner argued that this source-specific exemption from the emission limitations "cannot ensure compliance with the NAAQS and PSD increments for NO_X because ambient air quality is nowhere mentioned as a relevant consideration."[105]

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitation must be considered violations of such limitations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that excess emissions during emergency conditions, however defined, are not violations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs.

The first provision identified by the Petitioner explicitly states that emission limitations of sulfur compounds "shall not apply" to emissions coming from a stack or a chimney during "abnormal emergency conditions," when the discharges are solely to relieve pressure of gas, vapor, or liquid. The EPA believes that inclusion of such an exemption from emission limitations in N.J. Admin. Code 7:27–7.2(k)(2) is a substantial inadequacy and renders this specific SIP provision impermissible. The EPA notes that this exemption is impermissible even though the state has imposed the limitation that such exemption would apply only during "abnormal emergency conditions." The core problem remains that the provision provides an impermissible exemption from the sulfur compound emission limitations otherwise applicable under the SIP.

With regard to the second provision raised by the Petitioner (N.J. Admin. Code 7:27–19.1), the EPA disagrees that it is a substantial inadequacy in the SIP, because the exemption from the NO_X emission limitations ceased to be applicable after November 15, 2005. Because the statute's exemption applies only to those emergency situations, or

[104] Petition at 53–54.

[105] Petition at 54.

"MEG alerts," that occur "on or before November 15, 2005" (N.J. Admin. Code 7:27–19.1), the Petitioner's claim is moot.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to N.J. Admin. Code 7:27–7.2(k)(2). The EPA believes that this provision allows for an exemption from the otherwise applicable emission limitations, and that such an exemption is inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs as required by CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). For this reason, the EPA is proposing to find that this provision is substantially inadequate to meet CAA requirements and thus is proposing to issue a SIP call with respect to this provision. The EPA proposes to deny the Petition with respect to N.J. Admin. Code 7:27–19.1, because its effectiveness expired on November 15, 2005, and therefore Petitioner's claim with regard to the impermissibility of this provision is moot.

2. [Reserved]

D. Affected States in EPA Region III

1. Delaware

a. Petitioner's Analysis

The Petitioner objected to seven provisions in the Delaware SIP that provide exemptions during startup and shutdown from the otherwise applicable SIP emission limitations.[106] The seven source-specific and pollutant-specific provisions that provide exemptions during periods of startup and shutdown are: 7–1100–1104 Del. Code Regs § 1.5 (Particulate Emissions from Fuel Burning Equipment); 7–1100–1105 Del. Code Regs § 1.7 (Particulate Emissions from Industrial Process Operations); 7–1100–1108 Del. Code Regs § 1.2 (Sulfur Dioxide Emissions from Fuel Burning Equipment); 7–1100–1109 Del. Code Regs § 1.4 (Emissions of Sulfur Compounds From Industrial Operations); 7–1100–1114 Del. Code Regs § 1.3 (Visible Emissions); 7–1100–1124 Del. Code Regs § 1.4 (Control of Volatile Organic Compound Emissions); and 7–1100–1142 Del. Code Regs § 2.3.5 (Specific Emission Control Requirements). These provisions provide exemptions to the emission limitations during startup and shutdown when "the emissions * * * during start-up and shutdown are governed by an operation permit issued pursuant to the provisions of 2.0 of 7 DE Admin. Code 1102." (*E.g.*, 7–1100–1104 Del. Code Regs § 1.5.)

The Petitioner objected to these provisions because they provide a state official with the discretion, through the permitting process, to exempt sources from otherwise applicable SIP emission limitations or to set alternative limitations for periods of startup and shutdown. The Petitioner argued that such discretion is not permissible because the CAA and the EPA's interpretation of the CAA in the SSM Policy require that all such excess emissions be treated as violations. Moreover, the Petitioner argued that any alternative limits for periods of startup and shutdown created by the state official through the permitting process do not meet the requirements of the Act and the EPA's SSM Policy, because there is no requirement in the provision that the limits be narrowly tailored, source-specific, created in consultation with the EPA, and approved into the Delaware SIP by the EPA.

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations, whether automatic or through the exercise of a state official's discretion. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitation must be considered violations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that the excess emissions during startup and shutdown could be deemed not a violation of the applicable emission limitations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs.

The EPA believes that the seven provisions raised by the Petitioner are impermissible because they are unbounded director's discretion provisions, created through the state permitting program, in which state officials are provided unbounded discretion to set alternative limits and could therefore provide an outright exemption from the emission limitations. In each of the provisions raised by the Petitioner, an exemption from the SIP's emission limitations during periods of startup and shutdown is automatically granted if the permit to which the source is subject has terms or conditions governing emissions during startup and shutdown. The SIP provisions therefore vest state officials with the unilateral power to establish alternative limits, or to create an exemption altogether, in permits by deeming such periods of excess emissions during startup and shutdown permissible. Were the state to exercise its discretion and decide on a case-by-case basis that such an event was not a violation of the emission limitations, the EPA and citizens could be precluded from enforcement. More importantly, however, an exemption from the emission limitations is impermissible in the first instance, and these provisions purport to authorize state officials in the permitting context to grant such exemptions. These provisions therefore undermine the SIP's emission limitations and the emissions reductions they are intended to achieve and render them less enforceable by the EPA or through a citizen suit. The EPA believes that the inclusion of insufficiently bounded director's discretion provisions in 7–1100–1104 Del. Code Regs § 1.5, 7–1100–1105 Del. Code Regs § 1.7, 7–1100–1108 Del. Code Regs § 1.2, 7–1100–1109 Del. Code Regs § 1.4, 7–1100–1114 Del. Code Regs § 1.3, 7–1100–1124 Del. Code Regs § 1.4, and 7–1100–1142 Del. Code Regs § 2.3.5 is thus a substantial inadequacy and renders these specific SIP provisions impermissible for this reason.

In addition, the EPA agrees with the Petitioner that while the CAA, as interpreted in the EPA's SSM Policy, allows states to set source category-specific alternative emission limitations or other forms of enforceable control measures or techniques that apply during periods of startup and shutdown, such alternative limitations are only permitted in a narrow set of circumstances and must be accomplished through the appropriate SIP process (*see* section VII.A of this notice.) Those alternative limitations must be developed in consultation with the EPA and must be approved by the EPA into the SIP. The provisions of Delaware's SIP raised by the Petitioner purport to authorize the state to establish alternative limitations for excess emissions during periods of startup and shutdown (or to exempt those emissions altogether, as discussed above) on a case-by-case basis in the permitting process, and the provisions do not require the state to consult with the EPA or have those alternative limits approved by the EPA into the SIP. The EPA believes that the inclusion of processes to establish alternative limits for some sources and in regard to some

[106] Petition at 28–29.

pollutants in a manner that does not conform with the requirements of the Act as interpreted in the EPA's SSM Policy in 7–1100–1104 Del. Code Regs § 1.5, 7–1100–1105 Del. Code Regs § 1.7, 7–1100–1108 Del. Code Regs § 1.2, 7–1100–1109 Del. Code Regs § 1.4, 7–1100–1114 Del. Code Regs § 1.3, 7–1100–1124 Del. Code Regs § 1.4, and 7–1100–1142 Del. Code Regs § 2.3.5 is thus a substantial inadequacy and renders these specific SIP provisions impermissible, in addition to the creation of unbounded discretion in a state official.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to 7–1100–1104 Del. Code Regs § 1.5, 7–1100–1105 Del. Code Regs § 1.7, 7–1100–1108 Del. Code Regs § 1.2, 7–1100–1109 Del. Code Regs § 1.4, 7–1100–1114 Del. Code Regs § 1.3, 7–1100–1124 Del. Code Regs § 1.4, and 7–1100–1142 Del. Code Regs § 2.3.5. The EPA believes that these provisions allow for exemptions from otherwise applicable SIP emission limitations, and that such outright exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs in sections 110(a)(2)(A), 110(a)(C), and 302(k). In addition, the aforementioned provisions each allow for such exemptions through a state official's unilateral exercise of insufficiently bounded discretionary authority in the permitting process, and such provisions are inconsistent with the fundamental requirements of the CAA with respect to SIPs and SIP revisions. Moreover, the discretion in these provisions also allows state officials to establish alternative emission limitations during periods of startup and shutdown through a process that does not conform to the requirements of the Act or the EPA's SSM Policy with regard to establishing alternative emission limitations. For these reasons, the EPA is proposing to find that these provisions are substantially inadequate to meet CAA requirements and thus is proposing to issue a SIP call with respect to these provisions.

2. District of Columbia

a. Petitioner's Analysis

The Petitioner objected to five provisions in the District of Columbia (D.C.) SIP as being inconsistent with the CAA and the EPA's SSM Policy.[107] The Petitioner first objected to a generally applicable provision in the D.C. SIP that allows for discretionary exemptions during periods of maintenance or malfunction (D.C. Mun. Regs. tit. 20 § 107.3). The provision provides the Mayor with the authority to permit continued operation of a stationary source when air pollution controls are shut down due to maintenance or malfunction. The Petitioner argued that this provision could provide an exemption from the otherwise applicable SIP emission limitations, and such an exemption is impermissible under the CAA because the statute and the EPA's interpretation of the CAA in the SSM Policy require that all such excess emissions be treated as violations. Moreover, the Petitioner objected to this discretionary exemption because the Mayor's grant of permission to continue to operate during the period of malfunction or maintenance could be interpreted to excuse excess emissions during such time period and could thus be read to preclude enforcement by the EPA or citizens in the event that the Mayor elects not to treat the event as a violation. Thus, in addition to creating an impermissible exemption for the excess emissions, the Petitioner argued, the provision is also inconsistent with the CAA as interpreted in the EPA's SSM Policy because it allows the Mayor to make a unilateral decision that the excess emissions were not a violation and thus purports to bar enforcement for the excess emissions by the EPA and citizens.

Secondly, the Petitioner objected to the alternative limitations on stationary sources for visible emissions during periods of "start-up, cleaning, soot blowing, adjustment of combustion controls, or malfunction," (D.C. Mun. Regs. tit. 20 § 606.1) and, for fuel-burning equipment placed in initial operation before January 1977, alternative limits for visible emissions during startup and shutdown (D.C. Mun. Regs. tit. 20 § 606.2). The Petitioner also objected to the exemption from emission limitations for emergency standby engines (D.C. Mun. Regs. tit. 20 § 805.1(c)(2)). The Petitioner argued that these provisions could provide exemptions or deviations from the otherwise applicable SIP emission limitations, and such exemptions are impermissible under the CAA because the statute and the EPA's interpretation of the CAA in the SSM Policy require that all such excess emissions be treated as violations. Moreover, the Petitioner argued that the alternative limits do not appear to meet the criteria for a source category-specific rule as permitted under the EPA's SSM Policy interpreting the Act.

Finally, the Petitioner objected to the provision in the D.C. SIP that provides an affirmative defense for violations of visible emission limitations during "unavoidable malfunction" (D.C. Mun. Regs. tit. 20 § 606.4). The Petitioner objected to this provision because the elements of the defense are not laid out clearly in the SIP, because the term "affirmative defense" is not defined in the SIP, and finally, the Petitioner argues, because affirmative defenses for any excess emissions are wholly inconsistent with the CAA and should be removed from the SIP.

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations, whether automatic or through the exercise of a state official's discretion. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitation must be considered violations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that the excess emissions during startup, shutdown, load change, or emergencies are not violations of the applicable emission limitations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. The EPA believes that the inclusion of such an exemption from the emission limitations in D.C. Mun. Regs. tit. 20 § 107.3 is thus a substantial inadequacy and renders this specific SIP provision impermissible.

The EPA believes that D.C. Mun. Regs. tit. 20 § 107.3 is also impermissible due to an unbounded director's discretion provision that purports to make the Mayor the unilateral arbiter of whether the excess emissions in a given event constitute a violation. In the case of D.C. Mun. Regs. tit. 20 § 107.3, the provision authorizes the Mayor to permit continued operation at stationary sources without functioning air pollution control equipment. The Mayor's grant of permission to continue to operate during the period of malfunction or maintenance could be interpreted to excuse excess emissions from that time period, and it could thus be read to preclude enforcement by the EPA or through a citizen suit in the event that the Mayor elects not to treat the event as a violation. In addition, the provision vests the Mayor with the unilateral power to grant an exemption from the

[107] Petition at 29–30.

otherwise applicable SIP emission limitation, without any additional public process at the D.C. or federal level, and without any bounds or parameters to the exercise of this discretion. Most importantly, however, the provision purports to authorize the Mayor to create an exemption from the emission limitation, and such an exemption is impermissible in the first instance. Such a director's discretion provision undermines the emission limitations and the emissions reductions they are intended to achieve and renders them less enforceable by the EPA or through a citizen suit. The EPA believes that the inclusion of an unbounded director's discretion provision in D.C. Mun. Regs. tit. 20 § 107.3 is thus a substantial inadequacy and renders this specific SIP provision impermissible for this reason, in addition to the creation of an impermissible exemption.

The EPA notes that while the CAA does not allow for exemptions for excess emissions, it does, as discussed in section VII.A of this notice, allow states to develop alternative emission limitations or other forms of enforceable control measures or techniques that apply during startup or shutdown. The EPA believes that emission limitations in SIPs should generally be developed in the first instance to account for the types of normal operation outlined in D.C. Mun. Regs. tit. 20 § 606.1, such as cleaning, soot blowing, and adjustment of combustion controls. The D.C. Mun. Regs. tit. 20 §§ 606.1 and 606.2 do not appear to comply with the CAA's requirements as interpreted in the EPA's SSM Policy. The alternative limitations on stationary sources for visible emissions during periods of "start-up, cleaning, soot blowing, adjustment of combustion controls, or malfunction," (D.C. Mun. Regs. tit. 20 § 606.1) do not comply with the Act and the EPA's policy interpreting the Act, because, for instance, they do not apply only to "specific, narrowly-defined source categories using specific control strategies." [108] The EPA believes that the inclusion of these alternative limitations, which do not comply with the requirements of the Act, in D.C. Mun. Regs. tit. 20 §§ 606.1 and 606.2 is thus a substantial inadequacy and renders these specific SIP provisions impermissible.

With respect to the Petitioner's objection to the exemption for emergency standby engines (D.C. Mun. Regs. tit. 20 § 805.1(c)(2)), the EPA disagrees that this provision applies to an exemption from emission limitations during startup, shutdown, or malfunction periods. Instead, this provision applies to a specific source category that is not subject to control under the D.C. SIP. At this point in time, the SIP reflects that regulation of this source category is not necessary in the SIP in order to meet the applicable reasonably available control technology (RACT) requirements or other CAA requirements in this area. The EPA therefore disagrees with Petitioner that D.C. Mun. Regs. tit. 20 § 805.1(c)(2) renders the D.C. SIP substantially inadequate.

Finally, the EPA agrees with the Petitioner that the affirmative defense contained in D.C. Mun. Regs. tit. 20 § 606.4 is not an acceptable affirmative defense provision under the CAA as interpreted the EPA's SSM Policy. Although the EPA believes that narrowly drawn affirmative defenses are permitted under the CAA for malfunction events (see section VII.B of this notice), the EPA's interpretation of the CAA is that such affirmative defenses can only shield the source from monetary penalties and cannot be a bar to injunctive relief. An affirmative defense provision that purports to bar any enforcement action for injunctive relief for violations of emission limitations is inconsistent with the requirements of CAA sections 113 and 304. Furthermore, the SIP provision is deficient because while it appears to create an affirmative defense, it does so with conditions that are not consistent with the criteria that the EPA recommends in the SSM Policy. The EPA acknowledges that the SSM Policy is only guidance concerning what types of SIP provisions could be consistent with the requirements of the CAA. Nonetheless, through this rulemaking, the EPA is proposing to determine that D.C. Mun. Regs. tit. 20 § 606.4 does not include criteria that are sufficiently robust to qualify as an acceptable affirmative defense provision. The EPA believes that the inclusion of the complete bar to liability, including injunctive relief, and the insufficiently robust qualifying criteria in D.C. Mun. Regs. tit. 20 § 606.4 are substantial inadequacies and render this specific SIP provision impermissible.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to D.C. Mun. Regs. tit. 20 § 107.3. The EPA believes that this provision allows for exemptions from the otherwise applicable SIP emission limitations, and that such exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs in sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, D.C. Mun. Regs. tit. 20 § 107.3 allows for such an exemption through a state official's unilateral exercise of discretionary authority that is unbounded and includes no additional public process at the D.C. or federal level, and such provisions are inconsistent with the fundamental requirements of the CAA with respect to SIPs and SIP revisions. For these reasons, the EPA is proposing to find that D.C. Mun. Regs. tit. 20 § 107.3 is substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to this provision.

The EPA also proposes to grant the Petition with respect to D.C. Mun. Regs. tit. 20 §§ 606.1 and 606.2. The EPA believes that section 606.1 impermissibly provides an alternative visible emission limitation to stationary sources during periods of malfunction and during planned maintenance events. Furthermore, while sections 606.1 and 606.2 appropriately provide alternative visible emission limitations only during periods of startup and shutdown, both sections apply to a broad category of sources and are not narrowly limited to a source category employing a specific control strategy, as required by the CAA as interpreted in the EPA's SSM Policy. For these reasons, the EPA is proposing to find that D.C. Mun. Regs. tit. 20 §§ 606.1 and 606.2 are substantially inadequate to meet CAA requirements and is thus proposing to issue a SIP call with respect to these provisions.

The EPA proposes to deny the Petition with respect to D.C. Mun. Regs. tit. 20 § 805.1(c)(2). The EPA disagrees that this provision applies to an exemption from emission limitations during startup, shutdown, or malfunction periods. Rather, this provision applies to a specific source category that is not subject to control under the D.C. SIP. At this point in time, the SIP reflects that regulation of this source category is not necessary in the SIP in order to meet the applicable RACT requirements or other CAA requirements in this area.

Finally, the EPA proposes to grant the petition with respect to D.C. Mun. Regs. tit. 20 § 606.4 because it is not a permissible affirmative defense provision consistent with the requirements of the CAA and the EPA's recommendations in the EPA's SSM Policy. By purporting to create a bar to enforcement that applies not just to monetary penalties but also to injunctive relief, this provision is inconsistent with the requirements of

[108] 1999 SSM Guidance Attachment at 4–5.

CAA sections 113 and 304. By not including sufficient criteria to assure that sources seeking to raise the affirmative defense have in fact been properly designed, maintained, and operated, and to assure that sources have taken all appropriate steps to minimize excess emissions, the provision also fails to be sufficiently narrowly drawn to justify shielding from monetary penalties for violations. Thus, this provision is not appropriate as an affirmative defense provision because it is inconsistent with fundamental requirements of the CAA. For these reasons, the EPA is proposing to find that this provision is substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to this provision.

3. Virginia

a. Petitioner's Analysis

The Petitioner objected to a generally applicable provision in the Virginia SIP that allows for discretionary exemptions during periods of malfunction (9 Va. Admin. Code § 5–20–180(G)).[109] First, the Petitioner objected because this provision provides an exemption from the otherwise applicable SIP emission limitations, and such an exemption is impermissible under the CAA because the statute and the EPA's interpretation of the CAA in the SSM Policy require that all such excess emissions be treated as violations. The Petitioner argued that the CAA and the EPA's interpretation of the CAA in the SSM Policy require that all such excess emissions be treated as violations.

Second, the Petitioner objected to the discretionary exemption for excess emissions during malfunction because the provision gives the state the authority to determine whether a violation "shall be judged to have taken place" (9 Va. Admin. Code § 5–20–180(G)). The Petitioner argued that this provision could be read to preclude enforcement by the EPA or citizens in the event that the state elects not to treat the event as a violation. Thus, in addition to creating an impermissible exemption for the excess emissions, the Petitioner argued, the provision is also inconsistent with the CAA and the EPA's SSM Policy because it allows the state to make a unilateral decision that the excess emissions were not a violation and thus purports to bar enforcement for the excess emissions by the EPA and citizens.

Third, the Petitioner argued that while the regulation provides criteria, akin to an affirmative defense, by which the state must make such a judgment that the event is not a violation, the criteria "fall far short of EPA policy" and the provision "fails to establish any procedure through which the criteria are to be evaluated."

[109] Petition at 70–71.

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations, whether automatic or through the exercise of a state official's discretion. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitation must be considered violations, whether or not the state elects to exercise its enforcement discretion. SIP provisions such as 9 Va. Admin. Code § 5–20–180(G) that create exemptions by authorizing the state to determine that the excess emissions during startup, shutdown, load change, or emergencies are not violations of the applicable emission limitations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. The EPA believes that the inclusion of such an exemption in 9 Va. Admin. Code § 5–20–180(G) is thus a substantial inadequacy and renders this specific SIP provision impermissible.

The EPA believes that 9 Va. Admin. Code § 5–20–180(G) is also impermissible due to the inclusion of a director's discretion provision that purports to make the state official the unilateral arbiter of whether the excess emissions in a given malfunction event constitute a violation. In the case of 9 Va. Admin. Code § 5–20–180(G), the provision authorizes the state official to judge that "no violation" has taken place. The provision therefore vests the state official with the unilateral power to grant an exemption from the otherwise applicable SIP emission limitation, without any additional public process at the state or federal level. By deciding that an exceedance of the emission limitation was not a "violation," exercise of this discretion could preclude enforcement by the EPA or the public who may not agree with that conclusion. Most importantly, however, the provision purports to authorize the state official to create an exemption from the otherwise applicable SIP emission limitation, and such an exemption is impermissible in the first instance. Such a director's discretion provision undermines the emission limitations in the SIP and the emissions reductions that they are intended to achieve and renders them less enforceable by the EPA or through a citizen suit. The EPA believes that the inclusion of a director's discretion provision in 9 Va. Admin. Code § 5–20–180(G) is thus a substantial inadequacy and renders this specific SIP provision impermissible for this reason, in addition to the creation of an impermissible exemption.

Finally, the EPA agrees with Petitioner that although the exemption requires that certain conditions must be met by the source, the conditions set forth in the provision do not render it an acceptable affirmative defense provision. The Petitioner is correct that 9 Va. Admin. Code § 5–20–180(G) is not an acceptable affirmative defense provision under the CAA as interpreted in the EPA's SSM Policy. Although the EPA believes that narrowly drawn affirmative defenses are permitted under the CAA for malfunction events (*see* section VII.B of this notice), the EPA's interpretation of the CAA is that such affirmative defenses can only shield the source from monetary penalties and cannot be a bar to injunctive relief. An affirmative defense provision that purports to bar any enforcement action for injunctive relief for violations of emission limitations is inconsistent with the requirements of CAA sections 113 and 304. Furthermore, Virginia's SIP provision is deficient because even if it attempts to create an affirmative defense rather than an automatic exemption from the emission limitations, it does so with conditions that are not consistent with the criteria that the EPA recommends in the SSM Policy. The EPA acknowledges that the SSM Policy is only guidance concerning what types of SIP provisions could be consistent with the requirements of the CAA. Nonetheless, through this rulemaking, the EPA is proposing to determine that 9 Va. Admin. Code § 5–20–180(G) does not include criteria that are sufficiently robust to qualify as an acceptable affirmative defense provision under the CAA. The EPA believes that the inclusion of the complete bar to liability, including injunctive relief, and the insufficiently robust qualifying criteria in 9 Va. Admin. Code § 5–20–180(G) are substantial inadequacies and render this specific SIP provision impermissible.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to 9 Va. Admin. Code § 5–20–180(G). The EPA believes

that this provision allows for an exemption from the otherwise applicable SIP emission limitations, and that such exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs in sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, 9 Va. Admin. Code § 5–20–180(G) allows for such an exemption through a state official's unilateral exercise of discretionary authority that includes no additional public process at the state or federal level, and such provisions are inconsistent with the fundamental requirements of the CAA with respect to SIPs and SIP revisions.

Moreover, even if the EPA were to consider 9 Va. Admin. Code § 5–20–180(G) as providing for an affirmative defense rather than an automatic exemption, the provision is not a permissible affirmative defense provision consistent with the requirements of the CAA as interpreted in the EPA's recommendations in the EPA's SSM Policy. By purporting to create a bar to enforcement that applies not just to monetary penalties but also to injunctive relief, this provision is inconsistent with the requirements of CAA sections 113 and 304. By not including sufficient criteria to assure that sources seeking to raise the affirmative defense have in fact been properly designed, maintained, and operated, and to ensure that sources have taken all appropriate steps to minimize excess emissions, the provision also fails to be sufficiently narrowly drawn to justify shielding from monetary penalties for violations. Thus, this provision is not appropriate as an affirmative defense provision because it is inconsistent with fundamental requirements of the CAA.

For these reasons, the EPA is proposing to find that this provision is substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to this provision.

4. West Virginia

a. Petitioner's Analysis

The Petitioner made four types of objections identifying inadequacies regarding startup, shutdown, and malfunction provisions in West Virginia's SIP.[119] First, the Petitioner objected to three specific provisions in the West Virginia SIP that allow for automatic exemptions from emission limitations, standards, and monitoring and recordkeeping requirements for excess emission during startup, shutdown, or malfunction (W. Va. Code R. § 45–2–9.1, W. Va. Code R. § 45–7–10.3, and W. Va. Code R. § 45–40–100.8). The Petitioner objected because all three of these provisions provide exemptions from the otherwise applicable SIP emission limitations, and such exemptions are inconsistent with the requirements of the CAA as interpreted in the EPA's SSM Policy. The Petitioner argued that the CAA and the EPA's interpretation of the CAA in the SSM Policy require that all such excess emissions be treated as violations. The Petitioner also objected to all three of these provisions because, by providing an outright exemption from otherwise applicable requirements, the state has defined these excess emissions as not violations, thereby precluding enforcement by the EPA or citizens for the excess emissions that would otherwise be violations.

Second, the Petitioner objected to seven discretionary exemption provisions because these provisions provide exemptions from the otherwise applicable SIP emission limitations, and such exemptions are impermissible under the CAA because the statute and the EPA's interpretation of the CAA in the SSM Policy require that all such excess emissions be treated as violations. The Petitioner noted that the provisions allow a state official to "grant an exception to the otherwise applicable visible emissions standards" due to "unavoidable shortage of fuel" or "any emergency situation or condition creating a threat to public safety or welfare" (W. Va. Code R. § 45–2–10.1), to permit excess emissions "due to unavoidable malfunctions of equipment" (W. Va. Code R. § 45–3–7.1, W. Va. Code R. § 45–5–13.1, W. Va. Code R. § 45–6–8.2, W. Va. Code R. § 45–7–9.1, and W. Va. Code R. § 45–10–9.1), and to permit exceedances where the limit cannot be "satisfied" because of "routine maintenance" or "unavoidable malfunction" (W. Va. Code R. § 45–21–9.3). The Petitioner argued that these provisions could be read to preclude enforcement by the EPA or citizens in the event that the state official elects not to treat the event as a violation. Thus, in addition to creating an impermissible exemption for the excess emissions, the Petitioner argued, the SIP's provisions are also inconsistent with the CAA as interpreted in the EPA's SSM Policy because they allow the state official to make a unilateral decision that the excess emissions were not a violation and thus purport to bar enforcement for the excess emissions by the EPA and citizens.

Third, the Petitioner objected to the alternative limit imposed on hot mix asphalt plants during periods of startup and shutdown in W. Va. Code R. § 45–3–3.2 because it was "not sufficiently justified" under the requirements of source category-specific rules. The Petitioner argued that this provision could provide an unacceptable deviation during periods of startup and shutdown from the otherwise applicable SIP emission limitations, and such deviations are impermissible under the CAA because the statute and the EPA's interpretation of the CAA in the SSM Policy require that all such excess emissions be treated as violations. Moreover, the Petitioner argued that the alternative limits do not appear to meet the criteria for a source category-specific rule as permitted under the Act as interpreted in the EPA's SSM Policy.

Fourth, the Petitioner objected to a discretionary provision allowing the state to approve an alternative visible emission standard during startups and shutdowns for manufacturing processes and associated operations (W. Va. Code R. § 45–7–10.4). The Petitioner argued that such a provision "allows a decision of the state to preclude enforcement by EPA and citizens."

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for automatic exemptions from otherwise applicable SIP emission limitations. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitation must be considered violations of such limitations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that the excess emissions during startup, shutdown, or malfunction are not violations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. Two of the automatic exemption provisions identified by the Petitioner explicitly state that the standards shall not apply or that certain operations "shall be exempt" during periods of startup, shutdown, malfunction, or maintenance (W. Va. Code R. § 45–2–9.1, W. Va. Code R. § 45–7–10.3). The third automatic exemption states that requirements for monitoring, recordkeeping, and reporting will not apply under certain circumstances (W. Va. Code R. § 45–40–100.8). Such an

[119] Petition at 72–74.

exemption would affect the enforceability of the emission limitations and thus adversely affects the approvability of the emission limitations themselves. Moreover, failure to account accurately for excess emissions at sources during SSM events has a broader impact on NAAQS implementation and SIP planning, because such accounting directly informs the development of emissions inventories and emissions modeling. The exemptions therefore provide that the resulting excess emissions will not be violations, which is contrary to the requirements of the CAA. The EPA believes that the inclusion of such automatic exemptions from emission limitations in W. Va. Code R. § 45–2–9.1, W. Va. Code R. § 45–7–10.3, and W. Va. Code R. § 45–40–100.8, is thus a substantial inadequacy and renders these specific SIP provisions impermissible.

With respect to the Petitioner's concern that these exemptions preclude enforcement by the EPA or citizens, the EPA agrees that this is one of the critical reasons why such provisions are impermissible under the CAA. By having SIP provisions that define what would otherwise be violations of the applicable emission limitations as non-violations, the state has effectively negated the ability of the EPA or the public to enforce against those violations.

The EPA also agrees that the CAA does not allow for discretionary exemptions from otherwise applicable SIP emission limitations. As noted above, in accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitation must be considered violations, whether or not the state elects to exercise its enforcement discretion. SIP provisions such as W. Va. Code R. § 45–2–10.1, W. Va. Code R. § 45–3–7.1, W. Va. Code R. § 45–5–13.1, W. Va. Code R. § 45–6–8.2, W. Va. Code R. § 45–7–9.1, W. Va. Code R. § 45–10–9.1, and W. Va. Code R. § 45–21–9.3 that create exemptions by permitting the state to determine that the excess emissions during startup, shutdown, load change, or emergencies are not violations of the applicable emission limitations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. The EPA believes that the inclusion of these discretionary exemptions in the SIP is thus a substantial inadequacy and renders these specific SIP provisions impermissible.

The EPA believes that W. Va. Code R. § 45–2–10.1, W. Va. Code R. § 45–3–7.1, W. Va. Code R. § 45–5–13.1, W. Va. Code R. § 45–6–8.2, W. Va. Code R. § 45–7–9.1, W. Va. Code R. § 45–10–9.1, and W. Va. Code R. § 45–21–9.3 are also impermissible because these provisions purport to make a state official the unilateral arbiter of whether the excess emissions in a given malfunction, maintenance, or emergency event constitute a violation. In the case of W. Va. Code R. § 45–2–10.1, the provision allows the state official to "grant an exception to the otherwise applicable visible emissions standards" due to "unavoidable shortage of fuel" or "any emergency situation or condition creating a threat to public safety or welfare." W. Va. Code R. § 45–3–7.1, W. Va. Code R. § 45–5–13.1, W. Va. Code R. § 45–6–8.2, W. Va. Code R. § 45–7–9.1, and W. Va. Code R. § 45–10–9.1 permit excess emissions "due to unavoidable malfunctions of equipment." The provision at W. Va. Code R. § 45–21–9.3 permits exceedances where the limit cannot be "satisfied" because of "routine maintenance" or "unavoidable malfunction."

These provisions authorize the state official to judge that violations have not occurred even though the emissions exceeded the applicable SIP emission limitations. The SIP's provisions therefore vest the state official with the unilateral power to grant exemptions from otherwise applicable SIP emission limitations, without any additional public process at the state or federal level. By deciding that an exceedance of the emission limitation was not a "violation," exercise of this discretion could preclude enforcement by the EPA or through a citizen suit. Most importantly, however, the provision purports to authorize the state official to create an exemption from the otherwise applicable SIP emission limitation, and such an exemption is impermissible in the first instance. Such a director's discretion provision undermines the emission limitations and the emissions reductions they are intended to achieve and renders them less enforceable by the EPA or through a citizen suit. The EPA believes that the inclusion of director's discretion provisions in W. Va. Code R. § 45–2–10.1, W. Va. Code R. § 45–3–7.1, W. Va. Code R. § 45–5–13.1, W. Va. Code R. § 45–6–8.2, W. Va. Code R. § 45–7–9.1, W. Va. Code R. § 45–10–9.1, and W. Va. Code R. § 45–21–9.3 is thus a substantial inadequacy and renders these specific SIP provisions impermissible for this reason, in addition to the creation of an impermissible exemption.

The EPA notes that while the CAA does not allow for exemptions for excess emissions, it does, as discussed in section VII.A of this notice, permit states to develop alternative emission limitations or other forms of enforceable control measures or techniques that apply during startup or shutdown. W. Va. Code R. § 45–3–3.2 and W. Va. Code R. § 45–2–10.2 [111] do not appear to comply with the Act's requirements as interpreted in the EPA's SSM Policy. The alternative smoke and/or particulate matter limitation on hot mix asphalt plants that applies during periods of startup and shutdown (W. Va. Code R. § 45–3–3.2) does not comply with the CAA as interpreted in the EPA's policy because, for instance, it does not apply only to "specific, narrowly-defined source categories using specific control strategies." [112] W. Va. Code R. § 45–2–10.2, which allows fuel-burning units employing flue gas desulphurization systems to bypass such systems during "necessary planned or unplanned maintenance" and provides an alternative limit of 20-percent opacity during such periods, also does not comply with the CAA as interpreted in the EPA's SSM Policy. The EPA believes that such special emission limitations or emissions controls may be appropriate during startup or shutdown, but other modes of normal source operation, including maintenance, should be accounted for in the development of the emission limitations themselves. The EPA believes that the inclusion of alternative limits that do not meet the requirements of the CAA as interpreted in the EPA's SSM Policy in W. Va. Code R. § 45–3–3.2 and W. Va. Code R. § 45–2–10.2 is thus a substantial inadequacy and renders these specific SIP provisions impermissible for this reason.

The EPA also agrees that the discretionary provision allowing a state official to approve an alternative visible emission standard during startups and shutdowns for manufacturing processes and associated operations (W. Va. Code R. § 45–7–10.4) does not comply with the CAA or the EPA's SSM Policy interpreting the CAA. These provisions purport to authorize the state official to establish alternative limits for excess emissions during periods of startup and shutdown (or, potentially, to exempt

[111] The EPA notes that the Petitioner specifically focused on concern with W. Va. Code R. § 45–2–10.1, but the same issue affects W. Va. Code R. § 45–2–10.2.

[112] 1999 SSM Guidance Attachment at 4–5.

those emissions altogether) on a case-by-case basis, and these provisions do not require the state official to consult with the EPA or to have those alternative limits approved by the EPA into the SIP, contrary to the EPA's SSM Policy interpreting the requirements of the CAA. The EPA believes that the inclusion of these alternative limitations, which do not comply with the EPA's interpretations of the requirements of the CAA, in W. Va. Code R. § 45–3–3.2 and W. Va. Code R. § 45–7–10.4, is thus a substantial inadequacy and renders these specific SIP provisions impermissible.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to W. Va. Code R. § 45–2–9.1, W. Va. Code R. § 45–7–10.3, and W. Va. Code R. § 45–40–100.8. The EPA believes that each of these provisions allows for automatic exemptions from the otherwise applicable SIP emission limitations, and that such exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs as required by sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, by creating these impermissible exemptions, the state has defined violations in way that would interfere with effective enforcement by the EPA and citizens for excess emissions during these events as provided in CAA sections 113 and 304. For these reasons, the EPA is proposing to find that these provisions are substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to these provisions.

The EPA proposes to grant the Petition with respect to W. Va. Code R. § 45–2–10.1, W. Va. Code R. § 45–3–7.1, W. Va. Code R. § 45–5–13.1, W. Va. Code R. § 45–6–8.2, W. Va. Code R. § 45–7–9.1, W. Va. Code R. § 45–10–9.1, and W. Va. Code R. § 45–21–9.3. The EPA believes that these provisions allow for discretionary exemptions from otherwise applicable SIP emission limitations, and that such exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs as required by sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, these provisions allow for exemptions through a state official's unilateral exercise of discretionary authority that includes no additional public process at the state or federal level, and such provisions are inconsistent with the fundamental requirements of the CAA with respect to SIPs and SIP revisions.

The EPA also proposes to grant the Petition with respect to W. Va. Code R. § 45–3–3.2, W. Va. Code R. § 45–2–10.2, and W. Va. Code R. § 45–7–10.4. The W. Va. Code R. § 45–3–3.2 applies to a broad category of sources and is not narrowly limited to a source category that uses a specific control strategy, as required by the EPA's SSM Policy interpreting the CAA. Similarly, W. Va. Code R. § 45–2–10.2 is inconsistent with the EPA's SSM Policy interpreting the CAA because it is an alternative limit that applies during periods of maintenance, and such alternative limits are only permissible during periods of startup and shutdown. The W. Va. Code R. § 45–7–10.4 allows state officials the discretion to establish alternative visible emissions standards during startup and shutdown upon application. This provision is inconsistent with the EPA's SSM Policy and requirements under the Act because, for example, the emission limitations are required to be developed in consultation with the EPA and must be included in the SIP itself. For these reasons, the EPA is proposing to find that W. Va. Code R. § 45–3–3.2, W. Va. Code R. § 45–2–10.2, and W. Va. Code R. § 45–7–10.4 are substantially inadequate to meet CAA requirements and is thus proposing to issue a SIP call with respect to these provisions.

E. Affected States and Local Jurisdictions in EPA Region IV

1. Alabama

a. Petitioner's Analysis

The Petitioner objected to two generally applicable provisions in the Alabama SIP that allow for discretionary exemptions during startup, shutdown, or load change (Ala Admin Code Rule 335–3–14–.03(1)(h)(1)), and during emergencies (Ala Admin Code Rule 335–3–14–.03(1)(h)(2)).[113] [114] First, the Petitioner objected because both of these provisions provide exemptions from the otherwise applicable emission limitations, and such exemptions are inconsistent with the requirements of the CAA and the EPA's SSM Policy. The Petitioner argued that the CAA and the EPA's interpretation of the CAA in the SSM Policy require that all such excess emissions be treated as violations.

Second, the Petitioner objected to the discretionary exemptions for excess emissions during startup, shutdown, or load change that are also present in Ala Admin Code Rule 335–3–14–.03(1)(h)(1) because the emissions during such events can be reasonably avoided. The Petitioner noted that such events are part of normal source operation and that any special treatment of excess emissions during such events must be justified with a showing that the excess emissions could not be avoided through careful planning and design, and that bypassing controls in such events is necessary to prevent loss of life, personal injury, or severe property damage.

Third, the Petitioner objected to the discretionary emergency exemption provision that also is present in Ala Admin Code Rule 335–3–14–.03(1)(h)(2), because the provision gives the state "sole authority to determine whether or not a violation has occurred." The Petitioner argued that this provision could be read to preclude enforcement by the EPA or citizens in the event that the state elects not to treat the event as a violation. Thus, in addition to creating an impermissible exemption for the excess emissions, the Petitioner argued that the provision is also inconsistent with the CAA and the EPA's SSM Policy because it allows the state to make a unilateral decision that the excess emissions were not a violation and thus purports to bar enforcement for the excess emissions by the EPA and citizens.

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable emission limitations, whether automatic or through the exercise of a state official's discretion. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitations must be considered violations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that the excess emissions during startup, shutdown, load change, or emergencies are not violations of the applicable emission limitations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. The EPA believes

[113] Petition at 17–18.

[114] The EPA notes that the Petitioner also identified several additional pollutant-specific and source category-specific provisions in the Alabama SIP that it alleged are inconsistent with the CAA and the EPA's SSM Policy. However, the Petitioner did not request that the EPA address those SIP provisions in its remedy request, and thus the EPA is not addressing those provisions in this action. The EPA may elect to evaluate those provisions in a later action.

that the inclusion of such exemptions from the emission limitations in Ala Admin Code Rule 335–3–14–.03(1)(h)(1) and Ala Admin Code Rule 335–3–14–.03(1)(h)(2) is thus a substantial inadequacy and renders these specific SIP provisions impermissible.

In addition, the EPA agrees that startup, shutdown, and load change are all part of normal source operation and that such events are usually planned for and predictable, and thus emissions during such events are more controllable than those that might occur during an "emergency" or other form of malfunction. Unlike excess emissions in malfunctions, which are by definition presumed to be beyond the reasonable control of the source through proper design, operation, and maintenance, excess emissions that occur during startup, shutdown, or load change can be anticipated and steps can be taken to minimize them. The Petitioner, citing the 1983 SSM Guidance, argued that the EPA's SSM Policy indicates that there should be "a higher showing to escape enforcement" during such planned events. While such a higher showing may be relevant in the context of whether a state elects to exercise its enforcement discretion, it should not be germane to whether or not the excess emissions constitute a violation of the applicable emission limitations. The EPA notes that the CAA does not allow exemptions for excess emissions during startup, shutdown, or load change, just as it does not allow such exemptions during malfunctions. As discussed in section VII.A of this notice, states may elect to develop alternative emission limitations or other forms of enforceable control measures or techniques that apply during startup and shutdown, but exemptions for excess emissions during such periods are inconsistent with the fundamental requirements of the CAA.

Finally, the EPA believes that both Ala Admin Code Rule 335–3–14–.03(1)(h)(1) and Ala Admin Code Rule 335–3–14–.03(1)(h)(2) are also impermissible as unbounded director's discretion provisions that make a state official the unilateral arbiter of whether the excess emissions in a given event constitute a violation. In the case of Ala Admin Code Rule 335–3–14–.03(1)(h)(1), the provision authorizes a state official unilaterally to "[], in the Air Permit, exempt on a case by case basis any exceedances of emission limits which cannot reasonably be avoided, such as during periods of start-up, shut-down or load change." This provision vests the state official with the unilateral power to grant in a state air permit, which may not provide any additional public process at the state or federal level, an exemption from the otherwise applicable emission limitations without any bounds or parameters to the exercise of this discretion. By deciding that an exceedance of the emission limitation will not be a "violation," exercise of this discretion could preclude enforcement by the EPA or the public who may not agree that the emissions in question could not "reasonably be avoided." Most importantly, however, the provision authorizes the state official to create an exemption from the emission limitations, and such an exemption is impermissible in the first instance. Such a director's discretion provision undermines the SIP emission limitations and the emissions reductions they are intended to achieve and renders them less enforceable by the EPA or through a citizen suit. As discussed in section VII.A of this notice, such provisions are substantially inadequate to meet CAA requirements.

Similarly, the EPA believes that Ala Admin Code Rule 335–3–14–.03(1)(h)(2) authorizes a state official unilaterally to decide that a given event was an "emergency" and thus to create an exemption from the otherwise applicable emission limitations. In this case, the provision does contain some general parameters for the source to establish that there was an emergency (*e.g.*, the source has to "identify" the cause of the emergency) but nevertheless empowers the state official to make a unilateral determination as to whether the event was an emergency. The provision thus vests the official with the power to grant an exemption from the otherwise applicable SIP emission limitations without any additional public process at the state or federal level, and with insufficient bounds or parameters applicable to the exercise of this discretion. Again, most significantly, this discretion authorizes the creation of an exemption on a case-by-case basis that is not permissible in the first instance. Thus, this provision also may undermine the SIP emission limitations, and the emissions reductions they are intended to achieve, and renders them less enforceable by the EPA or through a citizen suit. The EPA believes that the inclusion of an insufficiently bounded director's discretion provision in Ala Admin Code Rule 335–3–14–.03(1)(h)(1) and Ala Admin Code Rule 335–3–14–.03(1)(h)(2) is thus a substantial inadequacy and renders these specific SIP provisions impermissible for this reason, in addition to the creation of impermissible exemptions.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to Ala Admin Code Rule 335–3–14–.03(1)(h)(1) and Ala Admin Code Rule 335–3–14–.03(1)(h)(2). The EPA believes that both of these provisions allow for exemptions from the otherwise applicable emission limitations, and that such exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs as required by sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, Ala Admin Code Rule 335–3–14–.03(1)(h)(1) and Ala Admin Code Rule 335–3–14–.03(1)(h)(2) both allow for such exemptions through a state official's unilateral exercise of discretionary authority that is insufficiently bounded and includes no additional public process at the state or federal level, and such provisions are inconsistent with the fundamental requirements of the CAA with respect to SIPs and SIP revisions. Moreover, the discretion created by these provisions allows case-by-case exemptions from emission limitations, when such exemptions are not permissible in the first instance. For these reasons, the EPA is proposing to find that Ala Admin Code Rule 335–3–14–.03(1)(h)(1) and Ala Admin Code Rule 335–3–14–.03(1)(h)(2) are substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to these provisions.

2. Florida

a. Petitioner's Analysis

The Petitioner objected to three specific provisions in the Florida SIP that allow for generally applicable automatic exemptions for excess emissions during startup, shutdown, or malfunction (Fla. Admin. Code Ann Rule 62–210.700(1)), for fossil fuel steam generators during startup and shutdown (Fla. Admin. Code Ann Rule 62–210.700(2)), and for such sources during boiler cleaning and load change (Fla. Admin. Code Ann Rule 62–210.700(3)).[115] [116] The Petitioner objected because all three of these provisions provide exemptions from the otherwise applicable SIP emission limitations, and such exemptions are

[115] Petition at 30–31.

[116] The EPA notes that the Petitioner also identified several additional pollutant-specific and source category-specific provisions in the Florida SIP that it alleged are inconsistent with the CAA and the EPA's SSM Policy. However, the Petitioner did not request that the EPA address those SIP provisions in its remedy request, and thus the EPA is not addressing those provisions in this action. The EPA may elect to evaluate those provisions in a later action.

inconsistent with the requirements of the CAA and the EPA's SSM Policy. The Petitioner argued that the CAA and the EPA's interpretation of the CAA in the SSM Policy require that all excess emissions be treated as violations.

The Petitioner objected to all three of these provisions because, by stating that the excess emissions during the relevant events and time periods "are permitted," the state has defined these excess emissions as not violations, thereby precluding enforcement by the EPA or citizens for the excess emissions that would otherwise be violations. The Petitioner also argued that the provision creating exemptions for excess emissions during boiler cleaning and load change in Fla. Admin. Code Ann Rule 62–201.700(3) is impermissible specifically because it creates an exemption for excess emissions during normal source operation that "are not eligible for any relief under EPA guidance."

After objecting to the three provisions that create the exemptions, the Petitioner noted that the related provision in Fla. Admin. Code Ann Rule 62–201.700(4) reduces the potential scope of the exemptions in the other three provisions if the excess emissions at issue are caused entirely or in part by things such as poor maintenance but that it does not eliminate the impermissible exemptions. Moreover, the Petitioner asserted that none of the four provisions provides any "procedure by which the factual premises of any of these subsections are to be proven."

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable emission limitations. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable SIP emission limitations must be considered violations of such limitations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that the excess emissions during startup, shutdown, malfunction, boiler cleaning, or load change are not violations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. The three provisions identified by the Petitioner explicitly state that the excess emissions "shall be permitted" under certain circumstances and thus provide that the resulting excess emissions will not be violations contrary to the CAA, as required by sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). The EPA believes that the inclusion of such exemptions from emission limitations in Fla. Admin. Code Ann Rule 62–201.700(1), Fla. Admin. Code Ann Rule 62–201.700(2) and Fla. Admin. Code Ann Rule 62–201.700(3), is thus a substantial inadequacy and renders these specific SIP provisions impermissible.

The EPA notes that these exemptions are impermissible even though the state has imposed some factual and temporal limitations on their potential scope. For example, in Fla. Admin. Code Ann Rule 62–201.700(1), the state has specified that the excess emissions from startup, shutdown, and malfunction events "shall be permitted" (*i.e.*, allowed and thus not treated as violations) provided: "(1) best operational practices to minimize emissions are adhered to and (2) the duration of excess emissions shall be minimized but in no case exceed two hours in any 24 hour period unless specifically authorized by the Department for longer duration." Similarly, in Fla. Admin. Code Ann Rule 62–201.700(2) with respect to startup and shutdown from certain sources, the state has conditioned the exemption "provided that best operational practices to minimize emissions are adhered to and the duration of excess emissions shall be minimized." In Fla. Admin. Code Ann Rule 62–201.700(3), the state has imposed much more specific limits on the duration of the events and some additional limitations on the excess emissions in the form of specified opacity limits that apply during such events. Although these extra limitations on the scope of the exemptions are helpful features, they nevertheless constitute a variance at a state official's discretion from the otherwise applicable emissions limitations, and the core problem remains that each of the three provisions provides impermissible exemptions from the emission limitations by defining the excess emissions as "permitted" and thus not violations. The CAA does, as discussed in section VII.A of this notice, allow states to develop alternative emission limitations or other forms of enforceable control measures or techniques that apply during startup or shutdown. However, the Florida SIP provisions do not appear to comply with the Act's requirements as interpreted in the EPA's SSM Policy because, for instance, they do not apply only to "specific, narrowly-defined source categories using specific control strategies." [117]

With respect to the Petitioner's concern that these exemptions preclude enforcement by the EPA or citizens, the EPA agrees that this is one of the critical reasons why such provisions are impermissible under the CAA. By having SIP provisions that define what would otherwise be violations of the applicable emission limitations as non-violations, the state has effectively negated the ability of the EPA or the public to enforce against those violations.

In addition, the EPA agrees that the limiting provision of Fla. Admin. Code Ann Rule 62–201.700(4) that curtails the exemptions in the prior provisions if the excess emissions are caused "entirely or in part" by factors within the source's control such as "poor maintenance" does not negate the underlying problem of providing exemptions for the excess emissions in the first instance. The EPA acknowledges that this provision would serve to prevent sources that fail to maintain or operate correctly or otherwise to take action reasonably to prevent excess emissions during SSM events from getting the benefits of the exemption. However, the EPA recommends that these are the types of considerations that should be relevant either in the state's exercise of enforcement discretion for violations, in the state's adoption of a SIP provision concerning that exercise of enforcement discretion by the state, or by an appropriately drawn affirmative defense SIP provision for excess emissions in the case of malfunctions.

Finally, the Petitioner expressed concern that the four SIP provisions at issue "do not specify the procedure by which the factual premises are to be proven." Were these provisions authorizing a state official to make discretionary decisions as to whether or not a given event qualified for the (impermissible) exemption, there could be an additional concern that these provisions included a director's discretion problem as well. However, the EPA believes that these regulations are directly enforceable by the state, the EPA, or members of the public in the appropriate forums, and thus the "procedure" for proving the violation would be the normal process in such forums. The fact that the state has established factual requirements that would need to be evaluated in order to prove a violation of the applicable emission limitations is not itself inconsistent with CAA requirements. The EPA believes that providing

[117] 1999 SSM Guidance Attachment at 4–5.

requisite factual evidence to establish a violation in an enforcement proceeding is entirely appropriate.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to Fla. Admin. Code Ann Rule 62–201.700(1), Fla. Admin. Code Ann Rule 62–201.700(2), Fla. Admin. Code Ann Rule 62–201.700(3), and Fla. Admin. Code Ann Rule 62–201.700(4). The EPA believes that each of these provisions allows for exemptions from the otherwise applicable emission limitations, and that such exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs as required by sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, by creating these impermissible exemptions, the state has defined violations in way that would interfere with effective enforcement by the EPA and citizens for excess emissions during these events as provided in CAA sections 113 and 304. For these reasons, the EPA is proposing to find that these provisions are substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to Fla. Admin. Code Ann Rule 62–201.700(1), Fla. Admin. Code Ann Rule 62–201.700(2), Fla. Admin. Code Ann Rule 62–201.700(3), and Fla. Admin. Code Ann Rule 62–201.700(4).

3. Georgia

a. Petitioner's Analysis

The Petitioner objected to a provision in the Georgia SIP that provides for exemptions for excess emissions during startup, shutdown, or malfunctions under certain circumstances (Ga. Comp. R. & Regs. 391–3–1–.02(2)(a)(7)).[118] The Petitioner acknowledged that this provision of the Georgia SIP includes some conditions for when sources may be entitled to seek the exemption under state law, such as when the source has used "best operational practices" to minimize emissions during the SSM event.

First, the Petitioner objected because the provision creates an exemption from the applicable emission limitations by providing that the excess emissions "shall be allowed" subject to certain conditions, whereas the CAA and the EPA's interpretation of the CAA in the SSM Policy prohibit any such exemptions. The Petitioner noted that all excess emissions are required to be treated as violations of the applicable emission limitations, even if they would qualify for some other special consideration through other means such as enforcement discretion.

Second, the Petitioner argued that although the provision provides some "substantive criteria," the provision does not meet the criteria the EPA recommends for an affirmative defense provision consistent with the requirements of the CAA in the EPA's SSM Policy. Third, the Petitioner asserted that the provision is not a permissible "enforcement discretion" provision applicable only to state personnel, because it "is susceptible to interpretation as an enforcement exemption, precluding EPA and citizen enforcement as well as state enforcement."

b. The EPA's Evaluation

At the outset, the EPA notes that the Petitioner failed to include any discussion of the extensive prior litigation and administrative proceedings concerning this specific provision of the Georgia SIP. Nearly 10 years ago, citizen suit plaintiffs including the Petitioner sought to bring an enforcement action against a source for self-reported exceedances of emission limitations in the source's operating permit, and the source asserted that those exceedances were not "violations" through application of a permit provision that mirrored the underlying SIP provision in Ga. Comp. R. & Regs. 391–3–1–.02(2)(a)(7).[119] In that case, the plaintiffs argued that the provision at issue was an "enforcement discretion" provision applicable to state personnel only and thus that it was not relevant in the event of enforcement actions by other parties. The District Court agreed and held that the provision was merely an enforcement discretion provision applicable to the state and that it provided no affirmative defense in the enforcement action, and thus the court ruled in favor of the plaintiffs on this issue.[120]

On appeal, the Court of Appeals examined the same operating permit language and underlying SIP provision and came to a different conclusion.[121] The Court of Appeals concluded that the provision does provide an affirmative defense and is not an enforcement discretion provision. Moreover, the Court noted that even if the provision is not consistent with the EPA's guidance on permissible affirmative defense provisions in SIPs (e.g., because it creates exemptions for exceedances and purports to allow a complete bar to any liability, not just relief from monetary penalties), the EPA had not taken action through rulemaking to rectify that discrepancy. Because the EPA had not called upon the state to revise the SIP to bring it into compliance with the EPA's current interpretation of the CAA embodied in the 1999 SSM Guidance, the Court held that the exceedances of the applicable emission limitations were not violations and thus ruled against the plaintiffs.

Contemporaneously with this litigation, the Petitioner had also filed a May 23, 2005 petition for rulemaking, requesting that the EPA require the state to revise its SIP "to correct a significant ambiguity" concerning the excess emissions from SSM events.[122] On July 18, 2007, the EPA denied that petition.[123] As a basis for this denial, the EPA reasoned that the opinion of the Court of Appeals had rendered the petition moot as to the issues raised therein. Specifically, the EPA stated that the Court's decision that the existing provision did not create an "automatic exemption" and did constitute an "affirmative defense" resolved any "ambiguity" about the meaning and application of Ga. Comp. R & Regs. 391–3–1–.02(2)(a)(7).

At this juncture, the EPA believes that the extensive proceedings concerning Ga. Comp. R. & Regs. 391–3–1–.02(2)(a)(7) in which plaintiffs, defendants, courts, and both state and federal agencies examined the same provision and came to different conclusions concerning its meaning illustrates the need to examine this SIP provision again. In particular, the EPA concludes that the provision warrants further evaluation on the merits, because the Petition requests that the EPA consider more specific allegations about deficiencies in the provision than did the 2005 petition. As the 11th Circuit Court of Appeals suggested, the EPA agrees that a formal notice-and-comment rulemaking though CAA section 110(k)(5) is a good mechanism through which to evaluate whether or not Ga. Comp. R. & Regs. 391–3–1–.02(2)(a)(7) meets the substantive requirements of the CAA. Accordingly,

[118] Petition at 32.

[119] *See, Sierra Club, et al.* v. *Georgia Power Co.*, 365 F. Supp 1297 (N.D. Ga. 2004).

[120] *Id.* at 1304. The court also made a series of findings to illustrate that the permit provision was not consistent with the EPA's interpretation of the CAA requirements concerning excess emissions during SSM events embodied in the 1999 SSM Guidance.

[121] *See, Sierra Club, et al.* v. *Georgia Power Co.*, 443 F.3d 1346 (11th Cir. 2006).

[122] The petition was filed by Richard M. Watson of the Georgia Center for Law in the Public Interest on behalf of the Georgia Chapter of the Sierra Club.

[123] *See*, Letter from Stephen E. Johnson, Administrator, to Georgia Chapter of the Sierra Club, dated July 18, 2007. A copy of this letter is in the docket for this action.

the EPA is reevaluating the provision on the merits.[124]

The first concern with this provision is that it does create exemptions from the applicable emission limitations. The provision explicitly states that the "excess emissions resulting from startup, shutdown, malfunction of any source which occur though ordinary diligence is employed shall be allowed," *i.e.*, are exempt and not subject to enforcement for either monetary penalties or injunctive relief. The exemption for these excess emissions is conditioned upon several criteria relevant to minimizing emissions during the startup, shutdown, or malfunction event, which criteria are helpful and are structured as a form of affirmative defense. Even if Ga. Comp. R. & Regs. 391–3–1–.02(2)(a)(7) could otherwise qualify as an affirmative defense provision, however, the EPA's interpretation of the CAA is that such affirmative defenses can only shield the source from monetary penalties and cannot be a bar to injunctive relief. An affirmative defense provision that purports to bar any enforcement action for violations of emission limitations is inconsistent with the requirements of CAA sections 113 and 304.

The EPA's second concern with Ga. Comp. R. & Regs. 391–3–1–.02(2)(a)(7) is that while the provision appears to create an affirmative defense, it does so with conditions that are not consistent with the full range of criteria that the EPA recommends in the SSM Policy. The EPA acknowledges that the SSM Policy is only guidance concerning what types of SIP provisions could be consistent with the requirements of the CAA. Nonetheless, through this rulemaking, the EPA is proposing to determine that Ga. Comp. R. & Regs. 391–3–1–.02(2)(a)(7) does not include criteria that are sufficiently robust to qualify as an acceptable affirmative defense provision. In particular, the provision does not limit the type of event that qualifies as a malfunction to those that are entirely beyond the control of the source, that were not reasonably foreseeable and avoidable, and that were not part of a recurring pattern indicative of inadequate design, operation, or maintenance. While the EPA continues to believe that affirmative defense provisions applying to malfunctions can be consistent with the CAA as long as the criteria set forth in the SSM Policy are carefully adhered to, as explained in more detail in sections IV.B and VII.B of this notice, the EPA believes that the criteria in Ga. Comp. R. & Regs. 391–3–1–.02(2)(a)(7) should be augmented to assure that the affirmative defense is available only in appropriately narrow circumstances.

The EPA's third concern with Ga. Comp. R. & Regs. 391–3–1–.02(2)(a)(7) is that even if the provision were otherwise construed as an affirmative defense, it extends not just to malfunctions but also to startup and shutdown events. As explained in sections IV.B and VII.C of this notice, the EPA interprets the CAA to allow affirmative defense provisions applicable to malfunctions but not to other normal modes of source operation, including startup and shutdown. Thus, the provision is not drawn to assure that the affirmative defense is available only in appropriately narrow circumstances, as required by the EPA's interpretation of CAA requirements.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to Ga. Comp. R. & Regs. 391–3–1–.02(2)(a)(7). The EPA believes that this provision allows for exemptions from the otherwise applicable emission limitations, and that such outright exemptions for excess emissions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. Such a provision is inconsistent with the requirements of CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k).

In addition, Ga. Comp. R. & Regs. 391–3–1–.02(2)(a)(7) is not a permissible affirmative defense provision consistent with the requirements of the CAA and the EPA's recommendations for such provisions in the EPA's SSM Policy. By creating a bar to enforcement that applies not just to monetary penalties but also to injunctive relief, this provision is inconsistent with the requirements of CAA sections 113 and 304. By not including sufficient criteria to assure that sources seeking to raise the affirmative defense have in fact been properly designed, maintained, and operated, and to assure that sources have taken all appropriate steps to minimize excess emissions, the provision also fails to be sufficiently narrowly drawn to justify shielding from monetary penalties for violations. Moreover, Ga. Comp. R. & Regs. 391–3–1–.02(2)(a)(7) currently applies not only to malfunctions but also to startup and shutdown events, contrary to the EPA's interpretation of the CAA. Thus, this provision is not appropriate as an affirmative defense provision because it is inconsistent with fundamental requirements of the CAA as interpreted in the EPA's SSM Policy. For these reasons, the EPA is proposing to find that Ga. Comp. R. & Regs. 391–3–1–.02(2)(a)(7) is substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to this provision.

4. Kentucky

a. Petitioner's Analysis

The Petitioner objected to a generally applicable provision that allows discretionary exemptions from otherwise applicable SIP emission limitations in Kentucky's SIP (401 KAR 50:055 § 1(1)).[125] [126] The provision provides that "[e]missions which, due to shutdown or malfunctions, temporarily exceed the standard * * * shall be deemed in violation of such standards unless the requirements of this section are satisfied and the determinations specified in subsection (4) * * * are made." The provision requires sources to notify the director that such violations are going to or have occurred. The provision then provides that "[a] source shall be relieved from compliance with the standards * * * if the director determines" that the source has met a number of enumerated criteria.

The Petitioner argued that this provision could provide an exemption from the otherwise applicable SIP emission limitations, and such an exemption is impermissible under the CAA because the statute and the EPA's interpretation of the CAA in the SSM Policy require that all such excess emissions be treated as violations. Moreover, the Petitioner objected to this discretionary exemption because the director's determination that the source has met the specified criteria could be interpreted to excuse excess emissions during such time period and could thus be read to preclude enforcement by the EPA or citizens in the event that the director elects not to treat the event as a violation. Thus, in addition to creating an impermissible exemption for the excess emissions, the Petitioner argued, the provision is also inconsistent with the CAA as interpreted in the EPA's SSM Policy because it allows the

[124] The EPA notes that it is not bound to follow a prior incorrect interpretation of its own policy, nor is it precluded from changing its policy interpretations. *See, e.g., Luminant Generation Co. v. EPA*, 699 F.3d 427 (5th Cir. 2012), and U.S. Supreme Court precedent cited therein for these propositions.

[125] Petition at 39–40.

[126] The EPA notes that the Petitioner also identified several additional pollutant-specific and source category-specific provisions in Kentucky's SIP that it alleged are inconsistent with the CAA and the EPA's SSM Policy. However, the Petitioner did not request that the EPA address those SIP provisions in its remedy request, and thus the EPA is not addressing those provisions in this action. The EPA may elect to evaluate those provisions in a later action.

director to make a unilateral decision that the excess emissions were not a violation and thus could bar enforcement for the excess emissions by the EPA and citizens.

The Petitioner noted that the criteria that sources must demonstrate to the director in order to qualify for the exemption "resemble the criteria that are supposed to guide a state's enforcement discretion for malfunctions," but that if the provision is not removed from the SIP, it "must stipulate that all excess emissions are violations and preserve the authority of EPA and citizens to enforce the SIP standards and limitations." Thus, the Petitioner viewed this provision as either an impermissible discretionary exemption mechanism or an impermissible enforcement discretion provision.

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations, whether automatic or through the exercise of a state official's discretion. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitation must be considered violations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that the excess emissions during startup, shutdown, or malfunctions are not violations of the applicable emission limitations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. The EPA believes that the inclusion of such an exemption from the emission limitations in 401 KAR 50:055 § 1(1) is thus a substantial inadequacy and renders this specific SIP provision impermissible.

The EPA believes that 401 KAR 50:055 § 1(1) is impermissible as an unbounded director's discretion provision that makes a state official the unilateral arbiter of whether the excess emissions in a given event constitute a violation. In the case of 401 KAR 50:055 § 1(1), the provision authorizes the state official to make a determination that the source has met the specified criteria, and such a determination could be interpreted to excuse excess emissions during the event and could thus be read to preclude enforcement by the EPA or through a citizen suit. In addition, the provision vests a state official with the unilateral power to grant an exemption from the otherwise applicable SIP emission limitation, without any additional public process at the state or federal level. Most importantly, however, the provision authorizes a state official to create an exemption from the emission limitation, and such an exemption is impermissible in the first instance. Such a director's discretion provision undermines the SIP emission limitations, and the emissions reductions they are intended to achieve, and renders them less enforceable by the EPA or through a citizen suit. The EPA believes that the inclusion of an insufficiently bounded director's discretion provision in 401 KAR 50:055 § 1(1) is thus a substantial inadequacy and renders this specific SIP provision impermissible for this reason, in addition to the creation of an impermissible exemption.

The EPA also notes that after the submission of the Petition, there has been a subsequent regulatory action that touched upon this SIP provision tangentially. In connection with a redesignation of the Kentucky portion of the tri-state Cincinnati-Hamilton area for the 1997 $PM_{2.5}$ NAAQS, the state submitted an interpretive letter to the EPA explaining the state's reading of 401 KAR 50:055 § 1(1).[127] In this November 4, 2011 letter, the Kentucky Division of Air Quality (KDAQ) stated that it has "never formally taken the position that excess emissions under the regulations are not violations" and that a determination by KDAQ "does not limit" the authority of the EPA and citizens to take enforcement action.[128] Based on the state's interpretation of 401 KAR 50:055 § 1(1), the EPA at that time concluded that the provision could be construed not to bar enforcement by the EPA or through a citizen suit if the state elects not to pursue enforcement; *i.e.*, it could be construed as an enforcement discretion provision applicable to state personnel. In the context of acting upon the redesignation request under CAA section 107(d)(3), this clarification from the state was sufficient to address the concern raised in comments on that action. Nevertheless, the EPA noted in the redesignation action that it would evaluate 401 KAR 50:055 § 1(1) as part of its consideration of issues raised by the Petition.

At this juncture, the EPA believes that the difference of views about the correct reading of 401 KAR 50:055 § 1(1) illustrates the need to examine this SIP provision again. The EPA appreciates KDAQ's clarification of its reading of the provision in the November 4, 2011, letter and the EPA considers that interpretation sufficient for purposes of the redesignation action. However, in the course of reevaluating this provision in light of the issues raised in the Petition, the EPA believes that the provision contains regulatory language that is potentially contradictory and requires formal revision to eliminate significant ambiguities. For example, subsection 1 of the provision states that: "[e]missions which, due to shutdown or malfunctions, temporarily exceed the standard * * * shall be deemed in violation of such standards unless the requirements of this section are satisfied." In subsection 4, the provision states that "a source shall be relieved from compliance with the standards * * * if the director determines, upon a showing by the owner or operator of the source, that" certain conditions are met. KDAQ has indicated that it reads these provisions not to bar enforcement by the EPA or through a citizen suit in the event that the state does not pursue enforcement, but the EPA believes that the provision is sufficiently ambiguous on this point that a revision is necessary to ensure that outcome in the event of an enforcement action.

As discussed in section VI.B of this notice, the EPA believes that in some instances it is appropriate to clarify provisions of a SIP through the use of interpretive letters. However, in some cases, there may be areas of regulatory ambiguity in a SIP's provisions that are sufficiently significant for which resolution is both appropriate and necessary. Because the text of Kentucky's SIP provision is not clearly phrased in terms of the state's exercise of enforcement discretion and could be interpreted to allow discretionary exemptions from the otherwise applicable SIP emission limitations or as an affirmative defense provision inconsistent with the criteria recommended in the EPA's SSM Policy, the EPA believes that the provision is substantially inadequate to meet CAA requirements.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to 401 KAR 50:055 § 1(1). The EPA believes that this provision requires clarification to ensure that it meets CAA requirements.

[127] *See*, "Approval and Promulgation of Implementation Plans and Designations of Areas for Air Quality Planning Purposes; Kentucky; Redesignation of the Kentucky Portion of the Cincinnati-Hamilton, OH–KY–IN 1997 Annual Fine Particulate Matter Nonattainment Area to Attainment," 76 FR 77903 (Dec. 15, 2011).

[128] A copy of this letter can be found in the docket for this rulemaking.

The current provision could be read to allow for exemptions from the otherwise applicable SIP emission limitations, and such exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs in sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, 401 KAR 50:055 § 1(1) could be read to allow exemptions through a state official's unilateral exercise of discretionary authority that is insufficiently bounded and includes no additional public process at the state or federal level, and such provisions are inconsistent with the fundamental requirements of the CAA with respect to SIPs and SIP revisions. Moreover, the provision could be read to create discretion to allow case-by-case exemptions from emission limitations when such exemptions are not permissible in the first instance. In light of the potential conflicts between the provision and the differing interpretations that parties or a court might give the provision in an enforcement action, the EPA is proposing to find that 401 KAR 50:055 § 1(1) is substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to this provision.

5. Kentucky: Jefferson County

a. Petitioner's Analysis

First, the Petitioner objected to a generally applicable provision in the Jefferson County Air Regulations 1.07 because it provides for discretionary exemptions from compliance with emission limitations during startup, shutdown, and malfunction.[129] [130] The provision states that "[e]missions due to startup, shutdown, malfunction, or emergency, that temporarily exceed the standards * * * shall be deemed in violation of those standards unless, based upon a showing by the owner or operator of the source and an affirmative determination by the District, the applicable requirements of this regulation are satisfied." The provision requires different demonstrations for exemptions for excess emissions during startup and shutdown (Regulation 1.07 § 3), malfunction (Regulation 1.07 § 4 and § 7), and emergency (Regulation 1.07 § 5 and § 7).

[129] The Petitioner noted that this regulation was approved into Kentucky's SIP in "Approval and Promulgation of Air Quality Implementation Plans; Kentucky; Approval of Revisions to State Implementation Plan; Revised Format for Materials Being Incorporated by Reference for Jefferson County, Kentucky," 66 FR 53503 at 53505 (Oct. 23, 2001).

[130] Petition at 40–42.

The Petitioner argued that this provision could provide exemptions from the otherwise applicable SIP emission limitations, and that such exemptions are impermissible under the CAA because the statute and the EPA's interpretation of the CAA in the SSM Policy require that all excess emissions be treated as violations. The Petitioner objected to this provision as allowing discretionary exemptions, because a local official's determination that the source has met the specified criteria could be interpreted to excuse excess emissions during such events and could thus be read to preclude enforcement by the EPA or citizens if the district elects not to treat the event as a violation.

Second, the Petitioner objected to the affirmative defense for emergencies in Jefferson County Air Regulations 1.07. The Petitioner noted that the SIP provision "mirrors the language in 40 C.F.R. § 70.6(g)" in the EPA's own title V regulations. Thus, the Petitioner argued that the provision should not be included in the SIP because it is modeled on the EPA's own title V regulations, and such regulations do not belong in the SIP. The Petitioner also argued that even if the provision were appropriate as a SIP provision, it is deficient because it is not a "true affirmative defense." On the latter point the Petitioner argued that a "true affirmative defense" is a defense to be asserted by the source in the context of a judicial or administrative enforcement proceeding. The Petitioner opined that the emergency affirmative defense in Jefferson County Air Regulations 1.07 "appears to allow the District to decide whether the defense applies."

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations, whether automatic or through the exercise of a government official's discretion. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitation must be considered violations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that the excess emissions during startup, shutdown, load change, or emergencies are not violations of the applicable emission limitations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. The EPA believes that the inclusion of such an exemption from the emission limitations in Jefferson County Air Regulations 1.07 is thus a substantial inadequacy and renders this specific SIP provision impermissible.

The EPA believes that Regulation 1.07 is also impermissible as an insufficiently bounded director's discretion provision that makes a local official the unilateral arbiter of whether the excess emissions in a given event constitute a violation. In the case of Regulation 1.07, the provision authorizes local officials to make a determination that the source has met the specified criteria for each type of event—startup and shutdown (Regulation 1.07 § 3), malfunction (Regulation 1.07 § 4), emergency (Regulation 1.07 § 5), and extended malfunction or emergency (Regulation 1.07 § 7). The local official's "affirmative determination" that such requirements have been met has the effect of excusing the excess emissions (Regulation 1.07 § 2.1). This determination could be interpreted to preclude enforcement by the EPA or through a citizen suit. In addition, the provision vests the local official with the unilateral power to grant an exemption from the otherwise applicable SIP emission limitations, without any additional public process at the state or federal level. Most importantly, however, the provision authorizes the local official to create an exemption from the emission limitation, and such an exemption is impermissible in the first instance. Such a director's discretion provision undermines the emission limitations, and the emissions reductions they are intended to achieve, and renders them less enforceable by the EPA or through a citizen suit. The EPA believes that the inclusion of an insufficiently bounded director's discretion provision in Regulation 1.07 is thus a substantial inadequacy and renders this specific SIP provision impermissible for this reason, in addition to the creation of an impermissible exemption.

The EPA also agrees that Regulation 1.07 provides an impermissible exemption for excess emissions that occur during "emergencies." The provision uses language that is borrowed from the EPA's title V regulations (Regulation 1.07 § 5) but that is not appropriate for a SIP provision (*see* section VII.D of this notice). In addition, because Regulation 1.07 § 2.1 provides that the district may make a determination of whether "applicable requirements" of the regulation are "satisfied," and the affirmative defense

for emergencies is defined as one such "applicable requirement," the structure of Regulation 1.07 could be read as providing the district with the unilateral discretion to decide that the source has met the conditions for the affirmative defense. The EPA agrees with the Petitioner that affirmative defenses are only permitted in the context of an enforcement proceeding and cannot be granted unilaterally by a state agency, because this would have the effect of precluding the EPA or the public from taking enforcement action.

Regulation 1.07 also does not explicitly limit the affirmative defense for emergency events to civil penalties. Although the EPA believes that narrowly drawn affirmative defenses are permitted under the CAA for malfunction events (*see* sections IV.B and VII.B of this notice), the EPA's interpretation of the CAA is that affirmative defenses can only shield the source from monetary penalties and cannot be a bar to injunctive relief. An affirmative defense provision that purports to bar any enforcement action for injunctive relief for violations of emission limitations is inconsistent with the requirements of CAA sections 113 and 304. In addition, the provision does not contain elements for establishing the affirmative defense consistent with all of the recommended criteria in the EPA's SSM Policy. The EPA acknowledges that the SSM Policy is only guidance concerning what types of SIP provisions could be consistent with the requirements of the CAA. Nonetheless, through this rulemaking, the EPA is proposing to determine that Regulation 1.07 does not include criteria that are sufficiently robust to qualify as an acceptable affirmative defense provision for purposes of SIP requirements.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to Jefferson County Air Regulation 1.07.[131] The EPA believes that this provision allows for exemptions from the otherwise applicable SIP emission limitations, and that such exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs in sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, Regulation 1.07 allows for such exemptions through a local official's unilateral exercise of discretionary authority that is insufficiently bounded and includes no additional public process at the state or federal level, and such provisions are inconsistent with the fundamental requirements of the CAA with respect to SIPs and SIP revisions. Moreover, the discretion created by these provisions allows case-by-case exemptions from emission limitations, when such exemptions are not permissible in the first instance. For these reasons, the EPA is proposing to find that Regulation 1.07 is substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to this provision.

The EPA also proposes to grant the Petition because Regulation 1.07 contains an impermissible exemption for excess emissions during emergency events, conditioned upon an affirmative defense provision that is inconsistent with the criteria recommended in the EPA's SSM Policy. Regulation 1.07 can be read to authorize the district to grant an exemption under § 2.1 and § 5, and such an interpretation could preclude the EPA and the public from bringing an enforcement action. Furthermore, the affirmative defense provision is impermissible because it does not explicitly limit the defense to monetary penalties, and it does not include sufficient criteria to assure that sources seeking to raise the affirmative defense have in fact been properly designed, maintained, and operated, and to assure that sources have taken all appropriate steps to minimize excess emissions. The provision therefore also fails to be sufficiently narrowly drawn to justify shielding from monetary penalties for violations. For these reasons, the EPA is proposing to find that Regulation 1.07 is substantially inadequate to meet CAA requirements and proposes to issue a SIP call with respect to this provision.

6. Mississippi

a. Petitioner's Analysis

The Petitioner objected to two generally applicable provisions in the Mississippi SIP that allow for affirmative defenses for violations of otherwise applicable SIP emission limitations during periods of upset, *i.e.*, malfunctions (11–1–2 Miss. Code R. § 10.1) and unavoidable maintenance (11–1–2 Miss. Code R. § 10.3).[132] First, the Petitioner objected to both of these provisions based on its assertion that the CAA allows no affirmative defense provisions in SIPs. Second, the Petitioner asserted that even if affirmative defense provisions were permissible under the CAA, the affirmative defenses in these provisions "fall far short of the EPA policy." Specifically, the Petitioner argued that the EPA's guidance for affirmative defenses recommends that they "are not appropriate where a single source or a small group of sources has the potential to cause an exceedance of the NAAQS or PSD increments,"[133] and Mississippi's provisions do not contain a restriction to address this point. Further, the Petitioner argued that the affirmative defenses in Mississippi's SIP are not limited to actions seeking civil penalties and that they fail to meet other criteria "that EPA requires for acceptable defense provisions."[134] Finally, the Petitioner argued that the CAA and the EPA's SSM Policy interpreting it do not allow affirmative defenses for excess emissions during maintenance events under any circumstances.

The Petitioner also objected to a generally applicable provision that provides an exemption from otherwise applicable SIP emission limitations during startup and shutdown (11–1–2 Miss. Code R. § 10.2).[135] Within that provision, 11–1–2 Miss. Code R. § 10.2(a)(2) specifies that emission limitations apply during startup and shutdown except "when a startup or shutdown is infrequent, the duration of the excess emissions is brief in each event, and the design of the source is such that the period of excess emissions cannot be avoided without causing damage to the equipment or persons." The Petitioner argued that such an exemption is inconsistent with the requirements of the CAA and the EPA's SSM Policy. The Petitioner argued that the CAA and the EPA's interpretation of the CAA in the SSM Policy require that all such excess emissions be treated as violations.

b. The EPA's Evaluation

The EPA disagrees with the Petitioner's contention that no affirmative defense provisions are permissible in SIPs under the CAA. As explained in more detail in section IV of this notice, the EPA interprets the CAA to allow affirmative defense provisions for malfunctions. So long as these provisions are narrowly drawn and consistent with the CAA, as recommended in the EPA's guidance for affirmative defense provisions in SIPs,

[131] The EPA notes that Kentucky has recently made a SIP submission that includes revisions to the portion of the SIP applicable to Jefferson County that would amend Regulation 1.07. In this action, the EPA is only evaluating Regulation 1.07 as currently approved into the SIP. The EPA is not evaluating the more recent SIP submission as part of this action. The EPA will address the SIP submission in a later action.

[132] Petition at 47–49.

[133] Petition at 48.

[134] Petition at 47–48.

[135] Petition at 47–49.

the EPA believes that states may elect to have affirmative defense provisions for malfunctions.

The EPA agrees, however, that the affirmative defense contained in 11–1–2 Miss. Code R. § 10.1 for upsets is not an acceptable affirmative defense provision under the CAA as interpreted in the EPA's SSM Policy. Section 10.1 provides that "[t]he occurrence of an upset * * * constitutes an affirmative defense to an enforcement action brought for noncompliance with emission standards," conditioned upon the source meeting a series of criteria. Although the EPA believes that narrowly drawn affirmative defenses are permitted under the Act for malfunction events (*i.e.*, upsets) (*see* section VII.B of this notice), the EPA's interpretation of the CAA is that an affirmative defense can only shield the source from monetary penalties and cannot be a bar to injunctive relief. The provisions of 11–1–2 Miss. Code R. § 10.1 applicable to upsets appears to create a bar not just to monetary penalties but also to injunctive relief. An affirmative defense provision that purports to bar any enforcement action for injunctive relief for violations of emission limitations is inconsistent with the requirements of CAA sections 113 and 204.

In addition, the EPA agrees that 11–1–2 Miss. Code R. § 10.1 creates an affirmative defense for upsets with conditions that are not fully consistent with the criteria that the EPA recommends in the SSM Policy. The EPA acknowledges that the SSM Policy is only guidance concerning what types of SIP provisions could be consistent with the requirements of the CAA. Nonetheless, through this rulemaking, the EPA is proposing to determine that 11–1–2 Miss. Code R. § 10.1 does not include criteria that are sufficiently robust to qualify as an acceptable affirmative defense provision. Although this provision does contain many criteria that are comparable to those the EPA recommends, it does not address several that the EPA believes to be necessary to assure that the affirmative defense is available only in appropriate circumstances. For example, 11–1–2 Miss. Code R. § 10.1 does not contain criteria requiring the source to show that the malfunction event was not part of a recurring pattern indicative of inadequate design, operation, or maintenance. In addition, as discussed in section VII.B of this notice, the EPA believes that affirmative defense provisions should address the issue of single sources or groups of sources that have the potential to have adverse impacts on the NAAQS or PSD increments in one of two recommended ways. On its face, 11–1–2 Miss. Code R. § 10.1 does not appear to address this issue in either way. The EPA believes that the inclusion of the bar to enforcement for injunctive relief and the insufficiently robust qualifying criteria render 11–1–2 Miss. Code R. § 10.1 substantially inadequate to meet CAA requirements.

The EPA also agrees with the Petitioner that the affirmative defense for excess emissions during maintenance provided in 11–1–2 Miss. Code R. § 10.3 is not consistent with CAA requirements. As explained in sections IV and VII.C of this notice, the EPA believes that affirmative defenses are only permissible under the CAA in the case of events that are beyond the control of the source, *i.e.*, malfunctions. Affirmative defense provisions are not appropriate in the case of planned source actions, such as maintenance, because sources should be expected to comply with applicable emission limitations during those normal planned and predicted modes of source operation. Although this provision does contain parameters to limit its availability, it still provides an affirmative defense that is inconsistent with CAA requirements. The EPA believes that the inclusion of the affirmative defense for excess emissions during maintenance in 11–1–2 Miss. Code R. § 10.3 renders that provision substantially inadequate to meet CAA requirements.

The EPA also agrees that 11–1–2 Miss. Code R. § 10.2(a)(2) contains an exemption for excess emissions during startup and shutdown events that is inconsistent with CAA requirements. The EPA acknowledges that the state has imposed some parameters on the scope of the exemption by requiring that the events be infrequent, of short duration, and required to avoid damage to equipment or people. However, the EPA does not interpret the CAA to allow for exemptions for excess emissions during startup and shutdown. As discussed in section VII.A of this notice, the EPA believes that sources should be designed, operated, and maintained so that they can comply with applicable SIP emission limitations during normal modes of source operation. If appropriate, the state may elect to develop special emission limitations or other control measures that apply during startup and shutdown. The EPA believes that the inclusion of an exemption for excess emissions during startup and shutdown in 11–1–2 Miss. Code R. § 10.2 is substantially inadequate to meet CAA requirements.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to 11–1–2 Miss. Code R. § 10.1, 11–1–2 Miss. Code R. § 10.2, and 11–1–2 Miss. Code R. § 10.3. None of these provisions is consistent with the requirements of the CAA as interpreted in the EPA's recommendations in the EPA's SSM Policy. The EPA believes that 11–1–2 Miss. Code R. § 10.1 and 11–1–2 Miss. Code R. § 10.3 create affirmative defenses that are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs as required by sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, by purporting to create a bar to enforcement that applies not just to monetary penalties but also to injunctive relief, these provisions are inconsistent with the requirements of CAA sections 113 and 304. By not including sufficient criteria to assure that sources seeking to raise these affirmative defenses have in fact been properly designed, maintained, and operated, and to assure that sources have taken all appropriate steps to minimize excess emissions, 11–1–2 Miss. Code R. § 10.1 also fails to be sufficiently narrowly drawn to justify shielding from monetary penalties for violations. The comparable affirmative defense for maintenance in 11–1–2 Miss. Code R. § 10.3 is not consistent with CAA requirements because maintenance is a normal mode of source operation during which the source should be expected to comply with the applicable emission limitations. Thus, these provisions are not appropriate as affirmative defense provisions because they are inconsistent with fundamental requirements of the CAA.

The EPA is proposing to find that 11–1–2 Miss. Code R. § 10.2 is substantially inadequate to meet CAA requirements because it provides an exemption for excess emissions that occur during startup and shutdown, which are normal modes of source operation during which sources should comply with applicable emission limitations. Such an exemption provision is inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs as required by sections 110(a)(2)(A), 110(a)(2)(C), and 302(k).

For these reasons, the EPA is proposing to find that these provisions are substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to these provisions.

7. North Carolina

a. Petitioner's Analysis

The Petitioner objected to two generally applicable provisions in the North Carolina SIP that provide exemptions for emissions exceeding otherwise applicable SIP emission limitations at the discretion of the state agency during malfunctions (15A N.C. Admin. Code 2D.0535(c)) and during startup and shutdown (15A N.C. Admin. Code 2D.0535(g)).[136] The Petitioner argued that both provisions allow a state official to exempt sources from compliance with otherwise applicable SIP emission limitations, and therefore both provisions allow a state official to decide whether a violation has occurred. This decision would preclude enforcement action by the EPA and citizens for both civil penalties and injunctive relief, and such an interpretation is inconsistent with the CAA and the EPA's SSM policy interpreting the CAA. The Petitioner noted that the director's discretion provision for malfunctions provided by 15A N.C. Admin. Code 2D.0535(c) is limited to 15 percent of operating time during each calendar year. According to the Petitioner, this temporal limit does not render the provision permissible under the CAA and the EPA's SSM policy interpreting the CAA, because the limit "does nothing to ensure that ambient air quality standards are met."[137]

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations, whether automatic or through the exercise of a state official's discretion. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitations must be considered violations, whether or not the state elects to exercise its enforcement discretion.

The EPA believes that 15A N.C. Admin. Code 2D.0535(c) and 15A N.C. Admin. Code 2D.0535(g) are impermissible as insufficiently bounded director's discretion provisions. The explicit text of 15A N.C. Admin. Code 2D.0535(c) states that "[a]ny excess emissions * * * are considered a violation * * * unless the owner or operator of the source of excess emissions demonstrates to the Director, that the excess emissions are the result of a malfunction." Similarly, 15A N.C. Admin. Code 2D.0535(g) provides that a state official may determine that excess emissions during startup and shutdown are unavoidable, in which case emissions exceeding the otherwise applicable SIP limitations are not considered violations. These provisions vest the state official with unilateral power to grant an exemption from the otherwise applicable SIP emission limitation, without any public process at the state or federal level. Such a determination that the excess emissions in a given event do not constitute a violation could preclude enforcement by the EPA or through a citizen suit. While both provisions contain a list of factors that the state official "shall consider" in making the discretionary determination, they nevertheless empower the state official to create an exemption from the emission limitations, and such an exemption is impermissible in the first instance. Such a director's discretion provision undermines the emission limitations in the SIP, and the emissions reductions they are intended to achieve, and renders them less enforceable by the EPA or through a citizen suit. The EPA believes that the inclusion of an insufficiently bounded director's discretion provision in 15A N.C. Admin. Code 2D.0535(c) and 15A N.C. Admin. Code 2D.0535(g) is thus a substantial inadequacy and renders these specific SIP provisions impermissible for this reason.

Finally, the EPA notes that 15A N.C. Admin. Code 2D.0535(c) and 15A N.C. Admin. Code 2D.0535(g) contain a number of criteria for consideration by the state official when deciding whether the excess emissions should be treated as exempt and thus not as a violation. Superficially, these criteria are similar to those recommended by the EPA for affirmative defense provisions for malfunctions to meet CAA requirements, but they are not presented as criteria for an affirmative defense. Instead, each provision is structured so that if the source has met these criteria, the state official will deem the excess emissions not a violation. Moreover, instead of requiring that the source establish these facts in an administrative or judicial process, the provision appears to authorize the state official to make a unilateral determination whether the emissions are a violation and thus appears to bar enforcement by the EPA or through a citizen suit.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to 15A N.C. Admin. Code 2D.0535(c) and 15A N.C. Admin. Code 2D.0535(g). The EPA believes that both of these provisions could be read to allow for exemptions from otherwise applicable SIP emission limitations through a state official's unilateral exercise of discretionary authority that is insufficiently bounded and includes no additional public process at the state or federal level. Moreover, the discretion created by this provision could be read to allow case-by-case exemptions from emission limitations when such exemptions are not permissible in the first instance. Such exemption provisions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs as required by sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, by creating these impermissible exemptions, the state has defined violations in a way that would interfere with effective enforcement by the EPA and citizens for excess emissions during these events as provided in CAA sections 113 and 304. For these reasons, the EPA is proposing to find 15A N.C. Admin. Code 2D.0535(c) and 15A N.C. Admin. Code 2D.0535(g) are substantially inadequate to meet CAA requirements and thus is proposing to issue a SIP call with respect to these provisions.

8. North Carolina: Forsyth County

a. Petitioner's Analysis

The Petitioner objected to two generally applicable provisions in the Forsyth County Code that provide exemptions for emissions exceeding otherwise applicable SIP emission limitations at the discretion of a local official during malfunctions (Forsyth County Code, ch. 3, 3D.0535(c)) and startup and shutdown (Forsyth County Code, ch. 3, 3D.0535(g)).[138] The Petitioner argued that these "local regulations have the same problems as the [North Carolina] state-wide regulations" addressed in the previous section.[139] The Petitioner argued that both provisions allow the local official to exempt sources from compliance with otherwise applicable SIP emission limitations, and therefore both provisions allow the local official to decide whether a violation has occurred. This decision would preclude action by the EPA and citizens for both civil penalties and injunctive relief, and such a provision is inconsistent with the

[136] Petition at 57–58.

[137] Petition at 58.

[138] Petition at 58.

[139] Petition at 58.

CAA and the EPA's SSM policy interpreting the CAA.

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations, whether automatic or through the exercise of a government official's discretion. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitations must be considered violations, whether or not the state elects to exercise its enforcement discretion.

The EPA believes that Forsyth County Code, ch. 3, 3D.0535(c) and Forsyth County Code, ch. 3, 3D.0535(g) are impermissible as insufficiently bounded director's discretion provisions. Forsyth County Code, ch. 3, 3D.0535(c) states that "[a]ny excess emissions * * * are considered a violation * * * unless the owner or operator of the source of excess emissions demonstrates to the Director, that the excess emissions are the result of a malfunction." Similarly, Forsyth County Code, ch. 3, 3D.0535(g) provides that a local official may determine that excess emissions during startup and shutdown are unavoidable, in which case emissions exceeding the otherwise applicable SIP limitations are not considered violations. These provisions vest the local official with unilateral power to grant an exemption from the otherwise applicable SIP emission limitation, without any public process at the local, state, or federal level. Such a determination that the excess emissions in a given event do not constitute a violation could preclude enforcement by the EPA or through a citizen suit. While both provisions contain a list of factors that the local official "shall consider" in making the discretionary determination, they nevertheless empower the local official to create an exemption from the emission limitation, and such an exemption is impermissible in the first instance. Such a director's discretion provision undermines the emission limitations in the SIP, and the emissions reductions they are intended to achieve, and renders them less enforceable by the EPA or through a citizen suit. The EPA believes that the inclusion of an insufficiently bounded director's discretion provision in Forsyth County Code, ch. 3, 3D.0535(c) and Forsyth County Code, ch. 3, 3D.0535(g) is thus a substantial inadequacy and renders these specific SIP provisions impermissible for this reason.

As with the comparable statewide SIP provisions, the EPA notes that Forsyth County Code, ch. 3, 3D.0535(c) and Forsyth County Code, ch. 3, 3D.0535(g) also would not qualify as affirmative defense provisions consistent with CAA requirements. The provisions authorize the local official to deem excess emissions exempt and thus not subject to enforcement for injunctive relief. The provisions also appear to authorize the local official to make a unilateral determination that the emissions are not a violation and thus to bar enforcement by the EPA or through a citizen suit.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to Forsyth County Code, ch. 3, 3D.0535(c) and Forsyth County Code, ch. 3, 3D.0535(g). The EPA believes that both of these provisions could be read to allow for exemptions from otherwise applicable SIP emission limitations through a local official's unilateral exercise of discretionary authority that is insufficiently bounded and includes no additional public process at the local, state, or federal level. Moreover, the discretion created by this provision could be read to allow case-by-case exemptions from emission limitations when such exemptions are not permissible in the first instance. Such exemption provisions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs as required by sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, by creating these impermissible exemptions, the air agency has defined violations in a way that would interfere with effective enforcement by the EPA and citizens for excess emissions during these events as provided in CAA sections 113 and 304. For these reasons, the EPA is proposing to find that Forsyth County Code, ch. 3, 3D.0535(c) and Forsyth County Code, ch. 3, 3D.0535(g) are substantially inadequate to meet CAA requirements and thus is proposing to issue a SIP call with respect to these provisions.

9. South Carolina

a. Petitioner's Analysis

The Petitioner objected to three provisions in the South Carolina SIP, arguing that they contained impermissible source category- and pollutant-specific exemptions.[140] The Petitioner characterized these provisions as providing exemptions from opacity limits for fuel-burning operations for excess emissions that occur during startup or shutdown (S.C. Code Ann. Regs. 61–62.5 St 1(C)), exemptions from NOx limits for special-use burners that are operated less than 500 hours per year (S.C. Code Ann. Regs. 61–62.5 St 5.2(I)(b)(14)), and exemptions from sulfur limits for kraft pulp mills for excess emissions that occur during startup, shutdown, or malfunction events (S.C. Code Ann. Regs. St 4(XI)(D)(4)). The Petitioner argued that such exemptions violate the fundamental CAA requirement that all excess emissions be considered violations and that they interfere with enforcement by the EPA and citizens.

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations. In accordance with CAA sections 110(a)(2)(A) and 302(k), SIPs must contain "emission limitations" and those limitations must be continuous. Thus, any excess emissions above the level of the applicable SIP emission limitation must be considered a violation of such limitation, regardless of whether the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that the excess emissions during startup, shutdown, maintenance, or malfunctions are not violations of the applicable SIP emission limitations are inconsistent with the fundamental requirements of the CAA.

The first provision identified by the Petitioner states that "[t]he opacity standards set forth above do not apply during startup or shutdown." The EPA agrees with the Petitioner that the effect of this language is to exempt excess emissions that occur during startup or shutdown from otherwise applicable opacity standards, essentially treating such emissions as non-violations. The EPA believes that such automatic exemptions are impermissible under the CAA. By having SIP provisions that define what would otherwise be violations of the applicable SIP emission limitations as non-violations, the state has effectively negated the ability of the EPA or the public to enforce against those violations. Therefore, the EPA believes that the inclusion of such an automatic exemption in S.C. Code Ann. Regs. 61–62.5 St 1(C) is impermissible and renders the provision a substantial inadequacy under the CAA.

With respect to the Petitioner's second objection relating to the exemption for special-use burners, however, the EPA disagrees with the

[140] Petition at 65–66.

Petitioner's characterization of the provision. S.C. Code Ann. Regs. 61–62.5 St 5.2(I)(b)(14) provides: "The following sources are exempt from all requirements of this regulation unless otherwise specified: * * * (14) Special use burners, such as start-up/shut-down burners, that are operated less than 500 hours a year." The Petitioner argued that this provision provides an exemption from otherwise applicable NOx limitations for excess emissions that occur during startup or shutdown. Although this provision superficially resembles an exemption for emissions during startup and shutdown, the EPA interprets this provision merely to define a specific source category—special-use burners—that is not subject to control under S.C. Code Ann. Regs. 61–62.5 St 5.2, *Control of Oxides of Nitrogen (NO_X)*. In other words, the provision reflects that regulation of special-use burners is not necessary in order to meet the applicable RACT requirements or any other CAA requirements for NO_X emissions in this area. Rather than an exemption for NO_X emissions during startup and shutdown for a source category that is regulated for NO_X, this provision merely reflects that this category of source is not subject to regulation under S.C. Code Ann. Regs. 61–62.5 St 5.2. Therefore, the EPA disagrees with the Petitioner that S.C. Code Ann. Regs. 61–62.5 St 5.2(I)(b)(14) renders the South Carolina SIP substantially inadequate.

Finally, the EPA agrees that S.C. Code Ann. Regs. St 4(XI)(D)(4) implicitly includes impermissible exemptions for excess emissions during startup, shutdown, and malfunction events for the affected sources. The provision states that "[t]he Department will consider periods of excess emissions reported under Subpart D(3) of this section to be indicative of a violation if" the emissions from the specified source categories exceed certain limits over certain time periods. For example, for recovery furnaces, S.C. Code Ann. Regs. St 4(XI)(D)(4)(b) specifies that excess emissions will be "indicative of a violation" if "(a) the number of 12 hour exceedances from recovery furnaces is greater than 1% of the total number of contiguous 12 hour periods in a quarter (excluding periods of startup, shutdown, or malfunction * * *)." The parenthetical explicitly excludes the excess emissions that occur during startup, shutdown, and malfunction, automatically treating those emissions as non-violations. The other two source category-specific provisions to be considered in determining whether excess emissions are indicative of a violation contain similar parenthetical exclusions. Therefore, these provisions could reasonably be construed to preclude the EPA and the public from enforcing against violations that occur during these SSM events at these sources. The EPA believes that S.C. Code Ann. Regs. St 4(XI)(D)(4) includes automatic exemptions for excess emissions during SSM events for the three categories of sources and is thus substantially inadequate to satisfy CAA requirements.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to S.C. Code Ann. Regs. 61–62.5 St 1(C). The EPA believes that S.C. Code Ann. Regs. 61–62.5 St 1(C) allows for an exemption from otherwise applicable SIP emission limitations and that such exemptions are inconsistent with the fundamental requirements of CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). The EPA also proposes to grant the Petition with respect to S.C. Code Ann. Regs. St 4(XI)(D)(4). This provision appears to define violations at three source categories in a way that excludes excess emissions that occur during SSM events. It is unclear whether this provision is intended only to apply to the exercise of enforcement discretion by state personnel, but the EPA believes that it could reasonably be interpreted to preclude the EPA and citizen enforcement as well. Because S.C. Code Ann. Regs. St 4(XI)(D)(4) appears to define violations of the applicable emission limitations in a way that excludes excess emissions during SSM events, it is inconsistent with the fundamental requirements of CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). For these reasons, the EPA is proposing to find that S.C. Code Ann. Regs. 61–62.5 St 1(C) and S.C. Code Ann. Regs. St 4(XI)(D)(4) are substantially inadequate to meet CAA requirements and proposes to issue a SIP call with respect to these provisions.

However, the EPA proposes to deny the Petition with respect to S.C. Code Ann. Regs. 61–62.5 St 5.2(I)(b)(14), which does not exempt excess emissions from an otherwise applicable SIP emission limitation during startup and shutdown but rather excludes a specific source category from regulation under the South Carolina SIP, because such regulation was deemed unnecessary to meet other applicable CAA requirements. As a consequence, this provision does not constitute a substantial inadequacy in the SIP.

10. Tennessee

a. Petitioner's Analysis

The Petitioner objected to three provisions in the Tennessee SIP.[11] First, the Petitioner objected to two provisions that authorize a state official to "excuse or proceed upon" (Tenn. Comp. R. & Regs. 1200–3–20–.07(1)) violations of otherwise applicable SIP emission limitations that occur during "malfunctions, startups, and shutdowns" (Tenn. Comp. R. & Regs. 1200–3–20–.07(3)). The Petitioner argued that together, these provisions constitute a "blanket exemption from enforcement at the unfettered discretion of" a state official. Further, the Petitioner contended that once a violation has been "excused" by the state official, that decision could preclude enforcement by the EPA or citizens in violation of the CAA.

Second, the Petitioner objected to a provision that excludes excess visible emissions from the requirement that the state automatically issue a notice of violation for all excess emissions (Tenn. Comp. R. & Regs. 1200–3–5–.02(1)). This provision states that "due allowance may be made for visible emissions in excess of that permitted in this chapter which are necessary or unavoidable due to routine startup and shutdown conditions." The Petitioner argued that Tenn. Comp. R. & Regs. 1200–3–5–.02(1) is inconsistent with EPA's interpretation of the CAA because it operates as a blanket exemption for opacity violations.

b. The EPA's Evaluation

While the Petitioner suggested that Tenn. Comp. R. & Regs. 1200–3–20–.07(1) and Tenn. Comp. R. & Regs. 1200–3–20–.07(3) combine to operate as an impermissible discretionary exemption, the EPA believes that these provisions are better understood as attempting to provide the state agency with the discretion to decide whether to pursue an enforcement action. As discussed more fully in section IX.A of this notice, the EPA's SSM Policy has consistently encouraged states to utilize traditional enforcement discretion within appropriate bounds for violations relating to excess emissions that occur during SSM events. Moreover, the 1982 SSM Guidance explicitly recommended criteria that states might consider in the event that they elected to formalize their enforcement discretion with provisions in the SIP. However, such enforcement discretion provisions in a SIP must be "state-only," meaning that the

[11] Petition at 67–69.

provisions apply only to the state's own enforcement personnel and not to the EPA or to others. Here, the Tennessee SIP goes too far because a court could reasonably conclude that the provisions in question preclude the EPA and the public from enforcing against violations that occur during SSM events if the state official chooses to "excuse" such violations. Therefore, the EPA ultimately agrees with the Petitioner that Tenn. Comp. R. & Regs. 1200–3–20–.07(1) and Tenn. Comp. R. & Regs. 1200–3–20–.07(3) are substantially inadequate to satisfy CAA requirements.

In regard to Tenn. Comp. R. & Regs. 1200–3–5–.02(1), the EPA agrees with the Petitioner that this provision operates as an impermissible discretionary exemption because it allows a state official to excuse excess visible emissions after giving "due allowance" to the fact that they were emitted during startup or shutdown events. The EPA believes that this provision is impermissible because it creates unbounded discretion that purports to make a state official the unilateral arbiter of whether the excess emissions in a given event constitute a violation of otherwise applicable SIP emission limitations. More importantly, the provision purports to authorize the state official to create exemptions from applicable SIP emission limitations when such exemptions are impermissible in the first instance. As discussed in more detail in section VII.A of this notice, these types of director's discretion provisions undermine the purpose of emission limitations and the reductions they are intended to achieve, thereby rendering them less enforceable by the EPA or through a citizen suit. The EPA believes that the inclusion of such a director's discretion provision in Tenn. Comp. R. & Regs. 1200–3–5–.02(1) is therefore a substantial inadequacy that renders the provision impermissible under the CAA.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to Tenn. Comp. R. & Regs. 1200–3–20–.07(1) and Tenn. Comp. R. & Regs. 1200–3–20–.07(3). These enforcement discretion provisions could reasonably be interpreted to preclude EPA and citizen enforcement of applicable SIP emission limitations, in violation of CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). The EPA also proposes to grant the Petition with respect to Tenn. Comp. R. & Regs. 1200–3–5–.02(1). The discretion created by this provision allows for revisions of the applicable SIP emission limitations without meeting the applicable SIP revision requirements of the CAA, and it allows case-by-case exemptions from emission limitations when such exemptions are not permissible in the first instance. Thus, this provision is also inconsistent with CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). For these reasons, the EPA is proposing to find that these provisions are substantially inadequate to meet CAA requirements and proposes to issue a SIP call with respect to these provisions.

11. Tennessee: Knox County

a. Petitioner's Analysis

The Petitioner objected to a provision in the Knox County portion of the Tennessee SIP that bars evidence of a violation of SIP emission limitations from being used in a citizen enforcement action (Knox County Regulation 32.1(C)).[142] The provision specifies that "[a] determination that there has been a violation of these regulations or orders issued pursuant thereto shall not be used in any law suit brought by any private citizen." The Petitioner argued that this provision would prevent reports of SSM conditions, which owners and operators are required to submit per Knox County Regulation 34.1(A), from being used as evidence in citizen suits, thereby undermining the express authorization of citizen enforcement actions under the CAA.

b. The EPA's Evaluation

The EPA agrees with the Petitioner that Knox County Regulation 32.1(C) is inconsistent with the fundamental requirements of the CAA. Section 113(e)(1) of the CAA requires a court to take into consideration "the duration of the violation as established by any credible evidence" in determining penalties in citizen enforcement actions. Moreover, section 114(c) of the CAA states that "[a]ny records, reports or information" obtained from sources "shall be available to the public * * *." In accordance with these statutory mandates, the EPA promulgated its "credible evidence rule" in 1997. That rule states: "[f]or purpose of * * * establishing whether or not a person has violated or is in violation of any standard * * *, the [SIP] must not preclude the use, including the exclusive use, of any credible evidence or information, relevant to whether a source would have been in compliance with applicable requirements * * *".[143]

The EPA believes that the Knox County Regulation 32.1(C) runs afoul of these statutory and regulatory provisions. Knox County Regulation 32.1(c) explicitly bars a state official's determination that there has been a violation of a SIP emission limitation from being used as evidence in a citizen enforcement action, even though SIPs are prohibited from precluding the use of such evidence. The provision could also be interpreted to bar citizens from using evidence of a violation used by the state official in making such a determination, including reports of SSM conditions. Consequently, Knox County Regulation 32.1(C) is inconsistent with the fundamental requirements of CAA sections 113(e)(1) and 114(c) and the credible evidence rule. Moreover, by seeking to restrain the ability of private citizens to pursue enforcement actions, the provision is inconsistent with the fundamental enforcement structure created by Congress in CAA section 304. As such, the EPA believes that the Knox County Regulation 32.1(C) constitutes a substantial inadequacy in the Tennessee SIP.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to Knox County Regulation 32.1(C). This provision precludes the use of a state determination that a violation has occurred from being used as evidence in a citizen enforcement action, in violation of CAA sections 113(e)(1), 114(c), and 304, and the credible evidence rule. Therefore, the EPA is proposing to find that this provision is substantially inadequate to meet CAA requirements and proposes to issue a SIP call with respect to this provision in the Knox County portion of the state's SIP.

12. Tennessee: Shelby County

a. Petitioner's Analysis

The Petitioner objected to a provision in the Shelby County Code (Shelby County Code § 16–87) that addresses enforcement for excess emissions that occur during "malfunctions, startups, and shutdowns" by incorporating by reference the state's provisions in Tenn. Comp. R. & Regs. 1200–3–20.[144] Shelby County Code § 16–87 provides that "all such additions, deletions, changes and amendments as may subsequently be made" to Tennessee's regulations will automatically become part of the Shelby County Code. The Petitioner argued that once Tennessee changes its regulations, those revised provisions will be

[142] Petition at 69.

[143] 51 CFR 31.212(c); *see also* "Credible Evidence Revisions," 62 FR 8155 at 8314 (Feb. 24, 1997).

[144] Petition at 69–70.

effective in the Shelby County Code but will not be effective as part of the SIP until they are submitted to the EPA and approved.

b. The EPA's Evaluation

The EPA agrees that because Shelby County Code § 16–87 incorporates by reference provisions in the Tennessee SIP that are substantially inadequate, the Shelby County portion of the Tennessee SIP is likewise substantially inadequate to satisfy the fundamental requirements of the CAA for the same reasons.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to Shelby County Code § 16–87. For the same reasons that the EPA has determined that the Tennessee SIP is substantially inadequate to meet CAA requirements, the EPA believes that the Shelby County portion of the Tennessee SIP is substantially inadequate as well. Therefore, the EPA proposes to issue a SIP call with respect to this provision in the Shelby County portion of the state's SIP.

F. Affected States in EPA Region V

1. Illinois

a. Petitioner's Analysis

The Petitioner objected to three generally applicable provisions in the Illinois SIP which together have the effect of providing discretionary exemptions from otherwise applicable SIP emission limitations, and such exemptions are impermissible under the CAA because the statute and the EPA's interpretation of the CAA in the SSM Policy require that all such excess emissions be treated as violations.[145] [146] The Petitioner noted that the provisions invite sources to request, during the permitting process, advance permission to continue to operate during a malfunction or breakdown, and, similarly to request advance permission to "violate" otherwise applicable emission limitations during startup (Ill. Admin. Code tit. 35 § 201.261). The Illinois SIP provisions establish criteria that a state official must consider before granting the advance permission to violate the emission limitations (Ill. Admin. Code tit. 35 § 201.262). However, the Petitioner asserted, the provisions state that, once granted, the advance permission to violate the emission limitations "shall be a prima facie defense to an enforcement action" (Ill. Admin. Code tit. 35 § 201.265).

The Petitioner noted that Illinois has claimed that its SIP provisions do not provide for advance permission to violate emission limitations but that its SIP provisions instead authorize "case-by-case claims of exemption." [147] The Petitioner argued that despite this explanation, the language in the SIP is not clear and appears to grant advance permission for violations during malfunction and startup events. Furthermore, the Petitioner objected because the effect of granting that permission would be to provide the source with an absolute defense to any later enforcement action, that is, "a defense [would] attach[] at the state's discretion." The Petitioner argued that this approach would violate the fundamental requirement that all excess emissions be considered violations.

Finally, the Petitioner objected to the use of the term "prima facie defense" in Ill. Admin. Code tit. 35 § 201.265, arguing that the term is "ambiguous in its operation." The Petitioner argued that the provision is not clear regarding whether the defense is to be evaluated "in a judicial or administrative proceeding or whether the Agency determines its availability." Allowing defenses to be raised in these undefined contexts, the Petitioner argued, is "inconsistent with the enforcement structure of the Clean Air Act." The Petitioner asserted that "if * * * the "prima facie defense" is anything short of the "affirmative defense" as contemplated in the 1999 SSM Guidance, then "it clearly has the potential to interfere with EPA and citizen enforcement."

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for discretionary exemptions from otherwise applicable SIP emission limitations. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitation must be considered violations, whether or not the state elects to exercise its enforcement discretion. The EPA agrees that together Ill. Admin. Code tit. 35 § 201.261, Ill. Admin. Code tit. 35 § 201.262, and Ill. Admin. Code tit. 35 § 201.265 [148] can be read to create exemptions by authorizing a state official to determine in the permitting process that the excess emissions during startup and malfunction will not be considered violations of the applicable emission limitations. The language of the SIP on its face appears to permit the state official to grant advance permission to "continue to operate during a malfunction or breakdown" or "to violate the standards or limitations * * * during startup" (Ill. Admin. Code tit. 35 § 201.261(a)).

The EPA notes that the Petitioner's characterization of Illinois's interpretation of its SIP is not accurate. While the Petitioner alleged that Illinois believed its SIP provisions to authorize "case-by-case exemptions," Illinois in fact described the effect of the permission granted under these provisions as providing the source with the:

> * * * opportunity to make a claim of malfunction/breakdown or startup, with the viability of such claim subject to specific review against the requisite requirements. Indeed, 35 IAC 201.265 clearly states that violating an applicable state standard even if consistent with any expression of authority regarding malfunction/breakdown or startup set forth in a permit shall only constitute a prima facie defense in an enforcement action for violation of said regulation.

(Ill. Envtl. Prot. Agency, Statement of Basis for a Planned Revision of the CAAPP Permit for U.S. Steel Corp. Granite City Works (March 15, 2011), at 37.) Thus, the state claimed that under its SIP provisions, any excess emissions during periods of startup or malfunction would still constitute a "violation" and that the only effect of the permission granted by the state official in the permit would be to allow a source to assert a "prima facie defense" in an enforcement action. Even in light of this explanation, the EPA agrees that the plain language of the SIP provisions do not make explicit this limitation on the

[145] The EPA notes that the Petitioner also identified several additional pollutant-specific and source category-specific provisions in the Illinois SIP that it alleged are inconsistent with the CAA and the EPA's SSM Policy. However, the Petitioner did not request that the EPA address those SIP provisions in its remedy request, and thus the EPA is not addressing those provisions in this action. The EPA may elect to evaluate those provisions in a later action.

[146] Petition at 33–36.

[147] Petition at 35 (citing Ill. Envtl. Prot. Agency, Statement of Basis for a Planned Revision of the CAAPP Permit for U.S. Steel Corp. Granite City Works (Mar. 15, 2011), at 26–27). The EPA notes that the Petitioner appears to have cited the incorrect portion of this document and that the correct citation is to pages 36–37.

[148] The EPA notes that there are a number of other provisions in the same portion of the Illinois SIP that are integral to the regulation of startups, shutdowns, and malfunctions. Those provisions include Ill. Admin. Code tit. 35 § 201.149, Ill. Admin. Code tit. 35 § 201.263, and Ill. Admin. Code tit. 35 § 201.264. The Petitioner did not object to these provisions in its Petition, but because they are part of a functional scheme in the SIP, the state may elect to revise these provisions in accordance with the EPA's proposal.

state official's authorization to grant exemptions. Indeed, by expressly granting "permission," the provisions are ambiguous and could be read as allowing the state official to be the unilateral arbiter of whether the excess emissions in a given malfunction, breakdown, or startup event constitute a violation. By deciding that an exceedance of the emission limitation was not a "violation," exercise of this discretion could preclude enforcement by the EPA or through a citizen suit. Most importantly, however, the grant of permission would authorize the state official to create an exemption from the otherwise applicable SIP emission limitation, and such an exemption is impermissible in the first instance. Such a director's discretion provision undermines the emission limitations and the emission reductions they are intended to achieve and renders them less enforceable by the EPA or through a citizen suit. The EPA believes that the inclusion of director's discretion provisions in Ill. Admin. Code tit. 35 § 201.261, Ill. Admin. Code tit. 35 § 201.262, and Ill. Admin. Code tit. 35 § 201.265 is thus a substantial inadequacy and renders these specific SIP provisions impermissible for this reason.

Furthermore, even if the Illinois SIP provisions cited by the Petitioner are intended to provide only an affirmative defense to enforcement, rather than as advance permission to violate the otherwise applicable SIP emission limitations, the EPA agrees that the "prima facie defense" mechanism in Ill. Admin. Code tit. 35 § 201.261, Ill. Admin. Code tit. 35 § 201.262, and Ill. Admin. Code tit. 35 § 201.265 is not an acceptable affirmative defense provision under the CAA as interpreted in the EPA's SSM Policy. Although the EPA believes that narrowly drawn affirmative defenses are permitted for malfunction events (*see* section VII.B of this notice), the EPA's interpretation of the CAA is that such affirmative defenses can only shield the source from monetary penalties and cannot be a bar to injunctive relief. An affirmative defense provision that purports to bar any enforcement action for injunctive relief for violations of emission limitations is inconsistent with the requirements of CAA sections 113 and 304. In addition, Illinois's SIP provisions allow sources to obtain a *prima facie* defense for violations that occurred during startup periods, and, as discussed in section VII.C of this notice, the EPA does not believe affirmative defenses for violations of the otherwise applicable SIP emission limitations that occur during startup or shutdown periods is permissible under the CAA.

Significantly, these Illinois SIP provisions are also deficient because, although not defined in the Illinois SIP, a *prima facie* defense typically would shift the burden of proof to the opposing party, in this case the party bringing the enforcement action against the source. The EPA's longstanding interpretation of the CAA is that an affirmative defense provision must be narrowly drawn and must require the source to establish that it has met the conditions to justify relief from monetary penalties for excess emissions in a given event. Thus, an acceptable affirmative defense under EPA's interpretation of the CAA places the burden on the source to demonstrate that it has met all the appropriate criteria before it is entitled to the defense.

Lastly, the criteria that the Illinois SIP provisions require be met before advance permission and the *prima facie* defense may be granted are not consistent with the criteria that the EPA recommends in the SSM Policy. The EPA acknowledges that the SSM Policy is only guidance concerning what types of SIP provisions could be consistent with the requirements of the CAA. Nonetheless, through this rulemaking, the EPA is proposing to determine that Ill. Admin. Code tit. 35 § 201.261, Ill. Admin. Code tit. 35 § 201.262, and Ill. Admin. Code tit. 35 § 201.265 do not include criteria that are sufficiently robust to qualify as an acceptable affirmative defense provision. The EPA believes that the inclusion of the complete bar to liability, including injunctive relief, the availability of the defense for violations during startup and shutdown, the burden-shifting effect, and the insufficiently robust qualifying criteria in Ill. Admin. Code tit. 35 § 201.261, Ill. Admin. Code tit. 35 § 201.262, and Ill. Admin. Code tit. 35 § 201.265, are substantial inadequacies and render these specific SIP provisions impermissible.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to Ill. Admin. Code tit. 35 § 201.261, Ill. Admin. Code tit. 35 § 201.262, and Ill. Admin. Code tit. 35 § 201.265. The EPA believes that these provisions allow for exemptions from the otherwise applicable emission limitations, and that such exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. In addition, Ill. Admin. Code tit. 35 § 201.261, Ill. Admin. Code tit. 35 § 201.262, and Ill. Admin. Code tit. 35 § 201.265 potentially allow for such an exemption through a state official's unilateral exercise of discretionary authority, and such provisions are inconsistent with the fundamental requirements of the CAA with respect to SIPs and SIP revisions in sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). For these reasons, the EPA is proposing to find that Ill. Admin. Code tit. 35 § 201.261, Ill. Admin. Code tit. 35 § 201.262, and Ill. Admin. Code tit. 35 § 201.265 are substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to these provisions.

The EPA is proposing to grant the Petition with respect to these provisions even though the state has stated that the effect of these provisions only provides sources with a *prima facie* defense in an enforcement proceeding. Illinois's SIP provisions do not constitute an affirmative defense provision consistent with the EPA's recommendations in the EPA's SSM Policy interpreting the CAA, for a number of reasons: it is not clear that the defense applies only to monetary penalties, which is inconsistent with the requirements of CAA sections 113 and 304; the defense applies to violations that occurred during startup periods, which is inconsistent with CAA sections 113 and 304; the provisions shift the burden of proof to the enforcing party; and finally, the provisions do not include sufficient criteria to assure that sources seeking to raise the affirmative defense have in fact been properly designed, maintained, and operated, and to assure that sources have taken all appropriate steps to minimize excess emissions. Accordingly, even if Ill. Admin. Code tit. 35 § 201.261, Ill. Admin. Code tit. 35 § 201.262, and Ill. Admin. Code tit. 35 § 201.265 are interpreted to provide a defense to enforcement rather than an exemption, the EPA is proposing to find that the provisions are substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to these provisions.

2. Indiana

a. Petitioner's Analysis

The Petitioner objected to a generally applicable provision in the Indiana SIP that allows for discretionary exemptions during malfunctions (326 Ind. Admin. Code 1–6–4(a)).[149] [150] The Petitioner

[149] The EPA notes that the Petitioner also identified several additional pollutant-specific and source category-specific provisions in the Indiana SIP that it alleged are inconsistent with the CAA and the EPA's SSM Policy. However, the Petitioner did not request that the EPA address those SIP provisions in its remedy request, and thus the EPA is not addressing those provisions in this action.

Continued

objected to the provision because it provides an exemption from the otherwise applicable SIP emission limitations, and such exemptions are impermissible under the CAA because the statute and the EPA's interpretation of the CAA in the SSM Policy require that all such excess emissions be treated as violations. The Petitioner noted that the provision is ambiguous because it states that excess emissions during malfunction periods "shall not be considered a violation" if the source demonstrates that a number of conditions are met (326 Ind. Admin. Code 1–6–4(a)), but the provision does not specify to whom or in what forum such demonstration must be made. If made in a showing to the state, the Petitioner argued, the provision would give a state official the sole authority to determine that the excess emissions were not a violation and could thus be read to preclude enforcement by the EPA or citizens in the event that the state official elects not to treat the excess emissions as a violation. Thus, in addition to creating an impermissible exemption for the excess emissions, the Petitioner argued that the SIP's provision is also inconsistent with the CAA as interpreted in the EPA's SSM Policy because it allows the state official to make a unilateral decision that the excess emissions were not a violation and thus bar enforcement for the excess emissions by the EPA and citizens.

Alternatively, the Petitioner noted, if the demonstration was required to have been made in an enforcement context, the provision could be interpreted as providing an affirmative defense. The Petitioner argued that even if interpreted in this way, the provision is not permissible because it "appears to confuse an enforcement discretion approach with the affirmative defense approach." Furthermore, the Petitioner argued that 326 Ind. Admin. Code 1–6–4(a) is not an acceptable affirmative defense provision because it "could be interpreted to preclude EPA and citizen enforcement and shield sources from injunctive relief."

h. The EPA's Evaluation

The EPA agrees that the CAA does not allow for discretionary exemptions from otherwise applicable SIP emission limitations. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitation must be considered violations, whether or not the state elects to exercise its enforcement discretion. SIP provisions such as 326 Ind. Admin. Code 1–6–4(a) that can be interpreted to authorize a state official to determine unilaterally that the excess emissions during malfunctions are not violations of the applicable emission limitations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. The EPA believes that the inclusion of a provision that allows discretionary exemptions in the SIP is thus a substantial inadequacy and renders 326 Ind. Admin. Code 1–6–4(a) impermissible.

The EPA believes that 326 Ind. Admin. Code 1–6–4(a) is also impermissible because the provision can be interpreted to make a state official the unilateral arbiter of whether the excess emissions in a given malfunction event constitute a violation. The 326 Ind. Admin. Code 1–6–4(a) provides that if a source demonstrates that four criteria are met, the excess emissions "shall not be considered a violation." Because the provision does not establish who is to evaluate whether the source has made an adequate demonstration, the provision could be read to authorize a state official to judge that violations have not occurred even though the emissions exceeded the applicable SIP emission limitations. These provisions therefore appear to vest the state official with the unilateral power to grant exemptions from otherwise applicable SIP emission limitations, without any additional public process at the state or federal level. By deciding that an exceedance of the emission limitation was not a "violation," exercise of this discretion could preclude enforcement by the EPA or through a citizen suit. Most importantly, however, the provision could be read to authorize the state official to create an exemption from the otherwise applicable SIP emission limitation, and such an exemption is impermissible in the first instance. Such a director's discretion provision undermines the emission limitations and the emissions reductions they are intended to achieve and renders them less enforceable by the EPA or through a citizen suit. The EPA believes that the inclusion of a director's discretion provision in 326 Ind. Admin. Code 1–6–4(a) is thus a substantial inadequacy and renders these specific SIP provisions impermissible for this reason.

The EPA believes that even if 326 Ind. Admin. Code 1–6–4(a) is interpreted to allow the source to make the required demonstration only in the context of an enforcement proceeding, the conditions set forth in the provision do not render it an acceptable affirmative defense provision. Although the EPA believes that narrowly drawn affirmative defenses are permitted under the CAA for malfunction events (*see* section VII.B of this notice), the EPA's interpretation of the CAA is that such affirmative defenses can only shield the source from monetary penalties and cannot be a bar to injunctive relief. An affirmative defense provision that purports to bar any enforcement action for injunctive relief for violations of emission limitations is inconsistent with the requirements of CAA sections 113 and 304.

Furthermore, Indiana's SIP provision is deficient because even if it were interpreted to create an affirmative defense rather than an exemption from the applicable emission limitations, it does so with conditions that are not consistent with the criteria that the EPA recommends in the SSM Policy. The EPA acknowledges that the SSM Policy is only guidance concerning what types of SIP provisions could be consistent with the requirements of the CAA. Nonetheless, through this rulemaking, the EPA is proposing to determine that 326 Ind. Admin. Code 1–6–4(a) does not include criteria that are sufficiently robust to qualify as an acceptable affirmative defense provision under the CAA. The conditions in the provision are helpful but are not consistent with all of the criteria recommended in the EPA's SSM Policy. For example, this provision does not contain criteria requiring the source to establish that the malfunction event was not foreseeable and not part of a recurring pattern indicative of inadequate design, operation, or maintenance. Indeed, the explicit limitation that the "malfunctions have not exceeded five percent (5%), as a guideline, of the normal operational time of the facility" suggests that a source could be granted exemptions for excess emissions even though it was habitually violating the applicable emission limitations over some extended period of time.

The EPA believes that the inclusion of the complete bar to liability, including injunctive relief, and the insufficiently robust qualifying criteria render 326 Ind. Admin. Code 1–6–4(a) substantially inadequate to meet CAA requirements.

Significantly, the EPA notes that the correct meaning of 326 Ind. Admin.

The EPA may elect to evaluate those provisions in a later action.

[150] Petition at 36–37.

Code 1–6–4(a) has been addressed in the past in conjunction with an interpretive letter from the state in 1984, which characterized the provision as an enforcement discretion provision applicable to state personnel rather than as a provision allowing exemptions from the emission limitations. The EPA appreciates Indiana's clarification of its reading of the provision in the 1984 letter, but at this juncture, in the course of reevaluating this provision in light of the issues raised in the Petition, the EPA believes that 326 Ind. Admin. Code 1–6–4(a) contains regulatory language that requires formal revision to eliminate significant ambiguities. For example, the provision states that: "[e]missions temporarily exceeding the standards which are due to malfunctions * * * shall not be considered a violation of the rules provided the source demonstrates" four criteria. Indiana has acknowledged that it reads these provisions not to bar enforcement by the EPA or citizens in the event that the state does not pursue enforcement, but the EPA believes that the provision is sufficiently ambiguous on this point that a revision is necessary to ensure that outcome in the event of an enforcement action.

As discussed in section VI of this notice, the EPA believes that in some instances it is appropriate to clarify provisions of a SIP submission through the use of interpretive letters. However, in some cases, there may be areas of regulatory ambiguity in a SIP provision that are significant and for which resolution is both appropriate and necessary. Because the text of 326 Ind. Admin. Code 1–6–4(a) provision is not clear on its face that it is limited to the exercise of enforcement discretion by state personnel but rather could be interpreted as a discretionary exemption from the otherwise applicable SIP emission limitations or as an inadequate affirmative defense provision, the EPA believes this SIP provision is substantially inadequate to meet CAA requirements.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to 326 Ind. Admin. Code 1–6–4(a). The EPA believes that this provision appears on its face to allow for discretionary exemptions from otherwise applicable SIP emission limitations, and that such exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs in sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). This provision allows for exemptions through a state official's unilateral exercise of discretionary authority that includes no additional public process at the state or federal level, and such provisions are inconsistent with the fundamental requirements of the CAA with respect to SIPs and SIP revisions. Moreover, the discretion created by this provision allows case-by-case exemptions from emission limitations when such exemptions are not permissible in the first instance.

Even if the EPA were to interpret 326 Ind. Admin. Code 1–6–4(a) to be an affirmative defense applicable in an enforcement context, the provision is not consistent with the EPA's recommendations in the EPA's SSM Policy interpreting the CAA. By purporting to create a bar to enforcement that applies not just to monetary penalties but also to injunctive relief, and by including criteria inconsistent with those recommended by the EPA for affirmative defense provisions, this provision is inconsistent with the requirements of CAA sections 113 and 304. For these reasons, the EPA is proposing to find that 326 Ind. Admin. Code 1–6–4(a) is substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to this provision.

3. Michigan

a. Petitioner's Analysis

The Petitioner objected to a generally applicable provision in Michigan's SIP that provides for an affirmative defense to monetary penalties for violations of otherwise applicable SIP emission limitations during periods of startup and shutdown.[151] The Petitioner argued that affirmative defenses for excess emissions are inconsistent with the CAA and requested that the provision be removed from Michigan's SIP. Alternatively, if such a provision were to remain in the SIP, the Petitioner asked that the SIP be amended to address two deficiencies.

First, the Petitioner objected to one of the criteria in the affirmative defense provision, Mich. Admin. Code r. 336.1916, which makes the defense available to a single source or small group of sources as long as such source did not "cause[] an exceedance of the national ambient air quality standards or any applicable prevention of significant deterioration increment." The Petitioner argued that this criterion of Michigan's affirmative defense provision is contrary to the EPA's SSM Policy because "[s]ources with *the potential* to cause an exceedance should be more strictly controlled at all times and should not be able to mire enforcement proceedings in the difficult empirical questions of whether or not the NAAQS or PSD increments were exceeded as a matter of fact" (emphasis in original).

Second, the Petitioner objected to the availability of Michigan's affirmative defense provision, Mich. Admin. Code r. 336.1916, for violations of "an applicable emission limitation," which Petitioner pointed out would include "limits derived from federally promulgated technology based standards, such as NSPSs and NESHAPs." The Petitioner argued that according to the EPA's SSM Policy, sources should not be able to seek an affirmative defense for violations of these federal technology-based standards.

b. The EPA's Evaluation

As discussed in more detail in section IV.B of this notice, the EPA does not agree with the Petitioner that affirmative defenses should never be permissible in SIPs. The EPA believes that narrowly drawn affirmative defenses can be permitted under the CAA for malfunction events, because where excess emissions are entirely beyond the control of the owner or operator of the source, it can be appropriate to provide limited relief to claims for monetary penalties (*see* section VII.B of this notice). However, as discussed in section IV.B of this notice, this basis for permitting affirmative defenses for malfunctions does not translate to planned events such as startup and shutdown. By definition, the owner or operator of a source can foresee and plan for startup and shutdown events, and therefore the EPA believes that states should be able to establish, and sources should be able to comply with, the applicable emission limitations or other controls measures during these periods of time. A source can be designed, operated, and maintained to control and to minimize emissions during such normal expected events. If sources in fact cannot meet the otherwise applicable emission limitations during planned events such as startup and shutdown, then a state may elect to develop specific alternative requirements that apply during such periods, so long as they meet other applicable CAA requirements. The EPA believes that the inclusion of an affirmative defense that applies *only* to violations that occurred during periods of startup and shutdown in Mich. Admin. Code r. 336.1916 is thus a substantial inadequacy and renders this specific SIP provision impermissible.

[151] Petition at 44–46.

The EPA does not agree with the Petitioner that affirmative defense provisions are, *per se*, impermissible for a "single source or small group of sources." The EPA believes that a SIP provision may meet the overarching statutory requirements through a demonstration by the source that the excess emissions during the SSM event did not in fact cause a violation of the NAAQS. As discussed in section VII B of this notice, the EPA considers this another means by which to assure that affirmative defense provisions are narrowly drawn to justify relief from monetary penalties for excess emissions during malfunction events. Through this alternative approach, sources also have an incentive to comply with applicable emission limitations and thereby to support the larger objective of attaining and maintaining the NAAQS.

The EPA does agree that an approvable affirmative defense provision, consistent with CAA requirements, cannot apply to any federal emission limitations approved into a SIP. Thus, if the state has elected to incorporate NSPS or NESHAP into its SIP for any purpose, such as to obtain credit for the resulting emissions reductions as part of an attainment plan, the SIP cannot have a provision that would extend any affirmative defense to sources beyond what is otherwise provided in the underlying federal regulation. To the extent that any affirmative defense is warranted during malfunctions for these technology-based standards, the federal standards contained in the EPA's regulations already specify the appropriate affirmative defense. No additional or different affirmative defense provision applicable through a SIP provision is warranted or appropriate. On its face, Mich. Admin. Code r. 336.1916 does not explicitly limit its scope to exclude federal emission limitations approved into the SIP. Thus, this would be an additional way in which the provision is substantially inadequate to meet CAA requirements.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to Mich. Admin. Code r. 336.1916, which provides for an affirmative defense to violations of applicable emission limitations during startup and shutdown events. The availability of an affirmative defense for excess emissions that occur during planned events is contrary to the EPA's interpretation of the CAA to allow such affirmative defenses only for events beyond the control of the source, *i.e.*, during malfunctions. For this reason, the EPA is proposing to find that Mich. Admin. Code r. 336.1916 is substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to this provision.

4. Minnesota

a. Petitioner's Analysis

The Petitioner objected to a provision in the Minnesota SIP that provides automatic exemptions for excess emissions resulting from flared gas at petroleum refineries when those flares are caused by startup, shutdown, or malfunction (Minn. R. 7011.1415).[152] The provision states that: "The combustion of process upset gas in a flare, or the combustion in a flare of process gas or fuel gas which is released to the flare as a result of relief valve leakage is exempt from the standards of performance set forth in this regulation." The Petitioner noted that "process upset gas" is defined in the regulation as "any gas generated by a petroleum refinery process unit as a result of start-up, shutdown, upset, or malfunction" (Minn. R. 7011.1400(12)). The Petitioner argued that such an automatic exemption for emissions during startup, shutdown, or malfunction in a SIP provision is a violation of the fundamental requirements of the CAA and the EPA's SSM Policy that all excess emissions be considered violations, and that such an exemption interferes with enforcement by the EPA and citizens.

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for automatic exemptions from otherwise applicable SIP emission limitations and requirements. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitation must be considered violations of such limitations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that the excess emissions during startup, shutdown, or malfunction are not violations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs.

The automatic exemption provision identified by the Petitioner explicitly states that "process upset gas," which is defined as gas generated by the affected sources as a result of start-up, shutdown, upset, or malfunction, "is exempt from the standards" (Minn. R. 7011.1415). Any exceedances of the standards during those periods would therefore not be considered a violation under this provision. With respect to the Petitioner's concern that these exemptions could interfere with enforcement by the EPA or citizens, the EPA agrees that this is one of the critical reasons why such provisions are impermissible under the CAA. By having SIP provisions that define what would otherwise be violations of the applicable emission limitations as non-violations, the state has effectively negated the ability of the EPA or the public to enforce against those violations. The EPA believes that the inclusion of such automatic exemptions from SIP requirements in Minn. R. 7011.1415 is thus a substantial inadequacy and renders this specific SIP provision impermissible.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to Minn. R. 7011.1415. The EPA believes that this provision allows for automatic exemptions from the otherwise applicable SIP emission limitations and requirements, and that such exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs as required by sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, by creating these impermissible exemptions, the state has defined violations in a way that would interfere with effective enforcement by the EPA and citizens for excess emissions during these events as provided in CAA sections 113 and 304. For these reasons, the EPA is proposing to find that Minn. R. 7011.1415 is substantially inadequate to meet CAA requirements and thus is proposing to issue a SIP call with respect to this provision.

5. Ohio

a. Petitioner's Analysis

The Petitioner first objected to a generally applicable provision in the Ohio SIP that allows for discretionary exemptions during periods of scheduled maintenance (Ohio Admin. Code 3745–15–06(A)(3)).[153] The provision provides the state official with the authority to permit continued operation of a source during scheduled maintenance "where a complete source shutdown may result in damage to the air pollution sources or is otherwise impossible or

[152] Petition at 46–47.

[153] Petition at 60–61.

impractical." Upon application, the state official "shall authorize the shutdown of the air pollution control equipment if, in his judgment, the situation justifies continued operation of the sources." The Petitioner also objected to two source category-specific and pollutant-specific provisions that provide for discretionary exemptions during malfunctions (Ohio Admin. Code 3745–17–07(A)(3)(c) and Ohio Admin. Code 3745–17–07(B)(11)(f)).[154]

The Petitioner argued that these provisions could provide exemptions from the otherwise applicable SIP emission limitations, and such exemptions are impermissible under the CAA because the statute and the EPA's interpretation of the CAA in the SSM Policy require that all such excess emissions be treated as violations. Moreover, the Petitioner objected to these discretionary exemptions because the state official's grant of permission to continue to operate during the period of maintenance, or to exempt sources from otherwise applicable SIP emission limitations during malfunctions, could be interpreted to excuse excess emissions during such time periods and could thus be read to preclude enforcement by the EPA or citizens in the event that the state official elects not to treat the events as violations. Thus, in addition to creating an impermissible exemption for the excess emissions, the Petitioner argued, the provisions are also inconsistent with the CAA as interpreted in the EPA's SSM Policy because they allow the state official to make a unilateral decision that the excess emissions were not a violation and thus bar enforcement for the excess emissions by the EPA and citizens.

The Petitioner also objected to a source category-specific provision in the Ohio SIP that allows for an automatic exemption from applicable emission limitations and requirements during periods of startup, shutdown, malfunction, or regularly scheduled maintenance activities (Ohio Admin. Code 3745–14–11(D)). The Petitioner objected because this provision provides an exemption from the otherwise applicable SIP requirements, and such exemptions are inconsistent with the requirements of the CAA as interpreted in the EPA's SSM Policy. The Petitioner argued that the CAA and the EPA's interpretation of the CAA in the SSM Policy require that all excess emissions be treated as violations. The Petitioner also objected to this provision because, by providing an outright exemption from otherwise applicable requirements, the state has defined these excess emissions as not violations, thereby precluding enforcement by the EPA or citizens for the excess emissions that would otherwise be violations.

Finally, the Petitioner objected to provisions that contain exemptions for Hospital/Medical/Infectious Waste Incinerator (HMIWI) sources during startup, shutdown, and malfunction (Ohio Admin. Code 3745–75–02(E), Ohio Admin. Code 3745–75–02(J), Ohio Admin. Code 3745–75–03(I), Ohio Admin. Code 3745–75–04(K), Ohio Admin. Code 3745–75–04(L)). The Petitioner requested that these exemptions be removed entirely from Ohio's SIP.

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations through the exercise of a state official's discretion. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitation must be considered violations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that excess emissions during startup, shutdown, malfunctions, or maintenance are not violations of the applicable emission limitations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. The EPA believes that the inclusion of such exemptions from the emission limitations in Ohio Admin. Code 3745–15–06(A)(3), Ohio Admin. Code 3745–17–07(A)(3)(c), Ohio Admin. Code 3745–17–07(B)(11)(f), and Ohio Admin. Code 3745–15–06(C) is thus a substantial inadequacy and renders these specific SIP provisions impermissible.

The EPA believes that Ohio Admin. Code 3745–15–06(A)(3), Ohio Admin. Code 3745–17–07(A)(3)(c), Ohio Admin. Code 3745–17–07(B)(11)(f), and Ohio Admin. Code 3745–15–06(C) are also impermissible as unbounded director's discretion provisions that make a state official the unilateral arbiter of whether the excess emissions in a given event constitute a violation. In the case of Ohio Admin. Code 3745–15–06(A)(3), the provision authorizes the state official to allow continued operation at sources "during scheduled maintenance of air pollution control equipment." The state official's grant of permission to continue to operate during the period of maintenance could be interpreted to excuse excess emissions during that period and could thus be read to preclude enforcement by the EPA or through a citizen suit in the event that the state official elects not to treat the excess emissions as a violation. In addition, the provision vests the state official with the unilateral power to grant an exemption from the otherwise applicable SIP emission limitations, without any additional public process at the state or federal level. Although the provision does require sources to submit a report indicating the expected length of the event and estimated quantities of emissions, among other things, ultimately the state official makes his determination "if, in his judgment, the situation justifies continued operation of the sources." The state official's discretion is therefore not sufficiently bounded and extends to granting a complete exemption from applicable emission limitations that would be impermissible in the first instance.

The EPA believes that Ohio Admin. Code 3745–17–07(A)(3)(c), which exempts sources from visible particulate matter limitations during malfunctions, and Ohio Admin. Code 3745–17–07(B)(11)(f), which exempts sources from fugitive dust limitations during malfunctions, also impermissibly provide exemptions through exercise of a state official's discretion because the provisions authorize exemptions if the source has complied with Ohio Admin. Code 3745–15–06(C). The Ohio Admin. Code 3745–15–06(C) provides the state official with the discretion to "evaluate" reports of malfunctions submitted by sources and to "take appropriate action upon a determination" that sources have not adequately met the requirements of the provision. Although the Petitioner did not request that the EPA evaluate Ohio Admin. Code 3745–15–06(C), it is the regulatory mechanism by which exemptions are granted in the two provisions to which the Petitioner did object. Similar to Ohio Admin. Code 3745–15–06(A)(3), which is the director's discretion provision discussed earlier in this section of the notice, the EPA finds that Ohio Admin. Code 3745–

[154] The EPA notes that Petitioner did not categorize these provisions as discretionary exemptions, but both Ohio Admin. Code 3745–17–07(A)(3)(c) and Ohio Admin. Code 3745–17–07(B)(11)(f) provide for exemptions during malfunctions if sources have complied with Ohio Admin. Code 3745–15–06(C), which allows the director to "evaluate" malfunction reports required by the rule and to "take appropriate action upon a determination." The EPA therefore believes that the mechanism by which exemptions are granted under Ohio Admin. Code 3745–17–07(A)(3)(c) and Ohio Admin. Code 3745–17–07(B)(11)(f) is by exercise of the state director's discretion.

17–07(A)(3)(c) and Ohio Admin. Code 3745–17–07(B)(11)(f) could be interpreted to excuse excess emissions during malfunction events and could thus be read to preclude enforcement by the EPA or through a citizen suit in the event that the state official elects not to treat the excess emissions as a violation. In addition, the provision vests the state official with the unilateral power to grant an exemption from otherwise applicable SIP emission limitations, without any additional public process at the state or federal level. Although the provision does require the state official to consider the reports filed by sources before making a determination, the provision remains insufficiently bounded.

Most importantly, however, these provisions all purport to authorize the state official to create exemptions from the emission limitations, and such exemptions are impermissible in the first instance. Such director's discretion provisions undermine the emission limitations and the emissions reductions they are intended to achieve and render them less enforceable by the EPA or through a citizen suit. The EPA believes that the inclusion of an unbounded director's discretion provision in Ohio Admin. Code 3745–15–06(A)(3), Ohio Admin. Code 3745–17–07(A)(3)(c), Ohio Admin. Code 3745–17–07(B)(11)(f), and Ohio Admin. Code 3745–15–06(C) is thus a substantial inadequacy and renders these specific SIP provisions impermissible for this reason, in addition to the creation of impermissible exemptions.

With regard to the Petitioner's objection to the exemption for portland cement kilns from otherwise applicable requirements at Ohio Admin. Code 3745–14–11(D), the EPA agrees that the CAA does not allow for automatic exemptions from otherwise applicable SIP emission limitations and requirements. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitation must be considered violations of such limitations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that the excess emissions during startup, shutdown, malfunction, or maintenance are not violations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs.

The automatic exemption provision in Ohio Admin. Code 3745–14–11(D) explicitly states that the regulation's requirement that the use of control measures such as low-NOx burners during the ozone season and monitoring, reporting, and recordkeeping of ozone season NOx emissions "shall not apply" during periods of startup, shutdown, malfunction, and maintenance. The exemptions therefore provide that the excess emissions resulting from failure to run required control measures will not be violations, contrary to the requirements of the CAA. In addition, exemption from monitoring, recordkeeping, and reporting requirements during these events affects the enforceability of the emission limitation in the SIP provision. Moreover, failure to account accurately for excess emissions at sources during SSM events has a broader impact on NAAQS implementation and SIP planning, because such accounting directly informs the development of emissions inventories and emissions modeling. With respect to the Petitioner's concern that these exemptions preclude enforcement by the EPA or citizens, the EPA agrees that this is one of the critical reasons why such provisions are impermissible under the CAA. By having SIP provisions that define what would otherwise be violations of the applicable emission limitations as non-violations, the state has effectively negated the ability of the EPA or the public to enforce against those violations. The EPA believes that the inclusion of such automatic exemptions from SIP requirements in Ohio Admin. Code 3745–14–11(D) is thus substantially inadequate to meet CAA requirements.

Finally, the EPA disagrees that the provisions providing exemptions for HMIWI must be removed from the SIP. Ohio Admin. Code 3745–75–02(E), Ohio Admin. Code 3745–75–02(J), Ohio Admin. Code 3745–75–03(I), Ohio Admin. Code 3745–75–04(K), and Ohio Admin. Code 3745–75–04(L) are not approved into Ohio's SIP, but rather those rules were approved as part of the separate state plan to meet the applicable emissions guidelines under CAA § 111(d) and 40 CFR part 60. Because those rules are not in the Ohio SIP and are not related to any provisions in the SIP, they do not represent a substantial inadequacy in the SIP.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to Ohio Admin. Code 3745–15–06(A)(3), Ohio Admin. Code 3745–17–07(A)(3)(c), and Ohio Admin. Code 3745–17–07(B)(11)(f). The EPA believes that these provisions allow for exemptions from the otherwise applicable SIP emission limitations, and that such exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. In addition, Ohio Admin. Code 3745–15–06(A)(3), Ohio Admin. Code 3745–17–07(A)(3)(c), Ohio Admin. Code 3745–17–07(B)(11)(f), and by extension, Ohio Admin. Code 3745–15–06(C), allow for such exemptions through a state official's unilateral exercise of discretionary authority that is insufficiently bounded and includes no additional public process at the state or federal level, and such provisions are inconsistent with the fundamental requirements of the CAA with respect to SIPs and SIP revisions. Moreover, the discretion created by these provisions allows case-by-case exemptions from emission limitations when such exemptions are not permissible in the first instance. As described in section VII.A of this notice, such provisions are inconsistent with fundamental CAA requirements for SIP revisions. For these reasons, the EPA is proposing to find that Ohio Admin. Code 3745–15–06(A)(3), Ohio Admin. Code 3745–17–07(A)(3)(c), Ohio Admin. Code 3745–17–07(B)(11)(f), and Ohio Admin. Code 3745–15–06(C) are substantially inadequate to meet CAA requirements and thus is proposing to issue a SIP call with respect to these provisions.

The EPA also proposes to grant the Petition with respect to Ohio Admin. Code 3745–14–11(D). The EPA believes that this provision allows for automatic exemptions from the otherwise applicable SIP emission limitations and requirements, and that such exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs as required by CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, by creating these impermissible exemptions, the state has defined violations in a way that would interfere with effective enforcement by the EPA and citizens for excess emissions during these events as provided in CAA sections 113 and 304. For these reasons, the EPA is proposing to find that this provision is substantially inadequate to meet CAA requirements and thus is proposing to issue a SIP call with respect to this provision.

The EPA proposes to deny the Petition with respect to Ohio Admin. Code 3745–75–02(E), Ohio Admin. Code 3745–75–02(J), Ohio Admin. Code 3745–75–03(I), Ohio Admin. Code

3745–75–04(K), and Ohio Admin. Code 3745–75–04(L). These provisions are not part of the Ohio SIP and thus cannot represent a substantial inadequacy in the SIP.

G. Affected States in EPA Region VI

1. Arkansas

a. Petitioner's Analysis

The Petitioner objected to two provisions in the Arkansas SIP.[155] First, the Petitioner objected to a provision that provides an automatic exemption for excess emissions of volatile organic compounds (VOC) for sources located in Pulaski County that occur due to malfunctions (Reg. 19.1004(H)). The provision states that excess emissions "which are temporary and result solely from a sudden and unavoidable breakdown, malfunction or upset of process or emission control equipment, or sudden and unavoidable upset or operation will not be considered a violation * * *." The Petitioner argued that this language is impermissible because the CAA and the EPA's interpretation of the CAA in the SSM Policy require that all excess emissions be treated as violations.

Second, the Petitioner objected to a separate provision that provides a "complete affirmative defense" for excess emissions that occur during emergency conditions (Reg. 19.602). The Petitioner argued that this provision, which the state may have modeled after the EPA's title V regulations, is impermissible because its application is not clearly limited to operating permits.

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations. In accordance with CAA sections 110(a)(2)(A) and 302(k), SIPs must contain "emission limitations" and those limitations must be continuous. Thus, any excess emissions above the level of the applicable SIP emission limitation must be considered a violation of such limitation, regardless of whether the state elects to exercise its enforcement discretion. SIP provisions that create exemptions from applicable emission limitations during malfunctions or emergency conditions, however defined, are inconsistent with the fundamental requirements of the CAA.

The first provision identified by the Petitioner explicitly states that excess emissions of VOC "will not be considered a violation" of the applicable emission limitation if they occur due to an "unavoidable breakdown" or "malfunction." This exemption in Reg. 19.1004(H) is impermissible even though the state has limited the exemption to unavoidable breakdowns and malfunctions. The core problem remains that the provision provides an impermissible exemption from the otherwise applicable VOC emission limitations. In addition, by having a SIP provision that defines what would otherwise be violations of the applicable emission limitations as non-violations, the state has effectively negated the ability of the EPA or the public to enforce against those violations. The EPA believes that the inclusion of such an automatic exemption in Reg. 19.1004(H) is thus a substantial inadequacy and renders this SIP provision impermissible under the CAA.

The second provision identified by the Petitioner defines "emergency" conditions that may cause a source to exceed a technology-based emission limitation under a permit and provides a "complete affirmative defense" to an action brought for non-compliance with such limitations if certain criteria are met. The EPA believes that Reg. 19.602 is substantially inadequate for three reasons. First, the provision does not explicitly limit the affirmative defense to civil penalties. Although the EPA believes that narrowly drawn affirmative defenses are permitted under the CAA for malfunction events (*see* sections IV.B and VII.B of this notice), the EPA's interpretation of the CAA is that such affirmative defenses can only shield the source from monetary penalties and cannot be a bar to injunctive relief. An affirmative defense provision that purports to bar any enforcement action for injunctive relief for violations of emission limitations is inconsistent with the requirements of CAA sections 113 and 304. Second, the provision does not contain elements for establishing the affirmative defense consistent with all of the recommended criteria in the EPA's SSM Policy for SIP provisions. The EPA acknowledges that the SSM Policy is only guidance concerning what types of SIP provisions could be consistent with the requirements of the CAA. Nonetheless, through this rulemaking, the EPA is proposing to determine that Reg. 19.602 does not include criteria that are sufficiently robust to qualify as an acceptable affirmative defense provision. Finally, the provision can be read to provide additional defenses beyond those already provided in federal technology-based standards. The EPA believes that approvable affirmative defenses in a SIP provision cannot operate to create different or additional defenses from those that are provided in underlying federal technology-based emission limitations, such as NSPS or NESHAP. For these reasons, the EPA believes that Reg. 19.602 is substantially inadequate to meet the fundamental requirements of the CAA.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to Reg. 19.1004(H) and Reg. 19.602. The EPA believes that Reg. 19.1004(H) allows for an exemption from otherwise applicable SIP emission limitations and that such exemptions are inconsistent with the fundamental requirements of CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). Additionally, the EPA believes that Reg. 19.602 is an impermissible affirmative defense provision because it does not explicitly limit the defense to monetary penalties, establishes criteria that are inconsistent with those in the EPA's SSM Policy, and can be read to create different or additional defenses from those that are provided in underlying federal technology-based emission limitations. As a consequence, Reg. 19.602 is also inconsistent with CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). For these reasons, the EPA is proposing to find that these provisions are substantially inadequate to meet CAA requirements and proposes to issue a SIP call with respect to these provisions.

2. Louisiana

a. Petitioner's Analysis

The Petitioner objected to several provisions in the Louisiana SIP that allow for automatic and discretionary exemptions from SIP emission limitations during various situations, including startup, shutdown, maintenance, and malfunctions.[156] First, the Petitioner objected to provisions that provide automatic exemptions for excess emissions of VOC from wastewater tanks (LAC 33:III.2153(B)(1)(i)) and excess emissions of NOx from certain sources within the Baton Rouge Nonattainment Area (LAC 33:III.2201(C)(8)).[157] The

[155] Petition at 24. The Petitioner cites to 014–01–1 Ark. Code R. §§ 19.1004(H) and 19.602. The EPA interprets these citations as references to Reg. 19.1004(H) and Reg. 19.602 of the Arkansas Pollution Control & Ecology Commission (APC&EC), Regulation No. 19—Regulations of the Arkansas Plan of Implementation for Air Pollution Control, as approved by the EPA on Apr. 12, 2007 (72 FR 18394) (hereinafter referred to as Reg. 19.1004(H) and Reg. 19.602).

[156] Petition at 42–43.

[157] The EPA interprets the Petitioner's reference to La. Adm. Code tit. 33, § III:2153(B)(1)(i) as a

Continued

LAC 33:III.2153(B)(1)(i) provides that control devices "shall not be required" to meet emission limitations "during periods of malfunction and maintenance on the devices for periods not to exceed 336 hours per year." Similarly, LAC 33:III.2201(C)(8) provides that certain sources "are exempted" from emission limitations "during start-up and shutdown * * * or during a malfunction." The Petitioners argued that these provisions are impermissible because the CAA and the EPA's interpretation of the CAA in the SSM Policy require that all excess emissions be treated as violations.

Second, the Petitioner objected to provisions that provide discretionary exemptions to various emission limitations.[158] Three of these provisions provide discretionary exemptions from otherwise applicable SO_2 and visible emission limitations in the Louisiana SIP for excess emissions that occur during certain startup and shutdown events (LAC 33:III.1107, LAC 33:III.1507(A)(1), LAC 33:III.1507(B)(1)), while the other two provide such exemptions for excess emissions from nitric acid plants during startups and "upsets" (LAC 33:III.2307(C)(1)(a) and LAC 33:III.2307(C)(2)(a)). For example, LAC 33:III.1107, which deals with the control of emissions from flares, states that exemptions "may be granted by the administrative authority during startup and shutdown periods if the flaring was not the result of failure to maintain and repair equipment." The Petitioner argued that this language effectively allows a discretionary decision by a state official to exempt excess emissions during such events and thereby precludes enforcement by the EPA and citizens for what would otherwise be violations of the applicable SIP emission limitations, contrary to the requirements of the CAA.

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions for excess emissions from otherwise applicable SIP emission limitations, whether automatic or through the exercise of a state official's discretion. In accordance with sections 110(a)(2)(A) and 302(k), SIPs must contain "emission limitations" and those limitations must be continuous. Thus, any excess emissions above the level of the applicable SIP emission limitation must be considered a violation of such limitation, regardless of whether the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that the excess emissions during startup, shutdown, maintenance, or malfunctions are not violations of the applicable SIP emission limitations are inconsistent with the fundamental requirements of the CAA.

The first two SIP provisions identified by the Petitioner explicitly state that emission limitations for VOC and NOx are either "not required" or "exempted" during specified types of SSM events. The EPA believes that such automatic exemptions are impermissible under the CAA. By having SIP provisions that define what would otherwise be violations of the applicable SIP emission limitations as non-violations, the state has effectively negated the ability of the EPA or the public to enforce against those violations. Therefore, the EPA believes that the inclusion of such automatic exemptions in LAC 33:III.2153(B)(1)(i) and LAC 33:III.2201(C)(8) is a substantial inadequacy that renders these SIP provisions impermissible under the CAA.

The other five provisions identified by the Petitioner all provide the state with the discretion to "grant," "authorize," or "extend" exemptions from the otherwise applicable SIP emission limitations during various SSM events. The EPA believes that these provisions are impermissible as unbounded director's discretion provisions that make a state official the unilateral arbiter of whether the excess emissions in a given event constitute a violation of otherwise applicable SIP emission limitations. More importantly, the provisions purport to authorize the state official to create exemptions from applicable SIP emission limitations when such exemptions are impermissible in the first instance. As discussed in more detail in section VII.A of this notice, these types of director's discretion provisions undermine the purpose of emission limitations and the reductions they are intended to achieve, thereby rendering them less enforceable by the EPA or through a citizen suit. The EPA believes that the inclusion of such a director's discretion provision in LAC 33:III.1107(A), LAC 33:III.1507(A)(1), LAC 33:III.1507(B)(1), LAC 33:III.2307(C)(1)(a), and LAC 33:III.2307(C)(2)(a) is therefore a substantial inadequacy that renders these specific SIP provisions impermissible under the CAA.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to LAC 33:III.2153(B)(1)(i) and LAC 33:III.2201(C)(8). The EPA believes that these provisions allow for exemptions from otherwise applicable emission limitations and that such exemptions are inconsistent with the fundamental requirements of CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). The EPA also proposes to grant the Petition with respect to LAC 33:III.1107(A), LAC 33:III.1507(A)(1) & (B)(1), and LAC 33:III.2307(C)(1)(a) & (C)(2)(a). The discretion created by these provisions allows for revisions of the applicable SIP emission limitations without meeting the applicable SIP revision requirements of the CAA, and it allows case-by-case exemptions from emission limitations when such exemptions are not permissible in the first instance. Thus, these provisions are also inconsistent with CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). For these reasons, the EPA is proposing to find that each of these provisions is substantially inadequate to meet CAA requirements and proposes to issue a SIP call with respect to these specific provisions.

3. New Mexico

a. Petitioner's Analysis

The Petitioner objected to three provisions in the New Mexico SIP that provide affirmative defenses for excess emissions that occur during malfunctions (20.2.7.111 NMAC), during startup and shutdown (20.2.7.112 NMAC), and during emergencies 20.2.7.113 NMAC).[159] The Petitioner objected to the inclusion of these provisions in the SIP based on its view that affirmative defense provisions

citation to LAC 33:III.2153(B)(1)(i), as approved by the EPA on June 20, 2002 (67 FR 41840) (hereinafter referred to as LAC 33:III.2153(B)(1)(i)). Similarly, the EPA interprets the Petitioner's reference to La. Adm. Code tit. 33, § III:2201(C)(8) as a citation to LAC 33:III.2201(C)(8), as approved by the EPA on July 5, 2011 (76 FR 38977) (hereinafter referred to as LAC 33:III.2201(C)(8)).

[158] The EPA interprets the Petitioner's reference to La. Adm. Code tit. 33, § III:1107 as a citation to LAC 33:III.1107(A), as approved by the EPA on July 5, 2011 (76 FR 38977 (hereinafter referred to as LAC 33:III.1107(A)). Similarly, the EPA interprets the Petitioner's reference to La. Adm. Code tit. 33, § III:1507(A)(1) and (B)(1) as citations to LAC 33:III.1507(A)(1) and (B)(1), as approved by the EPA on July 15, 1993 (58 FR 38060) (hereinafter referred to as LAC 33:III.1507(A)(1) and (B)(1)). Also, the EPA interprets the Petitioner's reference to La. Adm. Code tit. 33, § III:2307(C)(1)(a) and (C)(2)(a) as a citation to LAC 33:III.2307(C)(1)(a) and (C)(2)(a), as approved by the EPA on July 5, 2011 (76 FR 38977) (hereinafter referred to as LAC 33:III.2307(C)(1)(a) and (C)(2)(a)).

[159] Petition at 54–57. The EPA interprets the Petitioner's reference to N.M. Code R. § 20.2.7.111, N.M. Code R. § 20.2.7.112, and N.M. Code R. § 20.2.7.113, as citations to 20.2.7.111 NMAC, 20.2.7.112 NMAC, and 20.2.7.113 NMAC, as approved by the EPA on Sept. 14, 2009 (74 FR 46910) (hereinafter referred to as 20.2.7.111 NMAC, 20.2.7.112 NMAC, and 20.2.7.113 NMAC).

are always inconsistent with CAA requirements. The Petitioner also argued that each of these affirmative defenses is generally available to all sources, which is in contravention of the EPA's recommendation in the SSM Policy that affirmative defenses should not be available to "a single source or groups of sources that has the potential to cause an exceedance of the NAAQS." Finally, the Petitioner argued that the affirmative defense provision applicable to emergency events is impermissible because it was modeled after the EPA's title V regulations, which are not meant to apply to SIP provisions.

b. The EPA's Evaluation

The EPA disagrees with the Petitioner's contention that no affirmative defense provisions are permissible in SIPs under the CAA. As explained in more detail in sections IV.B and VII.B of this notice, the EPA interprets the CAA to allow affirmative defense provisions for malfunctions. As long as these provisions are narrowly drawn and consistent with the CAA, as recommended in the EPA's guidance for affirmative defense provisions in SIPs, the EPA believes that states may elect to have affirmative defense provisions for malfunctions. By contrast, however, based on evaluation of the legal and factual basis for affirmative defenses in SIPs, the EPA now believes that affirmative defense provisions are not appropriate in the case of planned source actions, such as startup and shutdown, because sources should be expected to comply with applicable emission limitations during those normal planned and predicted modes of source operation. Again, as explained in sections IV.B and VII.C of this notice, the EPA is changing its interpretation of the CAA with respect to affirmative defenses applicable during startup and shutdown events. As a result, 20.2.7.112 NMAC, which provides an affirmative defense to excess emissions that occur during startup or shutdown, is substantially inadequate to meet the requirements of the CAA.

With respect to the Petitioner's second concern, the EPA agrees that the state's inclusion of an affirmative defense for malfunctions that is available to all sources, including single sources or groups of sources with the potential to cause exceedances of the NAAQS or PSD increments, renders the provision inconsistent with the CAA. As explained more fully in section VII.B of this notice, the EPA believes that such affirmative defenses may be permissible if either there is no "potential" for exceedances, or alternatively, if the provision requires that the source make an affirmative showing that any excess emissions did not in fact cause an exceedance of the NAAQS or PSD increments. The EPA has previously approved such provisions as meeting CAA requirements on a case-by-case basis in specific actions on SIP submissions. Here, however, 20.2.7.111 NMAC is not restricted in application to only those sources that do not have the potential to cause an exceedance, nor does it contain any criteria requiring an "after the fact" showing that excess emissions from a single source or group of sources did not cause an exceedance. Therefore, the provision is substantially inadequate to satisfy the CAA and EPA's interpretation of CAA requirements.

Finally, 20.2.7.113 NMAC provides an affirmative defense for excess emissions that occur during emergencies, a concept borrowed from the EPA's title V regulations. This provision defines "emergency" conditions that may cause a source to exceed a technology-based emission limitation and provides a "complete affirmative defense" to an action brought for non-compliance with such limitations if certain criteria are met. The 20.2.7.113 NMAC is substantially inadequate for three reasons. First, the provision does not explicitly limit the affirmative defense to civil penalties. Although the EPA believes that narrowly drawn affirmative defenses are permitted under the CAA for malfunction events (*see* sections IV.B and VII.B of this notice), the EPA's interpretation of the CAA is that such affirmative defenses can only shield the source from monetary penalties and cannot be a bar to injunctive relief. An affirmative defense provision that purports to bar any enforcement action for injunctive relief for violations of emission limitations is inconsistent with the requirements of CAA sections 113 and 304. Second, the provision does not contain elements for establishing the affirmative defense consistent with all of the recommended criteria in the EPA's SSM Policy for SIP provisions. The EPA acknowledges that the SSM Policy is only guidance concerning what types of SIP provisions could be consistent with the requirements of the CAA. Nonetheless, through this rulemaking, the EPA is proposing to determine that 20.2.7.113 NMAC does not include criteria that are sufficiently robust to qualify as an acceptable affirmative defense provision. Finally, the provision can be read to provide additional defenses beyond those already provided in federal technology-based standards. The EPA believes that approvable affirmative defenses in a SIP provision cannot operate to create different or additional defenses from those that are provided in underlying federal technology-based emission limitations, such as NSPS or NESHAP. For these reasons, the EPA believes that 20.2.7.113 NMAC is impermissible under the CAA.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to 20.2.7.112 NMAC, which includes an affirmative defense applicable during startup and shutdown events that is contrary to the EPA's interpretation of the CAA. The EPA believes that this provision is inconsistent with the fundamental requirements of CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, this provision is inconsistent with the requirements of CAA sections 113 and 304. The EPA also proposes to grant the Petition with respect to 20.2.7.111 NMAC, which includes an affirmative defense applicable during malfunction events. This provision is inconsistent with the CAA because it neither limits the defense to only those sources that do not have the potential to cause exceedances of the NAAQS or PSD increments nor does it require sources to make an "after the fact" showing that no such exceedances actually occurred. Therefore, the EPA believes that this provision is similarly inconsistent with the fundamental requirements of CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k), and with respect to CAA sections 113 and 304. Finally, the EPA proposes to grant the Petition with respect to 20.2.7.113 NMAC. The EPA believes that this provision is an impermissible affirmative defense because it does not explicitly limit the defense to monetary penalties, it establishes criteria that are inconsistent with those in EPA's SSM Policy, and it can be read to create different or additional defenses from those that are provided in underlying federal technology-based emission limitations. Thus, this provision too is inconsistent with CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k), and with respect to CAA sections 113 and 304. For these reasons, the EPA is proposing to find that these provisions are substantially inadequate to meet CAA requirements and proposes to issue a SIP call with respect to these provisions.

4. Oklahoma

a. Petitioner's Analysis

The Petitioner objected to two provisions in the Oklahoma SIP that together allow for discretionary

exemptions from emission limitations during startup, shutdown, maintenance, and malfunctions (OAC 252:100–9–3(a) and OAC 252:100–9–3(b)).[160] These provisions state that excess emissions during each of these types of events constitute violations of the applicable SIP emission limitations "unless the owner or operator of the facility has complied with the notification requirements," which consist of a demonstration to the Director of the Air Quality Division that at least one of several criteria have been met. One example of the criteria includes a demonstration that the excess emissions resulted from "either malfunction or damage to the air pollution control or process equipment" or "scheduled maintenance." The Petitioner argued that these provisions empower the director to excuse violations entirely and thereby preclude enforcement by the EPA or citizens. Specifically, if an owner or operator satisfies the director that the regulatory criteria under section 3(b) have been met, then the language of section 3(a) creates an exemption for the source and strongly implies that the excess emissions are not a violation of the applicable SIP emission limitations. Therefore, the Petitioner argued that these provisions are inconsistent with the requirements of the CAA.

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations, even where the exemption is only available at the exercise of a state official's discretion. In accordance with sections 110(a)(2)(A) and 302(k), SIPs must contain "emission limitations" and those limitations must be continuous. Thus, any excess emissions above the level of the applicable SIP emission limitations must be considered a violation of such limitations, regardless of whether the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that the excess emissions during startup, shutdown, malfunctions, or maintenance are not violations of the applicable emission limitations are inconsistent with the fundamental requirements of the CAA.

The provisions identified by the Petitioner state that excess emissions during SSM events constitute violations "unless" the Director of the Air Quality Division provides an exemption. The EPA believes that OAC 252:100–9–3(a) and OAC 252:100–9–3(b) are impermissible, because they are unbounded director's discretion provisions that purport to make a state official the unilateral arbiter of whether the excess emissions in a given event constitute a violation. The provisions authorize the state official to create exemptions from applicable SIP emission limitations on a case-by-case basis when such exemptions are impermissible in the first instance. These types of director's discretion provisions undermine the purpose of emission limitations, and the reductions they are intended to achieve, thereby rendering them less enforceable by the EPA or through a citizen suit. The EPA believes that the inclusion of such a director's discretion provision in OAC 252:100–9–3(a) and OAC 252:100–9–3(b) is therefore a substantial inadequacy and renders these SIP provisions impermissible.

The EPA further notes that the provision allowing exemptions for excess emissions that occur during scheduled maintenance is inconsistent with CAA requirements for the reason that maintenance is a normal mode of source operation, during which sources should be expected to meet applicable SIP emission limitations. Since the 1983 SSM Guidance, the EPA has indicated its view that excess emissions that occur during maintenance should not be excused. Similarly, in the 1999 SSM Guidance, the EPA did not recommend any affirmative defense for excess emissions that occur during maintenance. In this action, the EPA is reiterating its view that the CAA does not permit exemptions or affirmative defenses for excess emissions that occur during such planned events.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to OAC 252:100–9–3(a) and OAC 252:100–9–3(b).[161] The discretion created by these provisions allows for revisions of the applicable SIP emission limitations without meeting the applicable SIP revision requirements of the CAA, and it allows case-by-case exemptions from emission limitations when such exemptions are not permissible in the first instance. As a result, these provisions are inconsistent with the fundamental requirements of CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). Therefore, the EPA is proposing to find that these provisions are substantially inadequate to meet CAA requirements and proposes to issue a SIP call with respect to these provisions.

H. Affected States in EPA Region VII

1. Iowa

a. Petitioner's Analysis

The Petitioner first objected to a specific provision in the Iowa SIP that allows for automatic exemptions from otherwise applicable SIP emission limitations during periods of startup, shutdown, or cleaning of control equipment (Iowa Admin. Code r. 567–24.1(1)).[162] The Petitioner noted that Iowa Admin. Code r. 567–24.1(1) provides that excess emissions from these periods are not violations of the emissions standard "if the startup, shutdown or cleaning is accomplished expeditiously and in a manner consistent with good practice for minimizing emissions." The Petitioner argued that such exemptions are inconsistent with the requirements of the CAA and the EPA's SSM Policy. The Petitioner argued that the CAA and the EPA's interpretation of the CAA in the SSM Policy require that all such excess emissions be treated as violations.

Second, the Petitioner objected to a provision that empowers the state to exercise enforcement discretion for violations of the otherwise applicable SIP emission limitations during malfunction periods (Iowa Admin. Code r. 567–24.1(4)).[163] The Petitioner noted that this provision—which states that "[d]etermination of *any* subsequent enforcement action will be made following review of [a] report" (emphasis added by Petitioner) submitted by the owner or operator of the source demonstrating certain conditions—could be interpreted to mean that "no enforcement is warranted at all, by anyone."[164] The Petitioner argued that such an interpretation of this provision could preclude enforcement by the EPA or citizens, both for civil penalties and injunctive relief, and that the EPA's interpretation of the CAA would forbid such a provision. The Petitioner thus requested that Iowa revise this provision to eliminate any confusion that a decision by Iowa state personnel not to enforce against a violation would in any way

[160] Petition at 61–63. The EPA interprets the Petitioner's reference to Okla. Admin. Code § 252:100–9–3(a) and Okla. Admin. Code § 252:100–9–3(b) as citations to OAC 252:100–9–3(a) and OAC 252:100–9–3(b), as approved by the EPA on Nov. 3, 1999 (64 FR 59629) (hereinafter referred to as OAC 252:100–9–3(a) and (3)(b)).

[161] The EPA notes that on July 16, 2010, Oklahoma submitted a SIP revision that would remove OAC 252:100–9–3(a) and OAC 252:100–9–3(b) and replace them with affirmative defense provisions. In this action, the EPA is only evaluating these provisions as they are currently found in the EPA-approved Oklahoma SIP. The EPA is not evaluating the July 16, 2010 SIP revision as part of this action. The EPA will address the July 16, 2010 SIP revision in a later action.

[162] Petition at 37–38.

[163] Petition at 37–38.

[164] Petition at 38.

foreclose enforcement by the EPA or citizens.

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitation must be considered violations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that excess emissions during startup, shutdown, or control equipment cleaning are not violations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. The first provision identified by the Petitioner explicitly states that excess emission during periods of startup, shutdown, and cleaning of control equipment "is not a violation," contrary to the requirements of the CAA. The EPA believes that the inclusion of such an exemption from otherwise applicable SIP emission limitations in Iowa Admin. Code r. 567–24.1(1) is thus a substantial inadequacy and renders this specific SIP provision impermissible.

The EPA notes that these exemptions are impermissible even though the state has imposed some factual limitations on their potential scope. In Iowa Admin. Code r. 567–24.1(1), the state has conditioned the exemption for excess emissions during periods of startup, shutdown, or cleaning of control equipment, requiring that such activities be "accomplished expeditiously and in a manner consistent with good practice for minimizing emissions." Although this limitation on the scope of the exemptions is a helpful feature, the core problem remains that the provision provides impermissible exemptions from the otherwise applicable SIP emission limitations by defining the excess emission as "not a violation." Such provisions are impermissible under the CAA because the state has effectively negated the ability of the EPA or through a citizen suit to enforce against those violations.

However, the EPA disagrees with Petitioner that Iowa Admin. Code r. 567–24.1(4) is impermissible under the CAA. The EPA believes that this provision is permissible because it defines parameters for the exercise of enforcement discretion by state personnel for violations of emission limitations during malfunctions. According to the EPA's SSM Policy interpreting the CAA, as discussed in section IX.A of this notice, a state has authority to have a SIP provision that pertains to the exercise of enforcement discretion concerning actions taken by state personnel. The provision at issue clearly states that any excess emission during malfunction "is a violation." The rule also delineates factors that will be considered by state personnel in determining whether to pursue enforcement for those regulatory violations that are due to excess emissions during malfunctions. The listing of these factors does not alter the statement that excess emissions are violations under the Iowa regulations. The provisions that describe the factors to be considered by state personnel only require that the state personnel consider such factors. The regulations do not state or imply that if a source makes an appropriate showing of meeting the factors, it is exempt from penalties or injunctive relief. The provision does not state or imply that any other entity, including the EPA or a member of the public, is precluded from taking an enforcement action if the state exercises its discretion not to enforce violations of the emission limitations during malfunctions. Iowa Admin. Code r. 567–24.1(4) expressly identifies excess emissions described in the rule as violations and allows for the exercise of enforcement discretion in addressing malfunctions. This is consistent with the CAA and the EPA's SSM Policy and therefore does not render the SIP provision substantially inadequate.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to Iowa Admin. Code. R. 567–24.1(1). The EPA believes that this provision allows for exemptions from the otherwise applicable SIP emission limitations, and that such exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs as required by sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). For this reason, the EPA is proposing to find that Iowa Admin. Code. R. 567–24.1(1) is substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to this provision.

The EPA proposes to deny the Petition with respect to Iowa Admin. Code r. 567–24.1(4). The EPA believes that the provision is on its face clearly applicable only to Iowa state enforcement personnel and that the provision could not reasonably be read by a court to foreclose enforcement by the EPA or through a citizen suit where Iowa state personnel elect to exercise enforcement discretion. The EPA solicits comments on this issue, in particular from the State of Iowa, to assure that there is no misunderstanding with respect to the correct interpretation of Iowa Admin. Code r. 567–24.1(4).

2. Kansas

a. Petitioner's Analysis

The Petitioner objected to three provisions in the Kansas SIP that allow for exemptions for excess emissions during malfunctions and necessary repairs (K.A.R. § 28–19–11(A)), scheduled maintenance (K.A.R. § 28–19–11(B)), and certain routine modes of operation (K.A.R. § 28–19–11(C)).[165] The Petitioner objected because all three of these provisions "state that excess emissions are not violations (or are permitted)," [166] contrary to the fundamental requirement of the CAA that all excess emissions be considered violations. The Petitioner argued that all three of these provisions would thus appear impermissibly to preclude enforcement by the EPA or citizens for the excess emissions that would otherwise be violations.

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations, whether automatic or through the exercise of a state official's discretion. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitation must be considered violations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that the excess emissions during malfunctions, necessary repairs, and routine modes of operation are not violations of the applicable emission limitations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. Two of the provisions identified by the Petitioner explicitly state that excess emissions under certain circumstances will "not be deemed violations," which is contrary to the requirements of the CAA. The EPA believes that the inclusion of such exemptions from the

[165] Petition at 38–39.

[166] Petition at 39.

emission limitations in K.A.R. § 28–19–11(A) and the first part of K.A.R. § 28–19–11(C) is thus a substantial inadequacy and renders these specific SIP provisions impermissible.

The EPA notes that these exemptions are impermissible even though the state has imposed some factual and temporal limitations on their potential scope. For example, in K.A.R. § 28–19–11(A), the state has specified that excess emissions during malfunctions or necessary repairs "shall not be deemed violations provided that: (1) The person responsible * * * notifies the department of the occurrence and nature of such malfunctions, breakdowns, or repairs, in writing, within ten (10) days of noted occurrence." Similarly, in the first part of K.A.R. § 28–19–11(C) with respect to "[e]xcessive contaminant emission from fuel burning equipment used for indirect heating purposes resulting from fuel or load changes, start up, soot blowing, cleaning of fires, and rapping of precipitators," the state has made the exemption available only in such events that "do not exceed a period or periods aggregating more than five (5) minutes during any consecutive one (1) hour period." Although these extra limitations on the scope of the exemptions are helpful features, the core problem remains that both of the provisions provide impermissible exemptions from the emission limitations by defining the excess emissions as non-violations.

The EPA believes that both K.A.R. § 28–19–11(B) and the second part of K.A.R. § 28–19–11(C) are impermissible as unbounded director's discretion provisions that purport to make a state official the unilateral arbiter of whether the excess emissions in a given event constitute a violation. In the case of K.A.R. § 28–19–11(B), the provision authorizes a state official unilaterally to grant "prior approval" to permit "[e]missions in excess of the limitations specified in these emission control regulations resulting from scheduled maintenance of control equipment and appurtenances." The provision vests the state official with unilateral power to grant an exemption from the otherwise applicable emission limitation, without any public process at the state or federal level. By deciding that an exceedance of the emission limitation is "permitted," exercise of this discretion could preclude enforcement by the EPA or through a citizen suit. K.A.R. § 28–19–11(B) does contain a requirement that the source establish that it was not possible for the scheduled maintenance to occur during periods of shutdown but nevertheless empowers the state official to create an exemption from the emission limitation, and such an exemption is impermissible in the first instance. Such a director's discretion provision undermines the emission limitations in the SIP, and the emissions reductions they are intended to achieve, and renders them less enforceable by the EPA or through a citizen suit.

Similarly, the EPA believes that the second part of K.A.R. § 28–19–11(C) is impermissible because it allows a state official unilaterally to "authorize, upon request of the operator, an adjusted time schedule for permitting * * * excessive emissions" if the source can demonstrate that the period of "fuel or load changes, start up, soot blowing, cleaning of fires, and rapping of precipitators" is required to extend longer than the five minutes during a consecutive one-hour period allowed by the first part of K.A.R. § 28–19–11(C). Because the K.A.R. § 28–19–11(C) grant of an automatic exemption of excess emissions during these events is impermissible in the first instance, the provision's authorization of the state official to extend the period of exemption for an even longer period upon request from a source is also impermissible. Moreover, the provision permits the state official to extend the time period of exemption without any additional public process at the state or federal level. This discretion authorizes the creation of an extended exemption on a case-by-case basis, where the exemption is not permissible in the first instance. Thus, this provision undermines the SIP emission limitations, and the emissions reductions they are intended to achieve, and renders them less enforceable by the EPA or through a citizen suit. The EPA believes that the inclusion of director's discretion provisions in K.A.R. § 28–19–11(B) and K.A.R. § 28–19–11(C) is thus a substantial inadequacy and renders these specific SIP provisions impermissible for this reason.

The EPA notes that K.A.R. § 28–19–11(C) does condition the state official's authorization of an extended time period in which excess emissions are not considered violations upon a source limiting "visible emissions" to not exceed 60 percent opacity. The CAA does, as discussed in section VII.A of this notice, permit states to develop alternative emission limitations or other forms of enforceable control measures or techniques that apply during startup or shutdown. The EPA believes that emission limitations in SIPs should generally be developed in the first instance to account for the types of normal operation outlined in K.A.R. § 28–19–11(C), such as cleaning and soot blowing. K.A.R. § 28–19–11(C) does not appear to comply with the Act's requirements as interpreted in the EPA's SSM Policy in a number of respects. The provision's exemptions apply to all SIP emission limitations, and the alternative limitation in K.A.R. § 28–19–11(C) restricts only visible emissions and thus, at best, is an alternative emission limitation only for particulate matter. In addition, such alternative emission limitations must be developed in consultation with the EPA and must be narrowly drawn to apply to small groups of sources using specific types of control strategy. To the extent that the requirement limiting the opacity of visible emissions during periods of fuel or load changes, start up, soot blowing, cleaning of fires, and rapping of precipitators in K.A.R. § 28–19–11(C) was intended to function as an alternative emission limitation rather than as an exemption granted at the state official's discretion from the otherwise applicable SIP emission limitations, the terms of the alternative limitation are substantially inadequate and do not render this specific SIP provision permissible under the CAA.

With respect to the Petitioner's concern that the challenged exemptions preclude enforcement by the EPA or citizens, the EPA agrees that this is one of the critical reasons why such provisions are impermissible under the CAA. By having SIP provisions that automatically exempt or allow state officials to define what would otherwise be violations of the applicable SIP emission limitations as non-violations, the state has effectively negated the ability of the EPA or the public to enforce against those violations.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to K.A.R. § 28–19–11(A) and the first part of K.A.R. § 28–19–11(C). The EPA believes that both of these provisions allow for automatic exemptions from the otherwise applicable emission limitations, and that such outright exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs as required by sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, by creating these impermissible exemptions, the state has defined violations in a way that would interfere with effective enforcement by the EPA and citizens for excess emissions during these events as provided in CAA sections 113 and 304.

The EPA also proposes to grant the Petition with respect to K.A.R. § 28–19–11(B) and the second part of K.A.R.

§ 28–19–11(C). The EPA believes both allow for exemptions from otherwise applicable emission limitations through a state official's unilateral exercise of discretionary authority that is insufficiently bounded and includes no additional public process at the state or federal level. Such provisions are inconsistent with the fundamental requirements of the CAA with respect to SIPs and SIP revisions. Moreover, the requirement that visible emissions not exceed 60-percent opacity during the periods of operation specified in K.A.R. § 28–19–11(C) is not a permissible alternative emission limitation under the EPA's SSM Policy interpreting the CAA.

For these reasons, the EPA is proposing to find that K.A.R. § 28–19–11(A), K.A.R. § 28–19–11(B), and K.A.R. § 28–19–11(C) are substantially inadequate to meet CAA requirements and thus is proposing to issue a SIP call with respect to these provisions.

3. Missouri

a. Petitioner's Analysis

The Petitioner objected to two provisions in the Missouri SIP that could be interpreted to provide discretionary exemptions.[167] [168] The first provides exemptions for visible emissions exceeding otherwise applicable SIP opacity limitations (Mo. Code Regs. Ann. tit 10, § 10–6.220(3)(C)). The second provides authorization to state personnel to decide whether excess emissions "warrant enforcement action" where a source submits information to the state showing that such emissions were "the consequence of a malfunction, start-up or shutdown." (Mo. Code Regs. Ann. tit 10, § 10–6.050(3)(C)). The Petitioner argued that Mo. Code Regs. Ann. tit 10, § 10–6.050(3)(C) "clearly gives the director the authority to decide whether excess emissions occurred during a malfunction, start-up, or shutdown, and whether they 'warrant enforcement action.'" [169] According to the Petitioner, the provision could be interpreted to decide that enforcement is not warranted by anybody, which could preclude action by the EPA and citizens for both civil penalties and injunctive relief, and such an interpretation is inconsistent with the CAA and the EPA's SSM policy interpreting the CAA. Similarly, the Petitioner argued that Mo. Code Regs. Ann. tit 10, § 10–6.220(3)(C) could be construed to empower the director to preclude enforcement by the EPA and citizens. The Petitioner noted that the CAA and the EPA's SSM policy forbid such provisions if they would purport to preclude enforcement by the EPA or citizens.

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations, whether automatic or through the exercise of a state official's discretion. In accordance with the requirements of section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitations must be considered violations, whether or not the state elects to exercise its enforcement discretion.

The EPA believes that Mo. Code Regs. Ann. tit 10, § 10–6.220(3)(C) is impermissible as an insufficiently bounded director's discretion provision. The provision states that "[v]isible emissions over the limitations * * * of this rule are in violation of this rule unless the director determines that the excess emissions do not warrant enforcement action based on data submitted" by sources regarding startup, shutdown, and malfunction events. This provision could be read to mean that once the state official has determined that excess visible emissions do not warrant enforcement action, those excess emissions are not violations. Such an interpretation would make the state official the unilateral arbiter of whether the excess emissions in a given event constitute a violation, which could preclude enforcement by the EPA or the public who might disagree about whether enforcement action is warranted. Most importantly, however, the provision may be read to authorize the state official to create an exemption from the emission limitation, and such an exemption is impermissible in the first instance. The EPA believes that the inclusion of an insufficiently bounded director's discretion provision in Mo. Code Regs. Ann. tit 10, § 10–6.220(3)(C) is thus a substantial inadequacy and renders this specific SIP provision impermissible for this reason.

The EPA believes that Mo. Code Regs. Ann. tit 10, § 10–6.050(3)(C) is permissible because it defines parameters for the exercise of enforcement discretion by state personnel for violations of emission limitations. According to the EPA's SSM Policy, as discussed in section IX.A of this notice, a state has authority to have a SIP provision that pertains to the exercise of enforcement discretion concerning actions taken by state personnel. The provision only maintains that state enforcement personnel "shall consider" certain factors in determining whether to take an enforcement action under the state statutory enforcement provisions. The regulations do not state or imply that if a source makes an appropriate showing it is exempt from penalties or injunctive relief. The provisions that describe the factors to be considered by a state official only state that the official will consider such factors. The provision does not state or imply that any other entity, including the EPA or a member of the public, is precluded from taking an enforcement action if the state exercises its discretion not to pursue enforcement. The EPA believes that Mo. Code Regs. Ann. tit 10, § 10–6.050(3)(C) is consistent with the CAA and the EPA's SSM Policy and therefore does not render the SIP provision substantially inadequate.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to Mo. Code Regs. Ann. tit 10, § 10–6.220(3)(C). The EPA believes that this provision could be read to allow for exemptions from the otherwise applicable SIP emission limitations through a state official's unilateral exercise of discretionary authority that is insufficiently bounded and includes no additional public process at the state or federal level. Such a provision is inconsistent with the fundamental requirements of the CAA with respect to SIPs as required by sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). For these reasons, the EPA is proposing to find Mo. Code Regs. Ann. tit 10, § 10–6.220(3)(C) is substantially inadequate to meet CAA requirements and thus is proposing to issue a SIP call with respect to this provision.

[167] Petition at 49–50.

[168] The EPA notes that the Petitioner also identified additional provisions Mo. Code Regs. Ann. tit 10, § 10–6.200(3)(E)(1), Mo. Code Regs. Ann. tit 10, § 10–6.200(3)(E)(3)(C)(I), Mo. Code Regs. Ann. tit 10, § 10–6.200(3)(E)(4)(B), Mo. Code Regs. Ann. tit 10, § 10–6.200(3)(E)(5)(E), Mo. Code Regs. Ann. tit 10, § 10–6.200(3)(E)(6)(F), Mo. Code Regs. Ann. tit 10, § 10–6.200(3)(E)(7)(E), Mo. Code Regs. Ann. tit 10, § 10–6.200(3)(E)(11)(C), which provide for exemptions to HMIWIs, that it alleged are inconsistent with the CAA and the EPA's SSM Policy. However, the Petitioner did not request that the EPA address these provisions in its remedy request, and thus the EPA is not addressing these provisions in this action. (This is in contrast to the case of a similar HMIWI provision in Nebraska for which the Petition did specifically make such a request.) The EPA further notes that the provisions enumerated above are not part of Missouri's SIP but were approved as part of the separate state plan to meet the applicable emissions guidelines under CAA § 111(d) and 40 CFR Part 60. Therefore, a SIP call is not appropriate. The EPA may elect to evaluate these provisions in a later action.

[169] Petition at 50.

The EPA proposes to deny the Petition with respect to Mo. Code Regs. Ann. tit 10, § 10–6.050(3)(C). The EPA believes that the provision is on its face clearly applicable only to Missouri state enforcement personnel and that the provision could not reasonably be read by a court to foreclose enforcement by the EPA or through a citizen suit where Missouri state personnel elect to exercise enforcement discretion. The EPA solicits comments on this issue, in particular from the State of Missouri, to assure that there is no misunderstanding with respect to the correct interpretation of Mo. Code Regs. Ann. tit 10, § 10–6.050(3)(C).

4. Nebraska

a. Petitioner's Analysis

The Petitioner objected to two provisions in the Nebraska SIP.[170] First, the Petitioner objected to a generally applicable provision that provides authorization to state personnel to decide whether excess emissions "warrant enforcement action" where a source submits information to the state showing that such emissions were "the result of a malfunction, start-up or shutdown" (Neb. Admin. Code Title 129 § 11–35.001). The Petitioner argued that this provision "clearly gives the Director the authority to decide whether excess emission occurred during a malfunction, startup or shutdown, and whether they 'warrant enforcement action.'" [171] According to the Petitioner, the provision could be interpreted to give a state official the authority to decide that enforcement is not warranted by anybody, which could preclude action by the EPA and citizens for both civil penalties and injunctive relief, and such an interpretation is inconsistent with the CAA and the EPA's SSM policy interpreting the CAA. The Petitioner thus requested that Nebraska revise the provision to eliminate any confusion that a decision by state personnel not to enforce against a violation would in any way foreclose enforcement by the EPA or citizens.

Second, the Petitioner objected to a specific provision in Nebraska state law that contains exemptions for excess emissions at HMIWI during startup, shutdown, and malfunction (Neb. Admin. Code Title 129 § 18–004.02). The Petitioner requested that these exemptions be removed entirely from Nebraska's SIP.

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations, whether automatic or through the exercise of a state official's discretion. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitations must be considered violations, whether or not the state elects to exercise its enforcement discretion.

The EPA believes that Neb. Admin. Code Title 129 § 11–35.001 is permissible because it defines parameters for the exercise of enforcement discretion by state personnel for violations of emission limitations. According to the EPA's SSM Policy, as discussed in section IX.A of this notice, a state has authority to have a SIP provision that pertains to the exercise enforcement discretion concerning actions taken by state personnel. The provision in question maintains that state enforcement personnel "shall consider" certain factors in determining whether to take an enforcement action under the state statutory enforcement provisions. The regulation does not expressly or implicitly place any limits on the state personnel's ability to exercise discretion, and the enforcement discretion provided by this regulation is not an exemption to the SIP emission limitations. The provision does not state or imply that any other entity, including the EPA or a member of the public, is precluded from taking enforcement action if the state exercises its discretion not to pursue enforcement. The EPA believes that Neb. Admin. Code Title 129 § 11–35.001 is consistent with the CAA and the EPA's SSM Policy and therefore does not render the SIP substantially inadequate.

The EPA disagrees that the provisions providing exemptions for HMIWI must be removed from the SIP. Nebraska Admin. Code Title 129 § 18–004.02 was not approved into Nebraska's SIP, but rather it was approved as part of the separate state plan to meet the applicable emissions guidelines under CAA § 111(d) and 40 CFR Part 60. Because that rule is not in the Nebraska SIP is not related to any provisions in the SIP, it does not represent an inadequacy in the SIP.

c. The EPA's Proposal

The EPA proposes to deny the Petition with respect to Neb. Admin. Code Title 129 § 11–35.001. The EPA believes that this provision is on its face clearly applicable only to Nebraska state enforcement personnel and that the provision could not reasonably be read by a court to foreclose enforcement by the EPA or through a citizen suit where personnel from Nebraska elect to exercise enforcement discretion. The EPA solicits comments on this issue, in particular from the State of Nebraska, to assure that there is no misunderstanding with respect to the correct interpretation of this provision.

The EPA proposes to deny the Petition with respect to Neb. Admin. Code Title 129 § 18–004.02. This regulation is not part of the Nebraska SIP and thus cannot represent an inadequacy in the SIP.

5. Nebraska: Lincoln-Lancaster

a. Petitioner's Analysis

The Petitioner objected to a generally applicable provision in the Lincoln-Lancaster County Air Pollution Control Program (Art. 2 § 35), which governs the Lincoln-Lancaster County Air Pollution Control District of Nebraska, that is parallel "in all aspects pertinent to this analysis" to Neb. Admin. Code Title 129 § 11–35.001.[172] The Lincoln-Lancaster County provision provides authorization to local personnel to decide whether excess emissions 'warrant enforcement action" where a source submits information to the county showing that such emissions were "the result of a malfunction, start-up or shutdown." The Petitioner argued that this provision "clearly gives the Director the authority to decide whether excess emission occurred during a malfunction, startup or shutdown, and whether they 'warrant enforcement action.'" [173] According to the Petitioner, the provision could be interpreted to decide that enforcement is not warranted by anybody, which could preclude action by the EPA and citizens for both civil penalties and injunctive relief, and such an interpretation is inconsistent with the CAA and the EPA's SSM Policy interpreting the CAA. The Petitioner thus requested that Nebraska or Lincoln-Lancaster County revise the provision to eliminate any confusion that a decision by local personnel not to enforce against a violation would in any way foreclose enforcement by the EPA or citizens.

b. The EPA's Evaluation

The EPA agrees that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations, whether automatic or through the exercise of a state official's discretion. In

[170] Petition at 51.

[171] Petition at 51.

[172] Petition at 51–52.

[173] Petition at 52.

accordance with the requirements of CAA section 110(a)(2)(A). SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitations must be considered violations, whether or not the state elects to exercise its enforcement discretion.

The EPA believes that Lincoln-Lancaster County Air Pollution Control Program, Art. 2 § 35 is permissible because it defines parameters for the exercise of enforcement discretion by local personnel for violations of emission limitations. According to the EPA's SSM Policy, as discussed in section IX.A of this notice, a state has authority to have a SIP provision that pertains to the exercise enforcement discretion concerning actions taken by state personnel. The provision in question maintains that local enforcement personnel "shall consider" certain factors in determining whether to take an enforcement action under the local statutory enforcement provisions. The regulation does not expressly or implicitly place any limits on the local personnel's ability to exercise discretion, and the enforcement discretion provided by the regulation is not an exemption to the SIP emission limitations. The provision does not state or imply that any other entity, including the EPA or a member of the public, is precluded from taking enforcement action if the county exercises its discretion not to pursue enforcement. The EPA believes that Lincoln-Lancaster County Air Pollution Control Program, Art. 2 § 35 is consistent with the CAA and EPA's SSM Policy and therefore does not render the SIP substantially inadequate.

c. The EPA's Proposal

The EPA proposes to deny the Petition with respect to Lincoln-Lancaster County Air Pollution Control Program, Art. 2 § 35. The EPA believes that this provision is on its face clearly applicable only to Lincoln-Lancaster County enforcement personnel and that the provision could not reasonably be read by a court to foreclose enforcement by the EPA or through a citizen suit where personnel from Lincoln-Lancaster County elect to exercise enforcement discretion. The EPA solicits comments on this issue, in particular from the State of Nebraska and from the Lincoln-Lancaster County Air Pollution Control Program, to assure that there is no misunderstanding with respect to the correct interpretation of this provision.

I. Affected States in EPA Region VIII

1. Colorado

a. Petitioner's Analysis

The Petitioner objected to two affirmative defense provisions in the Colorado SIP that provide for affirmative defenses to qualifying sources during malfunctions (5 Colo. Code Regs § 1001–2(II.E)) and during periods of startup and shutdown (5 Colo. Code Regs § 1001–2(II.J)).[174] The Petitioner acknowledged that this state has correctly revised its SIP in important ways in order to be consistent with CAA requirements, as interpreted in the EPA's SSM Policy, including providing affirmative defense provisions that are limited to monetary penalties, that do not apply in actions to enforce federal standards such as NSPS or NESHAP approved into the SIP, and that meet "almost word for word" the recommendations of the 1999 SSM Guidance. Nevertheless, the Petitioner had two concerns with these SIP provisions.

First, the Petitioner objected to both of these provisions based on its assertion that the CAA allows no affirmative defense provisions in SIPs. Second, the Petitioner asserted that even if affirmative defense provisions were permissible under the CAA, the state had properly followed EPA guidance in the affirmative defense provision applicable to startup and shutdown events but failed to do so in the affirmative defense provisiou applicable to malfunctions. Specifically, the Petitioner argued that the EPA's own guidance for affirmative defenses recommended that they "are not appropriate where a single source or a small group of sources has the potential to cause an exceedance of the NAAQS or PSD increments."[175] Instead, the state's affirmative defense for malfunction events is potentially available to any source, if it can establish that the excess emissions during the event did not result in exceedances of ambient air quality standards that could be attributed to the source.[176] The Petitioner objected to this as not merely inconsistent with the EPA's 1999 SSM Guidance but an approach "that does not have the same deterrent effect" on sources and that would not have the same effects on sources to assure that they comply at all times in order to avoid violations. As a practical matter, the Petitioner also argued that including this element to the affirmative defense could "mire enforcement proceedings in the question of whether or not the NAAQS or PSD increments were exceeded as a matter of fact."

b. The EPA's Evaluation

The EPA disagrees with the Petitioner's contention that no affirmative defense provisions are permissible in SIPs under the CAA. As explained in more detail in section IV.B of this notice, the EPA interprets the CAA to allow affirmative defense provisions for malfunctions. So long as these provisions are narrowly drawn and consistent with the CAA, as recommended in the EPA's guidance for affirmative defense provisions in SIPs, the EPA believes that states may elect to have affirmative defense provisions for malfunctions. However, based on evalnation of the legal and factual basis for affirmative defenses in SIPs, the EPA now believes that affirmative defense provisions are not appropriate in the case of planned source actions, such as startup and shutdown, because sources should be expected to comply with applicable emission limitations during those normal planned and predicted modes of source operation. Again, as explained in section IV.B of this notice, the EPA is changing its interpretation with respect to affirmative defenses for startup and shutdown. The EPA acknowledges that at the time of its approval of 5 Colo. Code Regs § 1001–2(II.J) into the SIP in 2006, the state had complied with the EPA's then-applicable interpretation of the CAA and had worked with the EPA to develop that provision.[177] However, based on further consideration of this issue prompted by the Petition, the EPA is revising its SSM Policy to interpret the CAA to allow affirmative defenses only in the case of events that are beyond the control of the source, *i.e.*, malfunctions.

With respect to the Petitioner's second concern, the EPA disagrees that the state's inclusion of an affirmative defense available to all sources, including single sources or groups of sources with the "potential" to cause exceedances of the NAAQS or PSD increments, renders the provision inconsistent with the CAA. The EPA's recommendations for appropriate criteria for affirmative defenses in the SSM Policy are guidance, and as guidance, the EPA believes that there can be facts and circumstances in which a state may elect to develop a SIP

[174] Petition at 25–27.

[175] *Id.* at 25.

[176] *See*, 5 Colo. Code Regs § 1001–2(II.E.1.j).

[177] *See*, "Approval and Disapproval and Promulgation of Colorado Affirmative Defense Provisions for Startup and Shutdown," 71 FR 8958 (Feb. 22, 2006).

provision with somewhat different criteria, so long as they still meet the same statutory objectives. Conditioning the affirmative defense on a factual showing that there was no actual violation of air standards attributable to the excess emissions during the malfunction is an acceptable alternative means to the same end. For example, instead of providing no affirmative defense to sources with this "potential" for these impacts on air quality, the state could provide the affirmative defense to sources on the condition that the source must be able to demonstrate that the excess emissions did not have these impacts. The EPA considers this an appropriate means to the same end of providing the affirmative defense to sources in a way that provides relief from monetary penalties for events that were beyond their control, at the same time providing incentive to the source to prevent the violation and to take all practicable steps to minimize the impacts of the violation in order to qualify for the relief from penalties. As described in more detail in section VII.B of this notice, the EPA is revising its recommendations for affirmative defense provisions for malfunctions with respect to this specific point in this proposal.

Finally, the EPA understands the Petitioner's concern about enforcement proceedings becoming "mired" in various questions of fact that must be established in an enforcement action. However, the EPA notes that all enforcement proceedings turn upon important questions of fact that must be proven, including facts necessary to establish whether there was a violation, the extent of the violation, and whether there are extenuating circumstances that should be taken into consideration in the assessment of monetary penalties or injunctive relief for the violation. Indeed, the statutory factors that Congress provided for the assessment of penalties in CAA section 113(e) explicitly include "the seriousness of the violation," which would encompass the extent and severity of the environmental impact of the violation. Thus, the EPA does not agree that it is unreasonable to include an affirmative defense element that pertains to whether or not the excess emissions in question caused a violation of the NAAQS or PSD increments.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to 5 Colo. Code Regs § 1001–2(II.J) because it provides an affirmative defense for violations due to excess emissions applicable during startup and shutdown events, contrary to the EPA's current interpretation of the CAA. The EPA believes that this provision allows for an affirmative defense that is inconsistent with the fundamental requirements of CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, this provision is inconsistent with the requirements of CAA sections 113 and 304. For these reasons, the EPA is proposing to find that this provision is substantially inadequate to meet CAA requirements and proposes to issue a SIP call with respect to this provision.

The EPA proposes to deny the Petition with respect to 5 Colo. Code Regs § 1001–2(II.E), because this provision includes an affirmative defense applicable to malfunction events that is consistent with the requirements of the CAA, as interpreted by the EPA in the SSM Policy. In particular, the EPA denies the Petition with respect to the claim that this provision is inconsistent with the CAA because it is available to sources or groups of sources that might have the potential to cause violations of the NAAQS or PSD increments. The EPA believes that an acceptable alternative approach is to require the source to establish, as an element of the affirmative defense, that the excess emissions in question did not cause such impacts. Accordingly, the EPA is proposing to find that this provision is consistent with CAA requirements and thus declining to make a finding of substantial inadequacy with respect to this provision.

2. Montana

a. Petitioner's Analysis

The Petitioner objected to an exemption from otherwise applicable emission limitations for aluminum plants during startup and shutdown (Montana Admin. R 17.8.334).[178] The Petitioner argued that an automatic exemption for emissions during startup and shutdown events is inconsistent with the CAA and the EPA's interpretation of the CAA in the SSM Policy. In addition, the Petitioner argued that these exemptions also could not qualify as source-specific alternative limits applicable during startup and shutdown because there "is nothing to indicate that the State addressed the feasibility of control strategies, minimization of the frequency and duration of startup and shutdown modes, worst-case emissions, and impacts on air quality."[179] The Petitioner further objected that this provision would be in contravention of the EPA's recommendation that source-specific emission limitations for startup and shutdown would not be appropriate when a single source or small group of sources has the potential to cause an exceedance of the NAAQS or PSD increments.

b. The EPA's Evaluation

The EPA agrees that ARM 17.8.334 (in Administrative Rule of Montana) is inconsistent with the requirements of the CAA. This provision explicitly provides that affected sources are exempted from otherwise applicable SIP emission limitations during startup and shutdown. The relevant part of this SIP provision specifies that "[o]perations during startup and shutdown shall not constitute representative conditions for the purposes of determining compliance with this rule" and further specifies "nor shall emission in excess of the levels required in ARM 17.8.331 and 17.8.332 during periods of startup and shutdown be considered a violation of ARM 17.8.331 and 17.8.332."[180] The latter regulatory cross-references are to emission limits for fluorides and opacity at the source, both of which relate to the attainment and maintenance of the NAAQS and PSD increments.[181] Moreover, the provision in question also contains ambiguous regulatory text that suggests the exemption extends to other emission limitations applicable to this source category. By stating that operations during startup and shutdown are not representative conditions for determining compliance with "this rule," the provision appears to provide the same exemptions from other emission limitations that may apply to aluminum plants with respect to other air emissions as well. The EPA's longstanding interpretation of the CAA is that SIP provisions containing exemptions during startup and shutdown are not permissible.

The EPA also agrees that ARM 17.8.334 does not qualify as a source-specific emission limitation applicable during startup and shutdown, as recommended in the 1999 SSM Guidance. As explained in section VII.A of this notice, the EPA is clarifying that guidance to eliminate any misperception that exemptions from otherwise applicable emission limitations are permissible during startup and shutdown. States can elect to develop appropriate source-specific alternative emission limitations that

[178] Petition at 50–51.

[179] *Id.* at 51.

[180] *See*, Montana Admin. R 17.8.334(1).

[181] The EPA notes that the state has elected to control fluoride emissions as a means of addressing particulate matter from the affected sources.

apply during startup and shutdown events. The EPA recommended that in order to be approvable (*i.e.*, meet CAA requirements), any new special emission limitations applicable to the source during startup and shutdown should be narrowly tailored and take into account considerations such as the technological limitations of the specific source category and the control technology that is feasible during startup and shutdown. Any such SIP revision that would alter the existing applicable emission limitations for a source during startup and shutdown must meet the same requirements as any other SIP submission, *i.e.*, compliance with CAA sections 110(a), 110(k), 110(l), and 193, and any other CAA provision substantively germane to the SIP revision. Given the text of ARM 17.8.334, however, the EPA believes the state intended not to create a source-specific emission limitation applicable during startup and shutdown but instead merely an exemption for such emissions. Likewise, the EPA does not believe that the issue of special emission limitations during startup or shutdown for a single source or group of sources was contemplated at the time the state created this SIP provision. Nevertheless, the EPA notes that its current SSM Policy does not interpret the CAA to be a bar to special emission limitations in these circumstances, if the state addresses the concern about impacts on NAAQS and PSD increments in some other comparable way.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to ARM 17.8.334. The EPA believes that this provision allows for exemptions from otherwise applicable SIP emission limitations during startup and shutdown and that such exemptions are inconsistent with the fundamental requirements of CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). It is not necessary to reach the Petitioner's argument that this provision is not an appropriate source-specific emission limitation, because the provision at issue instead provides an impermissible exemption for emissions during startup and shutdown. Similarly, it is not necessary to reach the Petitioner's concern with respect to the issue of a single source or group of sources with the potential to cause an exceedance of the NAAQS or PSD increment, because the provision at issue provides an impermissible exemption. For these reasons, the EPA is proposing to find that this provision is substantially inadequate to meet CAA requirements and thus proposes to issue a SIP call with respect to this provision.

3. North Dakota

a. Petitioner's Analysis

The Petitioner objected to two provisions in the North Dakota SIP that create exemptions from otherwise applicable emission limitations.[182] The first provision creates exemptions from a number of cross-referenced opacity limits "where the limits specified in this article cannot be met because of operations and processes such as, but not limited to, oil field service and drilling operations, but only so long as it is not technically feasible to meet said specifications" (N.D. Admin. Code § 33–15–03–04(4)). The second provision creates an implicit exemption for "temporary operational breakdowns or cleaning of air pollution equipment" if the source meets certain conditions (N.D. Admin. Code § 33–15–05–01(2)(a)(1)). The Petitioner claimed that both provisions violate the CAA and the EPA's interpretation of the CAA in the SSM Policy because they create exemptions from otherwise applicable emission limitations for excess emissions during these events rather than treating the excess emissions as violations, and because the provisions could be construed to preclude enforcement of the emission limitations for these violations by the EPA and citizens.

b. The EPA's Evaluation

The EPA believes that N.D. Admin. Code 33–15–03–04.4 and N.D. Admin. Code 33–15–03–04.3 [183] are inconsistent with the requirements of the CAA. These provisions explicitly allow exemptions from the otherwise applicable emission limitations for opacity in several other regulations: N.D. Admin. Code 33–15–03–01, N.D. Admin. Code 33–15–03–02, N.D. Admin. Code 33–15–03–03, and N.D. Admin. Code 33–15–03–03.1. The exemption created by N.D. Admin. Code 33–15–03–04.4 is indefinite in scope and has unclear limits, because it is available whenever a source cannot meet the emission limitations "because of operations or processes such as, but not limited to, oil field service and drilling operations," but "only so long as it is not technically feasible to meet said [emission limitations]". It is unclear whether the provision is intended to apply only to special circumstances, such as malfunctions, or to a broader range of normal source operations. It is also unclear who determines what operations or processes make compliance impossible or who determines when it again becomes technically feasible to meet the limits. Whatever the parameters of this imprecise provision, however, it is clear that it contemplates outright exemptions from the applicable emission limitations under certain circumstances and at certain times.

The EPA believes that N.D. Admin. Code 33–15–03–04.3 is impermissible under the CAA as interpreted in the EPA's SSM Policy as an unbounded director's discretion provision. The provision states that the otherwise applicable emission limitations for opacity in the several other listed regulations do not apply "where an applicable opacity standard is established for a specific source." In accordance with this provision, a state official could modify the opacity limits in a permit or other document to allow emissions in excess of the otherwise applicable SIP limitations. As discussed in section VII.A of this notice, such director's discretion provisions are impermissible. Such an interpretation would make the state official the unilateral arbiter of whether the excess emissions in a given event constitute a violation, which could preclude enforcement by the EPA or the public who might disagree about whether enforcement action is warranted. Most importantly, however, the provision may be read to authorize the state official to create an exemption from the emission limitation, and such an exemption is impermissible in the first instance. The EPA believes that the inclusion of an unbounded director's discretion provision in N.D. Admin. Code 33–15–03–04.3 is thus a substantial inadequacy and renders this specific SIP provision impermissible for this reason.

In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. SIP provisions that create exemptions such that the excess emissions during startup, shutdown, or malfunctions are not violations of the applicable emission limitations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. The exemptions provided in N.D. Admin. Code 33–15–03–04.4 are not consistent with CAA requirements, because they would exempt excess emissions that

[182] Petition at 59.

[183] The EPA interprets the Petitioner's reference to N.D. Admin. Code § 33–15–03–04(4) as a citation to N.D. Admin. Code 33–15–03–04.4. The EPA notes also that the Petitioner specifically focused on concern with N.D. Admin. Code 33–15–04.4, but N.D. Admin. Code 33–15–03–04.3 also includes a related problem.

occur during the periods in question. In addition, the provision does not operate to create a source-specific emission limitation that applies during the periods in question, nor does it meet the recommended criteria and parameters for an affirmative defense for violations that occur as a result of a qualifying malfunction. Moreover, the amorphous nature of the provision, in which it is unclear who makes the determination whether the source should be excused from the emission limitations and what the precise parameters are for these exemptions, exacerbates the problem. Thus, the EPA also agrees with the Petitioner's concern that this provision could be interpreted to bar enforcement by the EPA or through a citizen suit, not only because it creates impermissible exemptions but also because of the inherent ambiguities about: (i) Who makes the determination whether the excess emissions are to be considered a violation; and (ii) what constitutes an event during which the excess emissions are to be excused. In its current form, the EPA has concerns not only about the impermissible exemptions created by the provision but also about its practical enforceability as a SIP provision meeting basic CAA requirements for implementation, maintenance, and enforcement of the NAAQS as contemplated in CAA section 110.

The EPA agrees that N.D. Admin. Code 33–15–05–01.2a(1) [184] is also inconsistent with CAA requirements for SIP provisions. This provision creates an implicit exemption for "temporary operational breakdowns or cleaning of air pollution equipment" if the source meets certain conditions. N.D. Admin. Code 33–15–05–01 in general imposes emission limitations for particulate matter from industrial processes, with the limitations stated in terms of the maximum amount of particulate matter allowed in any one hour. Notwithstanding these emission limitations, however, N.D. Admin. Code 33–15–05–01.2a(1) provides that:

> [t]emporary operational breakdowns or cleaning of air equipment for any process *are permitted* provided that the owner or operator immediately advises the department of the circumstances and outlines an acceptable corrective program and provided such operations do not cause an immediate public health hazard (emphasis added).

Although N.D. Admin. Code 33–15–05–01.2a(1) does not explicitly state that the exceedances of the emission limitations are not violations, the EPA believes that this is the most reasonable reading of the provision. Moreover, the title for this subsection is "exceptions," and the immediately preceding provisions impose the emission limitations on sources. Thus, the provision creates an impermissible exemption from the otherwise applicable SIP emission limitations.

The EPA notes that although the state has imposed some conditions on the exemptions, *e.g.*, the requirement to notify state officials of occurrence of the event, this provision would not qualify as an affirmative defense consistent with CAA requirements. First, the exemptions would negate the availability of monetary penalties or injunctive relief in any enforcement proceeding. Second, the conditions for qualifying for the exemption are not consistent with the criteria that EPA recommends for elements of an affirmative defense for which the source bears the burden of proof in order to assure that they are narrowly drawn and available only in suitable circumstances. Third, the provision extends not just to "breakdowns," which presumably equates to malfunctions, but also extends to "cleaning of air equipment," which clearly encompasses excess emissions during normal source maintenance—events for which sources should be designed, operated, and maintained to comply with emission limitations, and during which sources should be expected to comply.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to N.D. Admin. Code 33–15–03–04.4 (cited in the Petition as N.D. Admin. Code § 33–15–03–04(4)). The EPA believes that this provision allows for exemptions from otherwise applicable SIP emission limitations during startup and shutdown and that such exemptions are inconsistent with the fundamental requirements of CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, the EPA believes that this provision is sufficiently ambiguous that it would be difficult for the state, the EPA, or the public to enforce the provision effectively in its current form, and that this provision is thus inconsistent with the requirements of CAA section 110(a) on this basis as well. For these reasons, the EPA is proposing to find that this provision is substantially inadequate to meet CAA requirements and proposes to issue a SIP call with respect to this provision.

The EPA also proposes to grant the Petition with respect to N.D. Admin. Code 33–15–03–04.3 (cited in the Petition as N.D. Admin. Code § 33–15–03–04(3)). The EPA believes that this provision allows for discretionary exemptions from otherwise applicable emission limitations through a state official's unilateral exercise of discretionary authority that is insufficiently bounded. Such provisions are inconsistent with the fundamental requirements of the CAA with respect to SIPs and SIP revisions. Moreover, the discretion created by these provisions allows case-by-case exemptions from emission limitations, when such exemptions are not permissible in the first instance. Such exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs as required by sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). For these reasons, the EPA is proposing to find that this provision is substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to this provision.

The EPA also proposes to grant the Petition with respect to N.D. Admin. Code 33–15–05–01.2a(1) (cited in the Petition as N.D. Admin. Code § 33–15–05–01(2)(a)(1)). The EPA believes that this provision allows for exemptions from otherwise applicable SIP emission limitations during operational breakdowns (*i.e.*, malfunctions) or cleaning of air equipment (*i.e.*, maintenance) and that such exemptions are inconsistent with the fundamental requirements of CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). For these reasons, the EPA is also proposing to find that this provision is substantially inadequate to meet CAA requirements and proposes to issue a SIP call with respect to this provision.

4. South Dakota

a. Petitioner's Analysis

The Petitioner objected to a provision in the South Dakota SIP that creates exemptions from otherwise applicable SIP emission limitations (S.D. Admin. R. 74:36:12:02(3)).[185] The Petitioner asserted that the provision imposes visible emission limitations on sources but explicitly excludes emissions that occur "for brief periods during such operations as soot blowing, start-up, shut-down, and malfunctions." The Petitioner argued that such automatic exemptions for excess emissions is contrary to the requirements of the CAA for SIP provisions, as well as contrary to the EPA's 1982 SSM Guidance and 1999 SSM Guidance.

[184] The EPA interprets the Petitioner's reference to N.D. Admin. Code § 33–15–05–01(2)(a)(1) as a citation to N.D. Admin. Code 33–15–05–01.2a(1).

[185] Petition at 66.

b. The EPA's Evaluation

The EPA agrees that S.D. Admin. R. 74:36:12:02(3) is inconsistent with CAA requirements for SIP provisions. This provision creates an exemption from applicable visible emission limitations from the generally applicable SIP requirements. The S.D. Admin. R. 74:36:12:01 imposes a generally applicable opacity limit on all sources, measured using the EPA's Method 9. However, S.D. Admin. R. 74:36:12:02 provides exceptions to these limits and, in particular, in S.D. Admin. R. 74:36:12:02(3) includes an explicit exemption for emissions for "brief periods during such operations as soot blowing, start-up, shut-down, and malfunctions."

In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. SIP provisions that create exemptions such that the excess emissions during startup, shutdown, or malfunctions are not violations of the applicable emission limitations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. In addition, the EPA's SSM Policy has long interpreted the CAA not to permit exemptions for excess emissions during other modes of normal source operation, such as "soot blowing." The EPA notes that by its terms, S.D. Admin. R. 74:36:12:02(3) implies that it also would exempt excess emissions during other modes of normal source operation because it explicitly applies to events "such as" the four listed types, therefore implying it is not an exclusive list and could extend to other types of events as well. The exemptions provided in S.D. Admin. R. 74:36:12:02(3) are not consistent with CAA requirements, because they would exempt excess emissions that occur during the periods in question. Excess emissions must be treated as violations of the applicable emission limitations.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to S.D. Admin. R. 74:36:12:02(3). The EPA believes that this provision allows for exemptions from otherwise applicable SIP emission limitations during startup, shutdown, and malfunction, as well as during other modes of normal source operations such as "soot blowing." Automatic exemptions from otherwise applicable SIP emission limitations are inconsistent with the fundamental requirements of CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). For these reasons, the EPA is also proposing to find that this provision is substantially inadequate to meet CAA requirements and proposes to issue a SIP call with respect to this provision.

5. Wyoming

a. Petitioner's Analysis

The Petitioner objected to a specific provision in the Wyoming SIP that provides an exemption for excess particulate matter emissions from diesel engines during startup, malfunction, and maintenance (ENV–AQ–t Wyo. Code R. § 2(d)).[186] The provision exempts emission of visible air pollutants from diesel engines from applicable SIP limitations "during a reasonable period of warmup following a cold start or where undergoing repairs and adjustment following malfunction." The Petitioner argued that this exemption "is contrary to EPA policy for source category-specific rules for startup and shutdown."[187] Accordingly, the Petitioner requested that this provision be eliminated from the SIP.

b. The EPA's Evaluation

The EPA believes that the CAA does not allow for exemptions from otherwise applicable SIP emission limitations. In accordance with the requirements of CAA section 110(a)(2)(A), SIPs must contain emission limitations and, in accordance with the definition of "emission limitations" in CAA section 302(k), such emission limitations must be continuous. Thus, any excess emissions above the level of the applicable emission limitation must be considered violations, whether or not the state elects to exercise its enforcement discretion. SIP provisions that create exemptions such that the excess emissions during startup, shutdown, or malfunctions are not violations of the applicable emission limitations are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs. The EPA believes that the inclusion of such an exemption in WAQSR Chapter 3, section 2(d) from otherwise applicable SIP emission limitations for violations during cold startup or following malfunction of diesel engines is a substantial inadequacy and renders this specific SIP provision impermissible.

The EPA notes that WAQSR Chapter 3, section 2(d) does not appear to comply with the CAA's requirements for source category-specific rules for startup and shutdown as interpreted in the EPA's SSM Policy. The provision provides that the otherwise applicable emission "limitation shall not apply during a reasonable period of warmup following a cold start." Recent court decisions have made clear that automatic exemptions from otherwise applicable SIP emission limitations for excess emissions during periods of startup are not in fact permissible under the CAA. As discussed in section VII.A of this notice, states may elect to develop alternative emission limitations or other forms of enforceable control measures or techniques that apply during startup or shutdown, but exemptions for excess emissions during such periods are inconsistent with the fundamental requirements of the CAA.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to WAQSR Chapter 3, section 2(d) (cited as ENV–AQ–t Wyo. Code R. § 2(d) in the Petition). The EPA believes that this provision allows for exemptions from otherwise applicable SIP emission limitations, and that such exemptions are inconsistent with the fundamental requirements of the CAA with respect to emission limitations in SIPs as required by sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). In addition, by creating these impermissible exemptions, the state has defined violations in a way that would interfere with effective enforcement by the EPA and citizens for excess emissions during these events as provided in CAA sections 113 and 304. For these reasons, the EPA is proposing to find that this provision is substantially inadequate to meet CAA requirements and thus proposing to issue a SIP call with respect to this provision.

J. Affected States and Local Jurisdictions in EPA Region IX

1. Arizona

a. Petitioner's Analysis

The Petitioner objected to two provisions in the Arizona Department of Air Quality's (ADEQ) Rule R18–2–310, which provide affirmative defenses for excess emissions during malfunctions (AAC Section R18–2–310(B)) and for excess emissions during startup or shutdown (AAC Section R18–2–310(C)).[188] First, the Petitioner asserted

[186] Petition at 74. The EPA notes that the Petitioner appears to have provided an incorrect citation to this provision; accordingly, in this notice, the EPA replaces that citation with the following: "Wyoming Air Quality Standards and Regulations (WAQSR) Chapter 3, section 2(d)."

[187] *Id.*

[188] Petition at 20–22.

that all affirmative defenses for excess emissions are inconsistent with the CAA and should be removed from the Arizona SIP.

Additionally, quoting from the EPA's statement in the SSM Policy that such affirmative defenses should not be available to "a single source or small group of sources [that] has the potential to cause an exceedance of the NAAQS or PSD increments," the Petitioner contended that "sources with the power to cause an exceedance should be strictly controlled at all times, not just when they actually cause an exceedance."[189] Although acknowledging that R18–2–310 contains some limitations to address this issue, the Petitioner argued that the limitation in the SIP provision is not the same as entirely disallowing affirmative defenses for these types of sources, which removes the "incentive" for such sources to emit at levels close to those that would violate a NAAQS or PSD increment. Accordingly, the Petitioner requested that the EPA require Arizona either to entirely remove R18–2–310(B) and (C) from the SIP or to revise the rule so that affirmative defenses are not available to a single source or any small group of sources that has the potential to cause an exceedance of the NAAQS.

Second, the Petitioner asserted that the provision applicable to startup and shutdown periods (R18–2–310(C)) does not include an explicit requirement for a source seeking to establish an affirmative defense to prove that "the excess emissions were not part of a recurring pattern indicative of inadequate design, operation, or maintenance." The Petitioner provided a table specifically comparing the provisions in R18–2–310(C) against the EPA's recommended criteria in the 1999 SSM Guidance to show that R18–2–310(C) does not contain a specific provision to address this recommended criterion and stated that the rule should be revised to require such a demonstration.

b. The EPA's Evaluation

The EPA disagrees with the Petitioner's contention that no affirmative defense provisions are permissible in SIPs under the CAA. As explained in more detail in section IV of this notice, the EPA interprets the CAA to allow affirmative defense provisions for malfunctions. So long as these provisions are narrowly drawn and consistent with the CAA, as recommended in the EPA's guidance for affirmative defense provisions in SIPs, the EPA believes that states may elect to have affirmative defense provisions for malfunctions.

With respect to the potential air quality impacts of a "single source or small group of sources," the EPA believes that R18–2–310 satisfies the statutory requirements as interpreted in the EPA guidance. Rule R18–2–310 specifies five types of standards or limitations for which affirmative defenses are *not* available under the rule and includes among those five types: standards or limitations contained in any PSD or NSR permit issued by the EPA; standards or limitations included in a PSD permit issued by the ADEQ to meet the requirements of R18–2–406(A)(5) (Permit Requirements for Sources Located in Attainment and Unclassifiable Areas); and standards or limitations contained in R18–2–715(F) ("Standards of Performance for Existing Primary Copper Smelters; Site-specific Requirements") (R18–2–310(A)). Thus, no existing primary copper smelter subject to emission standards or limitations under R18–2–715(F) may seek an affirmative defense for any emissions in excess of those provisions, and likewise no major stationary source subject to permit conditions designed to protect the PSD increments in a PSD permit issued by ADEQ or the EPA may seek an affirmative defense for any emissions in excess of those permit conditions. Existing copper smelters are, to the EPA's knowledge, the only sources under ADEQ jurisdiction that have the potential to cause an exceedance of the NAAQS, and requirements to protect the PSD increments are implemented entirely through PSD permits issued by states and the EPA. Accordingly, the clear exclusion of these standards and limitations from the affirmative defense provisions in R18–2–310 adequately addresses the EPA's concerns with respect to potential violations of the NAAQS or PSD increments.

With respect to other emission standards or limitations (*i.e.*, those not specifically excluded from coverage under the rule), R18–2–310 requires each source seeking to establish an affirmative defense to demonstrate, among other things, that "[d]uring the period of excess emissions there were no exceedances of the relevant ambient air quality standards * * * that could be attributed to the emitting source" (R18–2–310(B)(7), (C)(1)(f)). The state's election to provide such an affirmative defense *contingent upon* a demonstration by the source that there were no exceedances of the relevant ambient air quality standards during the relevant period that could be attributed to the emitting source reasonably assures that these affirmative defense provisions will not create incentives to emit at higher levels or interfere with attainment and maintenance of the NAAQS. As described in section VII.B of this notice, the EPA considers this type of requirement an acceptable alternative approach to address the concern of sources or small groups of sources that could adversely impact the NAAQS or PSD increments through excess emissions.

Second, with respect to the Petitioner's assertion that R18–2–310 should be revised to require a demonstration that excess emissions during startup or shutdown are not part of a recurring pattern indicative of inadequate design, operation, or maintenance, it is not necessary to reach this issue. Instead, the EPA is proposing to modify its interpretation of the CAA with respect to affirmative defenses for startup and shutdown to eliminate the recommended criteria for such provisions as articulated in the 1999 SSM Guidance and to find, instead, that all affirmative defense provisions for planned startup and shutdown periods are not appropriate for SIP provisions under the CAA. As discussed in sections IV and VII.C of this notice, the EPA believes that affirmative defense provisions are appropriate in SIPs for malfunctions but not for startup and shutdown.

c. The EPA's Proposal

The EPA proposes to deny the Petition with respect to the arguments concerning ADEQ's affirmative defense provisions for malfunctions in R18–2–310(B). For the reasons provided above and in our previous approval of R18–2–310 into the Arizona SIP,[190] the EPA believes that these affirmative defense provisions are consistent with the requirements of the CAA.

With respect to the arguments concerning ADEQ's affirmative defense provisions for startup and shutdown periods in R18–2–310(C), however, the EPA proposes to grant the Petition, because R18–2–310(C) is inconsistent with the requirements of CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k), as well as CAA sections 113 and 304. The EPA believes that a SIP provision establishing an affirmative defense for planned startup and shutdown periods is substantially inadequate to comply with CAA requirements. For these reasons, the EPA is proposing to issue a SIP call with respect to R18–2–310(C).

[189] Petition at 20.

[190] *See*, 66 FR 48085 at 48087 (Sept. 18, 2001) (final rule approving R18–2–310 into Arizona SIP).

2. Arizona: Maricopa County

a. Petitioner's Analysis

The Petitioner objected to two provisions in the Maricopa County Air Pollution Control Regulations that provide affirmative defenses for excess emissions during malfunctions (Maricopa County Air Pollution Control Regulation 3, Rule 140, § 401) and for excess emissions during startup or shutdown (Maricopa County Air Pollution Control Regulation 3, Rule 140, § 402).[191] These provisions in Maricopa County Air Quality Department (MCAQD) Rule 140 are similar to the affirmative defense provisions in ADEQ R18–2–310.

First, the Petitioner asserted that the affirmative defense provisions in Rule 140 are problematic for the same reasons identified in the Petition with respect to ADEQ R18–2–310. Specifically, the Petitioner argued that affirmative defenses should not be allowed in any SIP and, alternatively, that to the extent affirmative defenses are permissible, the provisions in Rule 140 addressing exceedances of the ambient standards are "inappropriately permissive and do not comply with EPA guidance." [192] Accordingly, the Petitioner requested that the EPA require Arizona and/or MCAQD either to entirely remove these provisions from the SIP or to revise them so that they are not available to a single source or small group of sources that has the potential to cause a NAAQS exceedance. Second, the Petitioner asserted that the provisions for startup and shutdown in Rule 140 do not include an explicit requirement for a source seeking to establish an affirmative defense to prove that "the excess emissions in question were not part of a recurring pattern indicative of inadequate design, operation, or maintenance." The Petitioner argued that Rule 140 should be revised to require such a demonstration.

b. The EPA's Evaluation

First, with respect to the potential air quality impacts of a "single source or small group of sources," the EPA believes that MCAQD Rule 140 satisfies the statutory requirements as interpreted in the EPA's guidance. Rule 140 specifies four types of standards or limitations for which affirmative defenses are *not* available under the rule, including standards and limitations contained in any Prevention of Significant Deterioration (PSD) or New Source Review (NSR) permit issued by the EPA, and standards and limitations included in a PSD permit issued by MCAQD to meet the requirements of subsection 308.1(e) of Rule 240 (Permit Requirements For New Major Sources And Major Modifications To Existing Major Sources) (Rule 140, sections 103.3, 103.4). Thus, no major stationary source subject to permit conditions designed to protect the PSD increments in a PSD permit issued by MCAQD or the EPA may seek an affirmative defense for any emissions in excess of those permit conditions. These provisions adequately address the EPA's concerns regarding potential violations of the PSD increments.

Rule 140 also requires each source seeking to establish an affirmative defense to demonstrate, among other things, that "[d]uring the period of excess emissions there were no exceedances of the relevant ambient air quality standards * * * that could be attributed to the emitting source" (Rule 140, sections 401.7, 402.1(f)). The state's election to provide such an affirmative defense *contingent upon* a demonstration by the source that there were no exceedances of the relevant ambient air quality standards during the relevant period that could be attributed to the emitting source reasonably assures that these affirmative defenses provisions will not create incentives to emit at higher levels or interfere with attainment and maintenance of the NAAQS. As described in section VII.B of this notice, the EPA considers this type of requirement an acceptable alternative approach to address the concern of sources or small groups of sources that could adversely impact the NAAQS or PSD increments through excess emissions.

Second, with respect to the Petitioner's assertion that MCAQD Rule 140 should be revised to require a demonstration that excess emissions during startup or shutdown are not part of a recurring pattern indicative of inadequate design, operation, or maintenance, it is not necessary to reach this issue. Instead, the EPA is proposing to modify its interpretation of the CAA with respect to affirmative defenses for startup and shutdown to eliminate the recommended criteria for such provisions as articulated in the 1999 SSM Guidance and to find, instead, that all affirmative defense provisions for planned startup and shutdown periods are not appropriate for SIP provisions under the CAA. As discussed in sections IV and VII.C of this notice, the EPA believes that affirmative defense provisions are appropriate in SIPs for malfunctions but not for startup and shutdown.

c. The EPA's Proposal

The EPA proposes to deny the Petition with respect to the arguments concerning MCAQD's affirmative defense provisions for malfunctions in Rule 140, section 401. For the reasons provided above and in our previous approval of Rule 140 into the Arizona SIP,[193] the EPA believes that these affirmative defense provisions are consistent with the requirements of the CAA.

With respect to the arguments concerning ADEQ's affirmative defense provisions for startup and shutdown periods in Rule 140, section 402, however, the EPA proposes to grant the Petition, because it is inconsistent with the requirements of CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k), as well as CAA sections 113 and 304. The EPA believes that a SIP provision establishing an affirmative defense for planned startup and shutdown periods is substantially inadequate to comply with CAA requirements. For these reasons, the EPA is proposing to issue a SIP call with respect to Maricopa County Air Pollution Control Regulation 3, Rule 140, § 402.

3. Arizona: Pima County

a. Petitioner's Analysis

The Petitioner objected to a provision in the Pima County Department of Environmental Quality's (PCDEQ) Rule 706 that pertains to enforcement discretion.[194] Quoting from paragraph (D) of Rule 706, which provides that "[t]he Control Officer may defer prosecution of a Notice of Violation issued for an exceedance of a control standard if * * *" certain conditions are met, the Petitioner argued that ambiguity in this provision could be construed to preclude enforcement by the EPA or citizens. The Petitioner requested that the EPA require the PCDEQ and/or Arizona to revise this provision to make clear that a decision by the Pima County Control Officer not to enforce under the rule would in no way affect enforcement by the EPA or citizens.

b. The EPA's Evaluation

The EPA disagrees with the Petitioner's assertion that Rule 706 creates ambiguity that could be construed to preclude enforcement by the EPA or through a citizen suit. Paragraph (D) of Rule 706 states that "[t]he control officer *may* defer prosecution of a Notice of Violation

[191] Petition at 23.

[192] Petition at 23.

[193] *See*, 67 FR 54957 (Aug. 27, 2002) (final rule approving Rule 140 into Arizona SIP).

[194] Petition at 23–24.

issued for an exceedance of a control standard *if*" four specific conditions are met (PCDEQ Rule 706, paragraph (D), emphasis added). Rule 706 does not address the EPA or citizen enforcement in any way and on its face does nothing to preclude enforcement by the EPA or through a citizen suit. Even with respect to the PCDEQ's authorities, the rule authorizes but does not require the Control Officer to defer prosecution where the identified criteria are met.

c. The EPA's Proposal

The EPA proposes to deny the Petition with respect to PCDEQ Rule 706. The EPA believes that the provision regarding enforcement in paragraph (D) of this rule clearly applies only to the PCDEQ Control Officer and could not reasonably be read by a court to foreclose enforcement by the EPA or through a citizen suit where the PCDEQ Control Officer elects to exercise enforcement discretion. The EPA solicits comment on this issue, in particular from the State of Arizona and from the PCDEQ, to assure that there is no misunderstanding with respect to the correct interpretation of Rule 706.

K. Affected States in EPA Region X

1. Alaska

a. Petitioner's Analysis

The Petitioner objected to a provision in the Alaska SIP that provides an excuse for "unavoidable" excess emissions that occur during SSM events, including startup, shutdown, scheduled maintenance, and "upsets" (Alaska Admin. Code tit. 18 § 50.240).[195] The provision provides: "Excess emissions determined to be unavoidable under this section will be excused and are not subject to penalty. This section does not limit the department's power to enjoin the emission or require corrective action." The Petitioner argued that this provision excuses excess emissions in violation of the CAA and the EPA's SSM Policy, which require all such emissions to be treated as violations of the applicable SIP emission limitations. The Petitioner further argued that it is unclear whether the provision could be interpreted to bar enforcement actions brought by the EPA or citizens, because it is drafted as if the state were the sole enforcement authority. Finally, the Petitioner pointed out, the provision is worded as if it were an affirmative defense, but it uses criteria for enforcement discretion.

[195] Petition at 18–20.

b. The EPA's Evaluation

The EPA interprets Alaska Admin. Code tit. 18 § 50.240 as providing an affirmative defense under which excess emissions that occur during certain SSM events may be "excused" if the requisite showing is made by the source. This provision is substantially inadequate for three reasons. First, provisions that allow a state official's decision to bar EPA or citizen enforcement are impermissible under the CAA. Although Alaska Admin. Code tit. 18 § 50.240 states that it "does not limit the *department's* power to enjoin the emission nor require corrective action" (emphasis added), it also states that "[e]xcess emissions determined to be unavoidable under this section will be excused and are not subject to penalty." The net effect of this language appears to bar the EPA and the public from seeking injunctive relief. Moreover, the provision is ambiguous as to whether the EPA or the public could pursue an action for civil penalties if they disagreed with the state official's determination that excess emissions were unavoidable.

Second, as explained more fully in sections IV.B and VII.C of this notice, the EPA believes that affirmative defense provisions that apply to startup, shutdown, or maintenance events are inconsistent with the requirements of the CAA. Consequently, Alaska Admin. Code tit. 18 § 50.240, which applies to excess emissions that occur during startup, shutdown, and scheduled maintenance, is impermissible for this reason as well.

Finally, while the EPA continues to believe that affirmative defense provisions applying to malfunctions can be consistent with the CAA, as long as the criteria set forth in the SSM Policy are carefully adhered to (as explained in more detail in sections IV.B and VII.B of this notice), the criteria in Alaska Admin. Code tit. 18 § 50.240 are not sufficiently similar to those recommended in the EPA's SSM Policy to assure that the affirmative defense is available only in appropriately narrow circumstances. The EPA acknowledges that the SSM Policy is only guidance concerning what types of SIP provisions could be consistent with the requirements of the CAA. Nonetheless, through this rulemaking, the EPA is proposing to determine that Alaska Admin. Code tit. 18 § 50.240 does not include criteria that are sufficiently robust to qualify as an acceptable affirmative defense provision for malfunctions (*i.e.*, upsets). For example, the defense available in Alaska Admin. Code tit. 18 § 50.240 is not limited to excess emissions caused by sudden, unavoidable, breakdown of technology beyond the control of the owner or operator. Similarly, the provision contains neither a statement that the defense does not apply in situations where a single source or small group of sources has the potential to cause an exceedance of the NAAQS or PSD increments nor a requirement that sources make an after-the-fact showing that no such exceedance occurred. Accordingly, the EPA agrees with the Petitioner's contention that the provision is substantially inadequate to satisfy the requirements of the CAA.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to Alaska Admin. Code tit. 18 § 50.240. The provision applies to startup, shutdown, and maintenance events, contrary to the EPA's interpretation of the CAA to allow such affirmative defenses only for malfunctions. Additionally, the section of Alaska Admin. Code tit. 18 § 50.240 applying to "upsets" is inadequate because the criteria referenced are not sufficiently similar to those recommended in the EPA's SSM Policy for affirmative defense provisions applicable to malfunctions. Thus, the provision is inconsistent with the requirements of CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). Moreover, the provision appears to bar the EPA and citizens from seeking penalties and injunctive relief. As a result, Alaska Admin. Code tit. 18 § 50.240 is inconsistent with the fundamental requirements of CAA sections 113 and 304. For these reasons, the EPA is proposing to find that the provision is substantially inadequate to meet CAA requirements and proposes to issue a SIP call with respect to the provision.

2. Idaho

a. Petitioner's Analysis

The Petitioner objected to a provision in the Idaho SIP that appears to grant enforcement discretion to the state as to whether to impose penalties for excess emissions during certain SSM events (Idaho Admin. Code r. 58.01.01.131).[196] The provision provides that "[t]he Department shall consider the sufficiency of the information submitted and the following criteria to determine if an enforcement action to impose penalties is warranted * * *." The Petitioner argued that this provision could be interpreted to give the Department authority to decide that

[196] Petition at 33.

enforcement is not warranted by anyone, thereby precluding action by the EPA and citizens for civil penalties or injunctive relief.

b. The EPA's Evaluation

The EPA's SSM Policy interprets the CAA to allow states to elect to have appropriately drawn SIP provisions addressing the exercise of enforcement discretion by state personnel. As the Petitioner recognized, Idaho Admin. Code r. 58.01.01.131 appears to be a statement of enforcement discretion, and it delineates factors that will be considered by the Department in determining whether to pursue enforcement for violations due to excess emissions. Subsection 101.03 of the provision clearly states that "[a]ny decision by the Department * * * shall not excuse the owner or operator from compliance with the relevant emission standard." There is no language suggesting that the Department's determination to forgo state enforcement against a source would in any way preclude the EPA or the public from demonstrating that violations occurred or from taking enforcement action. Consequently, the EPA believes the provision is consistent with the requirements of the CAA.

c. The EPA's Proposal

The EPA proposes to deny the Petition with respect to Idaho Admin. Code r. 58.01.01.131. The EPA interprets this provision to allow both the EPA and the public to seek civil penalties or injunctive relief, regardless of how the state chooses to exercise its enforcement discretion. The EPA solicits comments on this issue, in particular from the State of Idaho, to assure that there is no misunderstanding with respect to the correct interpretation of Idaho Admin. Code r. 58.01.01.131.

3. Oregon

a. Petitioner's Analysis

The Petitioner objected to a provision in the Oregon SIP that grants enforcement discretion to the state to pursue violations for excess emissions during certain SSM events (Or. Admin. R. 340–028–1450).[197] The provision provides that "[i]n determining if a period of excess emissions is avoidable, and whether enforcement action is warranted, the Department, based upon information submitted by the owner and or operator, shall consider whether the following criteria are met * * *." The Petitioner argued that this provision could be interpreted to give the Department authority to decide that enforcement is not warranted by anyone, thereby precluding action by the EPA and citizens for civil penalties or injunctive relief.

b. The EPA's Evaluation

After the Petition was filed, the provision of the Oregon SIP cited by the Petitioner was recodified and revised by the state and was submitted to the EPA as part of a SIP revision. The EPA approved the SIP revision on December 27, 2011.[198] The provision has been recodified and revised at Or. Admin. R. 340–214–0350. The provision as recodified provides that "[i]n determining whether to take enforcement action for excess emissions, the Department considers, based upon information submitted by the owner or operator," a list of factors.

The EPA's SSM Policy interprets the CAA to allow states to elect to have SIP provisions that pertain to the exercise of enforcement discretion by state personnel. As revised by Oregon and approved by the EPA into the SIP, Or. Admin. R. 340–214–0350 is plainly a statement of enforcement discretion, and it delineates factors that will be considered by the Department in determining whether to pursue state enforcement for violations of the applicable SIP emission limitations due to excess emissions. There is no language in this provision suggesting that the Department's determination to forgo enforcement against a source would in any way preclude the EPA or the public from demonstrating that violations occurred and taking enforcement action. Consequently, the EPA believes the current SIP provision is consistent with the requirements of the CAA.

c. The EPA's Proposal

The EPA proposes to deny the Petition with respect to Or. Admin. R. 340–028–1450. This provision has since been recodified and approved by the EPA at Or. Admin. R. 340–214–0350. The EPA interprets the recodified provision to allow both the EPA and the public to seek civil penalties or injunctive relief, regardless of how the state chooses to exercise its enforcement discretion. The EPA solicits comments on this issue, in particular from the State of Oregon, to assure that there is no misunderstanding with respect to the correct interpretation of Or. Admin. R. 340–214–0350.

4. Washington

a. Petitioner's Analysis

The Petitioner objected to a provision in the Washington SIP that provides an excuse for "unavoidable" excess emissions that occur during certain SSM events, including startup, shutdown, scheduled maintenance, and "upsets" (Wash. Admin. Code § 173–400–107).[199] The provision provides that "[e]xcess emissions determined to be unavoidable under the procedures and criteria under this section shall be excused and are not subject to penalty." The Petitioner argued that this provision excuses excess emissions in violation of the CAA and the EPA's SSM Policy, which require all such emissions to be treated as violations of the applicable SIP emission limitations. The Petitioner further argued that it is unclear whether the provision could be interpreted to bar enforcement actions brought by the EPA or citizens, because it is drafted as if the state were the sole enforcement authority. Finally, the Petitioner pointed out, the provision is worded as if it were an affirmative defense, but it uses criteria for enforcement discretion.

b. The EPA's Evaluation

The EPA interprets Wash. Admin. Code § 173–400–107 as an affirmative defense under which excess emissions that occur during certain SSM events can be "excused" if the requisite showing is made by the source. This provision is substantially inadequate for four reasons. First, provisions that allow a state official's decision to bar the EPA or citizen enforcement are impermissible under the CAA. The Wash. Admin. Code § 173–400–107 provides that "[t]he owner or operator of a source shall have the burden of proving to Ecology or the authority or the decision-maker in an enforcement action that excess emissions were unavoidable." This language makes clear that the state's determination is not binding on the EPA or the public, because it refers to other authorities and decision-makers besides the state agency. However, the provision also states that "[e]xcess emissions determined to be unavoidable * * * shall be excused and not subject to penalty." This language could be interpreted to preclude those excess emissions deemed "unavoidable" from being considered violations of the applicable SIP emission limitations, and thus it could preclude enforcement by the EPA or through a citizen suit.

Second, it is unclear whether the affirmative defense applies only to

[197] Petition at 63.

[198] 76 FR 80725 at 80747.

[199] Petition at 71–72.

actions for monetary penalties or could also be used to bar actions seeking injunctive relief. Although the EPA believes that narrowly drawn affirmative defenses are permitted under the CAA for malfunction events, as discussed in sections IV.B and VII.B of this notice, the EPA's interpretation is that such affirmative defenses can only shield the source from monetary penalties and cannot be a bar to injunctive relief.

Third, as explained more fully in sections IV.B and VII.C of this notice, the EPA believes that affirmative defense provisions that apply to startup, shutdown, or maintenance events are inconsistent with the requirements of the CAA on their face. Consequently, Wash. Admin. Code § 173–400–107, which applies to excess emissions that occur during startup, shutdown, and scheduled maintenance, is impermissible for this reason as well.

Finally, while the EPA continues to believe that affirmative defense provisions applying to malfunctions can be consistent with the CAA as long as the criteria set forth in the SSM Policy are carefully adhered to, as discussed in sections IV.B and VII.B of this notice, the criteria in Wash. Admin. Code § 173–400–107 are not sufficiently similar to those recommended in the EPA's SSM Policy to assure that the affirmative defense is available only in appropriately narrow circumstances. The EPA acknowledges that the SSM Policy is only guidance concerning what types of SIP provisions could be consistent with the requirements of the CAA. Nonetheless, through this rulemaking, the EPA is proposing to determine that Wash. Admin. Code § 173–400–107 does not include criteria that are sufficiently robust to qualify as an acceptable affirmative defense provision for malfunctions (*i.e.*, "upsets"). For example, the defense available in Wash. Admin. Code § 173–400–107 is not limited to excess emissions caused by sudden, unavoidable, breakdown of technology beyond the control of the owner or operator. Similarly, the provision contains neither a statement that the defense does not apply in situations where a single source or small group of sources has the potential to cause an exceedance of the NAAQS or PSD increments nor a requirement that sources make an after-the-fact showing that no such exceedance occurred. As a result, the EPA believes that the provision is substantially inadequate to satisfy the requirements of the CAA.

c. The EPA's Proposal

The EPA proposes to grant the Petition with respect to Wash. Admin. Code § 173–400–107. The provision applies to startup, shutdown, and maintenance events, contrary to the EPA's interpretation of the CAA to allow such affirmative defenses only for malfunctions. Furthermore, the section of Wash. Admin. Code § 173–400–107 applying to "upsets" is inadequate because the criteria referenced are not sufficiently similar to those recommended in the EPA's SSM Policy for affirmative defenses for excess emissions due to malfunctions. Finally, the provision is unclear as to whether the EPA and the public could still seek injunctive relief if a state official made a determination that excess emissions were unavoidable. As a result, the EPA believes that Wash. Admin. Code § 173–400–107 is inconsistent with the fundamental requirements of CAA sections 110(a)(2)(A), 110(a)(2)(C), and 302(k). For these reasons, the EPA is proposing to find that the provision is substantially inadequate to meet CAA requirements and proposes to issue a SIP call with respect to the provision.

X. Statutory and Executive Order Reviews

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

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is a "significant regulatory action" because it raises novel legal or policy issues. Accordingly, the EPA submitted this action to the Office of Management and Budget (OMB) for review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011) and any changes made in response to OMB recommendations have been documented in the docket for this action.

B. Paperwork Reduction Act

This action does not impose any new information collection burden. The EPA's proposed actiou in response to the Petition merely reiterates the EPA's interpretation of the statutory requirements of the CAA and does not require states to collect any additional information. To the extent that the EPA proposes to grant the Petition and thus proposes to issue a SIP call to a state under CAA section 110(k)(5), the EPA is only proposing an action that requires the state to revise its SIP to comply with existing requirements of the CAA.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.[200]

After considering the economic impacts of this proposed rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. Courts have interpreted the RFA to require a regulatory flexibility analysis only when small entities will be subject to the requirements of the rule. *See, e.g., Michigan* v. *EPA*, 213 F.3d 663 (D.C. Cir. 2000); *Mid-Tex Elec. Co-op, Inc.* v. *FERC*, 773 F.2d 327 (D.C. Cir. 1985). This proposed rule will not impose any requirements on small entities. Instead, the proposed action merely reiterates the EPA's interpretation of the statutory requirements of the CAA. To the extent that the EPA proposes to grant the Petition and thus proposes to issue a SIP call to a state under CAA section 110(k)(5), the EPA is only proposing an action that requires the state to revise its SIP to comply with existing requirements of the CAA. The EPA's action, therefore, would leave to states the choice of how to revise the SIP provision in question to make it consistent with CAA requirements and determining, among other things, which of the several lawful approaches to the treatment of excess emissions during SSM events will be applied to particular sources. We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

This rule does not contain a federal mandate that may result in expenditures of $100 million or more for state, local, and tribal governments, in the aggregate, or the private sector in any one year. The action may impose a duty on

[200] Small entities include small businesses, small organizations, and small governmental jurisdictions. For purposes of assessing the impacts of this notice on small entities, *small entity* is defined as: (1) A small business that is a small industrial entity as defined in the U.S. Small Business Administration (SBA) size standards (see 13 CFR 121.201); (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.

certain state governments to meet their existing obligations to revise their SIPs to comply with CAA requirements. The direct costs of this action on states would be those associated with preparation and submission of a SIP revision by those states for which the EPA issues a SIP call. Examples of such costs could include development of a state rule, conducting notice and public hearing, and other costs incurred in connection with a SIP submission. These aggregate costs would be far less than the $100-million threshold in any one year. Thus, this rule is not subject to the requirements of sections 202 or 205 of UMRA.

This rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. The regulatory requirements of this action would apply to the states for which the EPA issues a SIP call. To the extent that such states allow local air districts or planning organizations to implement portions of the state's obligation under the CAA, the regulatory requirements of this action would not significantly or uniquely affect small governments because those governments have already undertaken the obligation to comply with the CAA.

E. Executive Order 13132—Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 because it will simply maintain the relationship and the distribution of power between the EPA and the states as established by the CAA. The proposed SIP calls are required by the CAA because the EPA is proposing to find that the current SIPs of the affected states are substantially inadequate to meet fundamental CAA requirements. In addition, the effects on the states will not be substantial because where a SIP call is finalized for a state, the SIP call will require the affected state to submit only those revisions necessary to address the SIP deficiencies and applicable CAA requirements. While this action may impose direct effects on the states, the expenditures would not be substantial because they would be far less than $25 million in the aggregate in any one year.[201] Thus, Executive Order 13132 does not apply to this action.

In the spirit of Executive Order 13132, and consistent with the EPA policy to promote communications between the EPA and state and local governments, the EPA specifically solicits comment on this proposed rule from state and local officials.

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

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). In this action, the EPA is not addressing any tribal implementation plans. This action is limited to states. Thus, Executive Order 13175 does not apply to this action. However, the EPA invites comment on this proposed action from tribal officials.

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

The EPA interprets EO 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the EO has the potential to influence the regulation. This action is not subject to EO 13045 because it merely prescribes the EPA's action for states regarding their obligations for SIPs under the CAA.

H. Executive Order 13211—Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not a "significant energy action" as defined in Executive Order 13211 (66 FR 28355(May 22, 2001)), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. This action merely prescribes the EPA's action for states regarding their obligations for SIPs under the CAA.

I. National Technology Transfer and Advancement Act

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

This proposed rulemaking does not involve technical standards. Therefore, the EPA is not considering the use of any voluntary consensus standards.

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

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

The EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it increases the level of environmental protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population. The rule is intended to ensure that all communities and populations across the affected states, including minority, low-income and indigenous populations overburdened by pollution, receive the full human health and environmental protection provided by the CAA. This proposed action concerns states' obligations regarding the treatment they give, in rules included in their SIPs under the CAA, to excess emissions during startup, shutdown, and malfunctions. This proposed action would require 36 states to bring their treatment of these emissions into line with CAA requirements, which would lead to sources' having greater incentives to control emissions during such events.

K. Determination Under Section 307(d)

Pursuant to CAA section 307(d)(1)(U), the Administrator determines that this action is subject to the provisions of section 307(d). Section 307(d)(1)(U) provides that the provisions of section

[201] "EPA's Action Development Process-Guidance on Executive Order 13132: Federalism," dated November 2008.

307(d) apply to "such other actions as the Administrator may determine."

L. Judicial Review

Section 307(b)(1) of the CAA indicates which Federal Courts of Appeal have venue for petitions of review of final agency actions by the EPA under the CAA. This section provides, in part, that petitions for review must be filed in the Court of Appeals for the District of Columbia Circuit (i) when the agency action consists of "nationally applicable regulations promulgated, or final actions taken, by the Administrator," or (ii) when such action is locally or regionally applicable, if "such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination."

This rule responding to the Petition is "nationally applicable" within the meaning of section 307(b)(1). First, the rulemaking addresses a Petition that raises issues that are applicable in all states and territories in the U.S. For example, the Petitioner requested that the EPA revise its SSM Policy with respect to whether affirmative defense provisions in SIPs are consistent with CAA requirements. The EPA's response is relevant for all states nationwide. Second, the rulemaking will address a Petition that raises issues relevant to specific existing SIP provisions in 39 states across the U.S. that are located in each of the 10 EPA Regions, 10 different federal circuits, and multiple time zones. Third, the rulemaking addresses a common core of knowledge and analysis involved in formulating the decision and a common interpretation of the requirements of the CAA being applied to SIPs in states across the country. Fourth, the rulemaking, by addressing issues relevant to appropriate SIP provisions in one state, may have precedential impacts upon the SIPs of other states nationwide. Courts have found similar rulemaking actions to be of nationwide scope and effect.[202]

This determination is appropriate because in the 1977 CAA Amendments that revised CAA section 307(b)(1), Congress noted that the Administrator's determination that an action is of "nationwide scope or effect" would be appropriate for any action that has "scope or effect beyond a single judicial circuit." H.R. Rep. No. 95–294 at 323—324, reprinted in 1977 U.S.C.C.A.N. 1402–03. Here, the scope and effect of this rulemaking extends to numerous judicial circuits because the action on the petition extends to states throughout the country. In these circumstances, section 307(b)(1) and its legislative history authorize the Administrator to find the rule to be of "nationwide scope or effect" and thus to indicate that venue for challenges to be in the D.C. Circuit. Thus, any petitions for review must be filed in the Court of Appeals for the District of Columbia Circuit. Accordingly, the EPA is proposing to determine that this will be a rulemaking of nationwide scope or effect.

In addition, pursuant to CAA section 307(d)(1)(V), the EPA is determining that this rulemaking action will be subject to the requirements of section 307(d).

[202] *See, e.g., State of Texas, et al. v. EPA*, 2011 U.S. App. LEXIS 5654 (5th Cir. 2011) (finding SIP call to 13 states to be of nationwide scope and effect and thus transferring the case to the U.S. Court of Appeals for the D.C. Circuit in accordance with CAA section 307(b)(1)).

XI. Statutory Authority

The statutory authority for this action is provided by CAA section 101 *et seq.* (42 U.S.C. 7401 *et seq.*).

List of Subjects in 40 CFR Part 52

Affirmative defense, Air pollution control, Carbon dioxide, Carbon dioxide equivalents, Carbon monoxide, Environmental protection, Excess emissions, Greenhouse gases, Hydrofluorocarbons, Intergovernmental relations, Lead, Methane, Nitrogen dioxide, Nitrous oxide, Ozone, Particulate matter, Perfluorocarbons, Reporting and recordkeeping requirements, Startup, shutdown, and malfunction, State implementation plan, Sulfur hexafluoride, Sulfur oxides, Volatile organic compounds.

Dated: February 12, 2013.

Gina McCarthy,

Assistant Administrator.

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Part IV

Department of Commerce

National Oceanic and Atmospheric Administration

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to an Exploration Drilling Program in the Chukchi Sea, Alaska; Notice

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC494

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to an Exploration Drilling Program in the Chukchi Sea, AK

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

ACTION: Notice; proposed incidental harassment authorization; request for comments.

SUMMARY: NMFS received an application from ConocoPhillips Company (COP) for an Incidental Harassment Authorization (IHA) to take marine mammals, by harassment, incidental to offshore exploration drilling on Outer Continental Shelf (OCS) leases in the Chukchi Sea, Alaska. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue an IHA to COP to take, by Level B harassment only, 12 species of marine mammals during the specified activity.

DATES: Comments and information must be received no later than March 25, 2013.

ADDRESSES: Comments on the application should be addressed to Michael Payne, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910. The mailbox address for providing email comments is *ITP.Nachman@noaa.gov*. NMFS is not responsible for email comments sent to addresses other than the one provided here. Comments sent via email, including all attachments, must not exceed a 25-megabyte file size.

Instructions: All comments received are a part of the public record and will generally be posted to *http://www.nmfs.noaa.gov/pr/permits/incidental.htm* without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

A copy of the application, which contains several attachments, including COP's marine mammal mitigation and monitoring plan and Plan of Cooperation, used in this document may be obtained by writing to the address specified above, telephoning the contact listed below (see **FOR FURTHER INFORMATION CONTACT**), or visiting the Internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm*. Documents cited in this notice may also be viewed, by appointment, during regular business hours, at the aforementioned address.

FOR FURTHER INFORMATION CONTACT: Candace Nachman, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth. NMFS has defined "negligible impact" in 50 CFR 216.103 as "* * *an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival."

Section 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the U.S. can apply for an authorization to incidentally take small numbers of marine mammals by harassment. Section 101(a)(5)(D) establishes a 45-day time limit for NMFS review of an application followed by a 30-day public notice and comment period on any proposed authorizations for the incidental harassment of marine mammals. Within 45 days of the close of the comment period, NMFS must either issue or deny the authorization.

Except with respect to certain activities not pertinent here, the MMPA defines "harassment" as:

> any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild ["Level A harassment"]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering ["Level B harassment"].

Summary of Request

NMFS received an application on March 1, 2012, from COP for the taking, by harassment, of marine mammals incidental to offshore exploration drilling on OCS leases in the Chukchi Sea, Alaska. However, before NMFS had an opportunity to review and comment on the March 1, 2012, submission, COP notified NMFS that they were making changes to the request and submitted a new application on July 16, 2012. NMFS reviewed COP's application and identified a number of issues requiring further clarification. After addressing comments from NMFS, COP modified its application and submitted a final revised application on December 6, 2012. NMFS carefully evaluated COP's application, including their analyses, and determined that the application was complete. The December 6, 2012, submission (2nd application revision) is the one available for public comment (see **ADDRESSES**) and considered by NMFS for this proposed IHA.

COP plans to drill up to two exploration wells on OCS leases offshore in the Chukchi Sea, Alaska, at the Devils Paw prospect during the 2014 Arctic open-water season (July through October). Impacts to marine mammals may occur from noise produced by the drill rig and support vessels alongside the drill rig in dynamic positioning (DP) mode, vertical seismic profile (VSP) surveys, and supporting vessels (including icebreakers) and aircraft. COP has requested an authorization to take 12 marine mammal species by Level B harassment, and NMFS is proposing to authorize take incidental to COP's offshore exploration drilling in the Chukchi Sea of the following species: beluga whale (*Delphinapterus leucas*); bowhead whale (*Balaena mysticetus*); gray whale (*Eschrichtius robustus*); killer whale (*Orcinus orca*); minke whale (*Balaenoptera acutorostrata*); fin whale (*Balaenoptera physalus*); humpback whale (*Megaptera novaeangliae*); harbor porpoise (*Phocoena phocoena*); bearded seal (*Erignathus barbatus*); ringed seal (*Phoca hispida*); spotted seal (*P. largha*); and ribbon seal (*Histriophoca fasciata*).

Description of the Specified Activity and Specified Geographic Region

COP plans to conduct an offshore exploration drilling program on U.S.

Department of the Interior (DOI), Bureau of Ocean Energy Management (BOEM) Alaska OCS leases located greater than 70 mi (113 km) from the Chukchi Sea coast during the 2014 open-water season. During the 2014 drilling program, COP plans to drill up to two exploration wells at the prospect known as Devils Paw. See Figure 1 in COP's application for the lease block and drill site locations (see **ADDRESSES**). The purpose of COP's program is to test whether oil deposits are present in a commercially viable quantity and quality. COP has stated that only if a significant accumulation of hydrocarbons is discovered will the company consider proceeding with development and production of the field.

Exploration Drilling

All of the possible Chukchi Sea offshore drill sites are located approximately 120 mi (193 km) west of Wainwright, the community proposed to be used for permanent infrastructure support for the project. Approximate distances from the exploration drilling project area to other communities along the Chukchi coast are 200 mi (322 km) from Barrow, 90 mi (145 km) from Point Lay, and 175 mi (282 km) from Point Hope. Water depths at the potential drill sites range from 132–138 ft (40.2–42 m). Table 2 in COP's application provides the coordinates for the potential drill sites (see **ADDRESSES**).

(1) Drill Rig Mobilization and Positioning

COP proposes to use a jack-up rig, instead of a drillship, to conduct the proposed program. Generally, jack-up rigs consist of a buoyant steel hull with three or more legs on which the hull can be "jacked" up or down. The jack-up drill rig has no self-propulsion capability and therefore needs to be transported by a heavy-lift vessel (HLV) from its original location to an area in the Bering Sea where it would then be placed in a floating mode under the control of three towing vessels. After delivering the jack-up rig, the HLV would depart immediately via the Bering Strait and would not return until completion of the project. When weather and ice conditions at the Devils Paw Prospect are favorable, the support vessels will tow the rig into position over the DP–5 drill site and initiate offloading.

Offloading procedures are estimated to take from 24 to 36 hrs, dependent on weather. Initial drill rig placement and orientation would be determined by logistics, current and forecasted weather events, ice extent, ice type, underwriter requirements, and safety considerations. Actual positioning of the rig would be determined by the well design, geology, shallow hazards, and seabed conditions. The rig would then be jacked up, manned with a crew, and provisioned for commencing drilling. The horizontal dimensions of the rig will be approximately 230 × 225 ft (70 × 68 m). When operating, the hull will be about 40 ft (12 m) above seawater surface. Maximum dimension of one leg spud can, which is the part on the seafloor, is about 60 ft (18 m).

If weather and ice conditions at the Devils Paw Prospect area are initially unfavorable, the HLV would transport the jack-up rig to the alternate staging area located about 20 mi (32 km) south of Kivalina and 6 mi (9.7 km) offshore (see Figure 1 in COP's application), offload the rig, and depart the Chukchi Sea via the Bering Strait. This alternative location has been chosen based on its proximity to infrastructure and likelihood to be ice free at the time of transfer. It may take up to 3 days to reach the prospect location from the alternate staging area (approximately 190 mi away [306 km]).

If the rig is offloaded at the alternate staging area, it would be placed into standby mode, which means it would be temporarily jacked up and manned by a limited crew to wait for conditions to improve at the prospect. In addition, support helicopters would be mobilized to Red Dog Mine near Kotzebue as necessary. Once ice conditions and weather at the Devils Paw Prospect area turn favorable, the anchor handling supply tug (AHST) and other vessels standing by in the immediate vicinity of the rig would move the rig to the prospect area. The rig would then be jacked up, manned with a crew, and supplied to commence drilling. (2) Support Vessel and Aircraft Movements

Various vessels will be involved in the drilling project, as summarized in Table 1 of COP's application (see **ADDRESSES**). The vessels involved in supporting the drilling operations will remain at about 5.5 mi (9 km) distance from the drill rig when they are not actively supporting the drilling operations. Several vessels will also be available for oil spill response purposes (see Table 1 in COP's application). Most of these vessels are relatively small and will be located aboard a mother vessel, either the oil spill response barge or the landing craft. These vessels will not be deployed in the water, unless needed to respond to a spill or to conduct oil spill response exercises as directed by DOI's Bureau of Safety and Environmental Enforcement (BSEE). The oil spill response vessel (OSRV) will also be on standby at 5.5 mi (9 km) from the drill rig. In addition to the vessels required for the actual drilling operations, a science vessel will be conducting monitoring activities. Figure 3 in COP's application provides an overview of the approximate locations of the vessels relative to the rig. The vessels will be located upwind from the rig, and, as such, they could be moved to any quadrant (A, B, C, or D) denoted in the figure, depending on the prevailing wind and currents.

COP also intends to have two helicopters and one fixed-wing airplane available as part of the operations. Helicopters would be used for personnel and equipment transport between shore and the drill rig consistently during operations. The airplane would be used for personnel and equipment transport between onshore locations. Wainwright would be the principal port from which crew transfers would take place; however, it is possible that under certain circumstances these activities might need to be conducted through Barrow or another location.

(3) Drill Rig Resupply

Transport of supplies to and from the drill rig will primarily be done with the ware vessel and offshore supply vessels (OSVs), although any other project vessel with the capability of DP could be used. The supplies would be loaded in Wainwright onto the large landing craft from where they would be transferred to the supply vessels. This transfer of supplies will take place somewhere between 5.5 mi (9 km) of the drill rig and 5 mi (8 km) offshore of Wainwright. When not engaged in transfers of supplies, the ware vessel and OSVs will be located about 5.5 mi (9 km) from the drill rig. The large landing craft will be located somewhere between 5.5 mi (9 km) of the drill site and 5 mi (8 km) offshore of Wainwright.

The duration of each supply trip by the ware vessel and OSV is estimated to be up to 7 hrs, assuming the vessels depart from their standby location at about 5.5 mi (9 km) of the rig. It would take approximately 0.5 hr to travel one-way to the drill rig (cruising mode). The supply vessel would be dynamically positioned next to the rig for about 6 hrs for each transfer of fuel and less than 6 hrs for each transfer of other supplies. The transit time between the large landing craft and the supply vessels is about 3 hrs one-way.

The ware vessel is estimated to make about two to three trips per week to the rig but could make an average of almost four resupply trips per week over 14 weeks. Based on an estimated 53 trips per season and a maximum of 6 hrs for

supply transfer, the ware vessel would be in DP mode up to a total of 318 hrs over the drilling season. The OSVs are estimated to make four and a half resupply trips per week over 14 weeks. Based on an estimated total of 63 trips, unloading supplies from the OSV to the rig would take up to a total of 378 hrs (in DP mode) over the course of the drilling season. Assuming that at any time only one supply vessel will be in DP alongside the drill rig, the total duration of DP is 696 hrs.

(4) Personnel Transfer and Refueling

About 300 persons are estimated to be involved in the proposed exploration drilling overall. The jack-up drill rig, support and oil spill response vessels will be self-contained, and the crew will live aboard the rig and vessels. Air support will be necessary to meet personnel and supply needs once the rig is operational. The helicopter will fly a direct route between Wainwright and the drill rig, eight to ten times per week.

Three refueling events per well are expected to be required for the drill rig, depending on the circumstances. The duration of a rig-fueling event will be approximately 6 hrs. All refueling operations will follow procedures approved by the U.S. Coast Guard.

Vertical Seismic Profile Test

COP intends to conduct two or three VSP data acquisition runs inside the wellbore to obtain high-resolution seismic images with detailed time-depth relationships and velocity profiles of the various geological layers. The VSP data can be used to help reprocess existing 2D or 3D seismic data prior to drilling a potential future appraisal well in case oil or gas is discovered during the proposed exploration drilling.

The procedure of one VSP data acquisition run can be summarized as follows (Figure 2 in COP's application provides a schematic of the layout):

- The source of energy for the VSP data acquisition, typically consisting of one or more airguns, will be lowered from the drilling platform or a vessel to a depth of approximately 10 ft (3 m) to 30 ft (10 m) below the water surface (depending on sea state). The total volume of the airgun(s) is not expected to exceed 760 in^3.
- A minimum of two geophones positioned 50 ft (15.2 m) apart will be placed at the end of a wireline cable, which will be lowered into the wellbore to total depth. Once total depth has been reached, the wireline cable will be pulled up and stopped at predefined depths (geophone stations). Data will be acquired by producing a series of sound pulses from the airgun(s) over a period of approximately 1 min. The sound waves generated by the source and reflected from various geological layers will be recorded by the two geophones.
- After each 1-minute airgun activity, the wireline cable with the geophones will be pulled up to a shallower position in the well after which the airgun(s) will again produce a series of sound pulses over a period of approximately 1 min. This process will be repeated until data have been acquired at all pre-identified geophone stations.

Two or three VSP data acquisition runs will be conducted; the first run will take place upon reaching the bottom of the 17.5-in (44.5 cm) borehole at approximately 5,220 ft (1,590 m) below sea level (bsl), the second run upon reaching the bottom of the 13.5 and 8.5 in (34.2 and 21.5 cm) borehole at approximately 9,580 ft (2,920 m) bsl, and a possible third run upon reaching the bottom of the 6.5 in (16.5 cm) borehole at approximately 11,020 ft (33,590 m) bsl. If the integrity of the 8.5 in borehole allows drilling to 11,020 ft without the need for an extra casing a third VSP run might not be needed. The number of geophone stations for each of the three VSP data acquisition runs varies depending on the length of the wellbore to be surveyed. The time required to finish a VSP data acquisition run depends on the depth of the wellbore (resulting in longer time to lower and pull up the wire cable with geophones) and the number of stations (resulting in longer data acquisition time). The period between VSP data acquisition runs is about 7–10 days, depending on the drilling progress. The total amount of time that airguns are operating for the three runs combined that might be performed in a well is about 2 hrs, not including ramp up. In case a second well is drilled, two or three additional VSP data acquisition runs might be conducted, meaning an additional 2 hrs of airgun operations over the course of the entire open-water drilling season.

Ice Management

Understanding ice systems and monitoring their movement are important aspects of COP's Chukchi Sea operations. COP has monitored Chukchi Sea ice since 2008 and would continue that monitoring through the proposed drilling season. Initial monitoring would incorporate satellite imagery to observe the early stages of sea ice retreat. Upon arrival in the project area, the ice management vessel, possibly with one other project vessel, would operate at the edge of the ice pack and monitor ice activity, updating all interested parties on ice pack coordinates to help determine scheduling for mobilization of the rig. COP has submitted an Ice Alerts Plan to BOEM for approval in connection with the Exploration Plan. The Ice Alerts Plan summarizes historic ice monitoring results which has assisted COP in estimating the timing and placement of the rig and support vessels. Under the COP Ice Alerts Plan, an ice monitoring and management center based out of Anchorage will monitor and interpret information collected from project vessels and satellite imagery during the entire drilling operation. A summary of the major components of COP's Ice Alerts Plan is provided below.

The ice edge position will be tracked in near real time using observations from satellite images, from the ice management vessel or other project vessels. The ice management and project vessels used for ice observations will remain on standby within about 5.5 mi (9 km) of the drill rig, unless deployed to investigate migrating ice-floes. When investigating ice, the vessels will likely stay within about 75 mi (121 km) of the rig. The Ice Alerts Plan includes a process for determining how close hazardous ice can approach before the well needs to be secured and the jack-up rig moved. This critical distance is a function of rig operations at that time, the speed and direction of the ice, the weather forecast, and the method of ice management.

Based on available historical and more recent ice data, there is low probability of ice entering the drilling area during the open water season. However, if hazardous ice is on a trajectory to approach the rig, the ice management vessel will be available to respond. One option for responding is to use the vessels fire monitor (water cannon) to modify the trajectory of the floe. Another option is to redirect the ice by applying pressure with the bow of the ice management vessel, slowly pushing the ice away from the direction of the drill rig. At these slow speeds, the vessel would use low power and slow propeller rotation speed, thereby reducing noise generation from propeller rotation effects in the water. Icebreaking is not planned as a way to manage ice that may be on a trajectory toward the drilling rig. In case the jack-up rig needs to be moved due to approaching ice, the support vessels will tow the rig to a secure location.

Timeframe of Activities

COP's anticipated start and end dates of the mobilization, drilling operations, and demobilization are on or about June 15, 2014, and November 16, 2014,

respectively, with actual activities in the lease sale area taking place roughly from July through October. Vessels would not arrive at the prospect prior to July 1. The HLV with the jack-up drill rig is expected to originate from Southeast Asia or the North Sea. The HLV will depart the area as soon as it has offloaded the rig. The AHST, OSVs, and ware vessel will mobilize from the Gulf of Mexico in early June and will be traveling north in close proximity to the HLV and jack-up rig. The ice management vessel will be the first to mobilize to the drill site to provide information on ice conditions to the HLV and other vessels.

COP anticipates the drilling of one well will take approximately 40 days. After the first Devils Paw well is drilled, it will be plugged and abandoned. If there is enough time, as estimated by the ice monitoring system, COP intends to drill a second well, which could take another 40 days. Relocation of the rig from the first to the second well would take approximately 24–48 hrs. If a second well is drilled, it would also be plugged and abandoned.

When drilling is completed, the jack-up rig will be demobilized and excess material transferred from the rig to supply vessels. The rig will then be jacked down and taken under tow by the AHST and OSVs to the load-out site, anticipated to be located south of the Devils Paw prospect area. The rig will remain in tow by the AHST until the HLV arrives. In case the drilling season ends earlier than anticipated, the rig may be towed to the alternate staging area and jacked up until the HLV arrives. In that situation, helicopters will be mobilized to Nome or the Red Dog Mine to support the rig as necessary. Once the AHST has the jack-up rig under tow, all other support vessels would be dismissed. The AHST and OSVs would accompany the rig until it is loaded onto the HLV. Once the rig has been loaded onto the HLV, the AHST, supply vessels, and air support will be demobilized.

Exploratory Drilling Program Sound Characteristics

Potential impacts to marine mammals could occur from the noise produced by the jack-up rig and its support vessels (including the ice management vessels and during DP), aircraft, and the airgun array during VSP tests. The drill rig produces continuous noise into the marine environment. NMFS currently uses a threshold of 120 dB re 1 µPa (rms) for the onset of Level B harassment from continuous sound sources. This 120 dB threshold is also applicable for the support vessels during DP. The airgun array proposed to be used by COP for the VSP tests produces pulsed noise into the marine environment. NMFS currently uses a threshold of 160 dB re 1 µPa (rms) for the onset of Level B harassment from pulsed sound sources.

(1) Drill Rig Sounds

The main contributors to the underwater sound levels from jack-up rig drilling activities are the use of generators and drilling machinery. Few underwater noise measurements exist from operations using a drill rig. Here we summarize the results from the drilling rig *Ocean General* and its two support vessels in the Timor Sea, Northern Australia (McCauley, 1998) and the jack-up rig *Spartan 151* in Cook Inlet, Alaska (MAI, 2011). For comparison, COP also included information on drilling sound measurements from a concrete drilling island and drillship. However, the sound propagation of a jack-up rig is substantially less than that of a drillship because the components that generate sound from a jack-up rig sit above the surface of the water instead of in the water.

McCauley (1998) conducted measurements under three different conditions: (a) Drilling rig sounds without drilling; (b) actively drilling, with the support vessel on anchor; and (c) drilling with the support vessel loading the rig (McCauley, 1998). The primary noise sources from the drill rig itself were from mechanical plants, fluid discharges, pumping systems and miscellaneous banging of gear on the rig. The overall noise level was low (117 dB re 1µPa at 410 ft [125 m]) mainly because the deck of the rig was well above the waterline (which is also the case for jack-up rigs). When the rig was actively drilling, the drill rig noise dominated the drilling sounds to a distance of about 1,312 ft (400 m). Beyond that distance, the energy from the drill string tones (in the 31 and 62 Hz ⅓ octaves) became apparent and resulted in an increase in the overall received noise level. With the rig drilling, the highest noise levels encountered were on the order of 117 dB re 1µPa at 410 ft (125 m) and 115 dB re1µPa at 1,228 ft (405 m). The noise source that far exceeded the previous two was from the support vessel standing alongside the rig for loading purposes. The thrusters and main propellers were engaged to keep the vessel in position and produced high levels of cavitation sound. The sound was broadband in nature, with highest levels of 137 dB 1µPa at 1,328 ft (405 m) and levels of 120 dB re 1µPa at 1.8–2.4 mi (3–4 km) from the well head.

Acoustic measurements of the drilling rig *Spartan 151* were conducted to report on underwater sound characteristics as a function of range using two different systems (moored hydrophone and real time system). Both systems provided consistent results. Primary sources of rig-based underwater sounds were from the diesel engines, mud pump, ventilation fans (and associated exhaust), and electrical generators. The loudest source levels (from the diesel engines) were estimated at 137 dB re 1 µPa at 1 m (rms) in the 141–178 Hz ⅓ octave band. Based on this estimate, the 120 dB (rms) re 1 µPa sound pressure level would be at about 154 ft (50 m) away from where the energy enters the water (jack-up leg or drill riser).

Hall and Francine (1991) measured drilling sounds from an offshore concrete island drilling structure. Source sound pressure level was 131 dB re 1µPa at 1 m for the drilling structure at idle (no drilling), and a transmission loss rate of 2.6 dB per doubling of distance, slightly less than theoretical cylindrical spreading. At a distance of 912 ft (278 m) from the drilling island the broadband sound pressure level was 109 dB re 1µPa. Strong tonal components at 1.375–1.5 Hz were detected in the acoustic records during drilling activities. These were likely associated with the rotary turntable, which was rotating between 75 and 110 rpm (which corresponds to 1.25–1.83 Hz). The received broadband sound pressure level at 849 ft (259 m) was 124 dB re 1µPa. The sounds measured from the concrete drilling island were almost entirely (>95%) composed of energy below 20 Hz.

Sound pressure levels of drilling activities from the concrete drilling island were substantially less than those reported for drill ships (Greene, 1987a). At a range of 557 ft (170 m) the 20–1000 Hz band level was 122–125 dB for the drillship *Explorer I*, with most energy below 600 Hz (although tones up to 1850 Hz were recorded). Drilling activity from the *Explorer* was measured as 134 dB at a range of 656 ft (200 m), with all energy below 600 Hz. Underwater sound measurements from the drillship *Kulluk* at 3,215 ft (980 m) were substantially higher (143 dB re 1µPa). Underwater sound levels recorded from the drillship *Stena Forth* in Disko Bay, Greenland, corresponded to measurements from other drillships and were higher than sound levels reported for semi-submersibles and drill rigs (Kyhn et al., 2011). The broadband source levels were similar to a fast

moving merchant vessel with source levels up to 184–190 dB re 1 µPa during drilling and maintenance work, respectively. At a range of 1,640 ft (500 m) from the drillship the 10–1000 Hz band level during drilling at 295 ft (90 m) ranged from approximately 100–128 dB re1 µPa, with the highest sound level at 100 and 400 Hz. Sound levels were ≤110 dB re1 µPa at 1.2 mi (2 km) distance.

Expected sound pressure levels for the proposed drilling activities have been modeled by JASCO Applied Research, Inc. for drilling sounds only and for drilling sounds in combination with the proximity of a support vessel using DP. The acoustic modeling results show that the maximum radii to received sound levels of 120 and 160 dB re 1 µPa from drilling operations alone are 689 ft (210 m) and <33 ft (10 m), respectively (O'Neill et al., 2012). More detailed results are included in Attachment A of COP's IHA application.

(2) Vessel Sounds

In addition to the drill rig, various types of vessels will be used in support of the operations including ice management vessels, anchor handlers, supply vessels and oil-spill response vessels. Like other industry-generated sound, underwater sound from vessels is generally most apparent at relatively low frequencies (20–500 Hz). The sound characteristic of each vessel is unique depending upon propulsion unit, machinery, hull size and shape. These characteristics change with load, vessel speed and weather conditions. For example, increase in vessel size, power and speed produces increasing broadband and tonal noise. The sound produced by vessels is generated by engine machinery and propeller cavitation. When a vessel increases speed, broadband sound from propeller cavitation and hull vibration becomes dominant over machinery sound. It has been estimated that propeller cavitation produces at least 90% of all ship generated ambient noise (Ross, 2005). Sound from large vessels is generally higher at low frequencies. Small high-powered (>100 horse power [HP]) propeller driven boats often exceed large vessel sound at frequencies above 1 kHz.

Ice management vessels operating in thick ice require a greater amount of power and propeller cavitation and hence produce higher sound levels than ships of similar size during normal operation in open water (Richardson et al., 1995b). Roth and Schmidt (2010) examined ice management vessel sound pressure levels during different sea ice conditions and modes of propulsion. Comparison of source spectra in open-water and while breaking moderate ice showed increases as much as 15 dB between 20 Hz and 2 kHz. For low frequencies, a sound pressure level of about 193 dB re 1µPa at 1 m was estimated to be a reasonable peak value.

Numerous measurements of underwater vessel sound have been performed since 2000 (for review see Wyatt, 2008) mostly in support of industry activity. Results of underwater vessel sounds that have been measured in the Chukchi and Beaufort Seas were reported in various 90-day and comprehensive reports since 2007 (e.g., Aerts *et al.*, 2008; Hauser *et al.*, 2008; Brueggeman *et al.*, 2009a; Ireland *et al.*, 2009). Due to the highly variable conditions under which these measurements were conducted, including equipment and methodology used, it is difficult to compare source levels (i.e., back calculated sound levels at a theoretical 1 m from the source) or even received levels between vessels. For example, source sound pressure levels of the same tug with barge varied from 173 dB to 182 dB re 1µPa at 1 m, depending on the speed and load at the time of measurement (Zykov and Hannay, 2006). Sound pressure levels of a drill rig support vessel traveling at a speed of about 11 knots (20 kph) was measured to be 136 dB re 1µPa at 1,312 ft (400 m) (McCauley, 1998). Acoustic measurements of an anchor handling support tug of similar size and horsepower traveling at 4.3 knots (8 kph) resulted in sound pressure levels of approximately 137 dB re 1µPa at 1,312 ft (400 m) and 120 dB re 1µPa at 4,855 ft (1,480 m) (Funk *et al.*, 2008).

(3) Aircraft Sounds

Helicopters are proposed to be used for personnel and equipment transport to and from the drill rig. Over calm water away from shore, the maximum transmission of rotor and engine sounds from helicopters into the water can generally be visualized as a 26° cone under the aircraft. The size of the water surface area where transmission of sound can take place is therefore generally larger with a higher flight altitude, though the sound levels will be much lower due to the larger distance from the water. In practice, the width of the area where aircraft sounds will be received is usually wider than the 26° cone and varies with sea state because waves provide suitable angles for additional transmission of the sound. In shallow water, scattering and absorption will limit lateral propagation. Dominant tones in noise spectra from helicopters are generally below 500 Hz (Greene and Moore, 1995). Harmonics of the main rotor and tail rotor usually dominate the sound from helicopters; however, many additional tones associated with the engines and other rotating parts are sometimes present. Because of Doppler shift effects, the frequencies of tones received at a stationary site diminish when an aircraft passes overhead. The apparent frequency is increased while the aircraft approaches and is reduced while it moves away. Aircraft flyovers are not heard underwater for very long, especially when compared to how long they are heard in air as the aircraft approaches an observer.

Underwater sounds were measured for a Bell 212 helicopter (Greene 1982, 1985; Richardson *et al.*, 1990). These measurements show that there are numerous prominent tones at frequencies up to about 350 Hz, with the strongest measured tone at 20–22 Hz. Received peak sound levels of a Bell 212 passing over a hydrophone at an altitude of approximately 1,000 ft (300 m), varied between 106–111 dB re 1µPa at 29 and 59 ft (9 and 18 m) water depth. Two Class 1 or Group A type helicopters will fly to and from the jack-up rig for transportation of manpower and supplies. Helicopters will be operated by a flight crew of two and capable of carrying 12 to 13 passengers.

(4) Vertical Seismic Profile Airgun Sounds

Airguns function by venting high-pressure air into the water. The pressure signature of an individual airgun consists of a sharp rise and then fall in pressure, followed by several positive and negative pressure excursions caused by oscillation of the resulting air bubble. Most energy emitted from airguns is at relatively low frequencies. Typical high-energy airgun arrays emit most energy at 10–120 Hz. However, the pulses contain significant energy up to 500–1000 Hz and some energy at higher frequencies (Goold and Fish, 1998; Potter *et al.*, 2007). Studies in the Gulf of Mexico have shown that the horizontally-propagating sound can contain significant energy above the frequencies that airgun arrays are designed to emit (DeRuiter *et al.*, 2006; Madsen *et al.*, 2006; Tyack *et al.*, 2006). Energy at frequencies up to 150 kHz was found in tests of single 60-in^3 and 250-in^3 airguns (Goold and Coates, 2006). Nonetheless, the predominant energy is at low frequencies.

The strengths of airgun pulses can be measured in different ways, and it is important to know which method is being used when interpreting quoted source or received levels. Geophysicists usually quote peak-to-peak (p-p) levels, in bar-meters or (less often) dB re 1 µPa.

Peak level (zero-to-peak [0-p]) for the same pulse is typically approximately 6 dB less. In the biological literature, levels of received airgun pulses are often described based on the average or rms level, where the average is calculated over the duration of the pulse. The rms value for a given airgun pulse is typically approximately 10 dB lower than the peak level and 16 dB lower than the p-p value (Greene, 1997; McCauley *et al.*, 1998, 2000). A fourth measure that is increasingly used is the Sound Exposure Level (SEL), in dB re 1 μPa2s. Because the pulses, even when stretched by propagation effects (see below), are usually <1 s in duration, the numerical value of the energy is usually lower than the rms pressure level. However, the units are different.

Because the level of a given pulse will differ substantially depending on which of these measures is being applied, it is important to be aware which measure is in use when interpreting any quoted pulse level. NMFS refers to rms levels when discussing levels of pulsed sounds that may harass marine mammals; these are the units used in this IHA notice. Specifics about the VSP airgun(s) and expected radii of various received rms sound levels are included in the acoustic modeling report of JASCO Applied Sciences (Attachment A of COP's application). The airgun array proposed for use will not exceed 760 in^3. The VSP airgun operations differ from normal marine seismic surveys in that the airguns are fixed to one location (the drill rig), and a limited number of shots will be fired (a total of about 2 hrs of airgun activity per well, not including time required for ramp ups).

Although there will be several support vessels in the drilling operations area, NMFS considers the possibility of collisions with marine mammals highly unlikely. Once on location, the majority of the support vessels will remain in the area of the drill rig throughout the 2014 drilling season and will not be making trips between the shorebase and the offshore vessels (with the exception of the resupply transits). As noted earlier in this document and in Figure 3 of COP's application, the majority of the vessels will sit on standby mode approximately 5.5 mi (9 km) upwind of the drill rig. As the crew change/resupply activities are considered part of normal vessel traffic and are not anticipated to impact marine mammals in a manner that would rise to the level of taking, those activities are not considered further in this document.

Description of Marine Mammals in the Area of the Specified Activity

The Chukchi Sea supports a diverse assemblage of marine mammals, including: bowhead, gray, beluga, killer, minke, humpback, and fin whales; harbor porpoise; ringed, ribbon, spotted, and bearded seals; narwhals (*Monodon monoceros*); polar bears (*Ursus maritimus*); and walruses (*Odobenus rosmarus divergens;* see Table 3 in COP's application). The bowhead, humpback, and fin whales are listed as "endangered" under the Endangered Species Act (ESA) and as depleted under the MMPA. The ringed and bearded seals are listed as "threatened" under the ESA. Certain stocks or populations of gray, beluga, and killer whales and spotted seals are listed as endangered or are proposed for listing under the ESA; however, none of those stocks or populations occur in the proposed activity area. Additionally, the ribbon seal is considered a "species of concern" under the ESA. Both the walrus and the polar bear are managed by the U.S. Fish and Wildlife Service (USFWS) and are not considered further in this proposed IHA notice.

Of these species, 12 are expected to occur in the area of COP's proposed operations. These species include: the bowhead, gray, humpback, minke, fin, killer, and beluga whales; harbor porpoise; and the ringed, spotted, bearded, and ribbon seals. Beluga, bowhead, gray, and killer whales, harbor porpoise, and ringed, bearded, and spotted seals are anticipated to be encountered more than the other four marine mammal species mentioned here. The marine mammal species that is likely to be encountered most widely (in space and time) throughout the period of the proposed drilling program is the ringed seal. Encounters with bowhead and gray whales are expected to be limited to particular seasons. Where available, COP used density estimates from peer-reviewed literature in the application. In cases where density estimates were not readily available in the peer-reviewed literature, COP used other methods to derive the estimates. NMFS reviewed the density estimate descriptions and documents and determined that they were acceptable for these purposes. The explanation for those derivations and the actual density estimates are described later in this document (see the "Estimated Take by Incidental Harassment" section).

The narwhal occurs in Canadian waters and occasionally in the Alaskan Beaufort Sea and the Chukchi Sea, but it is considered extralimital in U.S. waters and is not expected to be encountered. There are scattered records of narwhal in Alaskan waters, including reports by subsistence hunters, where the species is considered extralimital (Reeves *et al.*, 2002). Due to the rarity of this species in the proposed project area and the remote chance it would be affected by COP's proposed Chukchi Sea drilling activities, this species is not discussed further in this proposed IHA notice.

COP's application contains information on the status, distribution, seasonal distribution, abundance, and life history of each of the species under NMFS jurisdiction mentioned in this document. When reviewing the application, NMFS determined that the species descriptions provided by COP correctly characterized the status, distribution, seasonal distribution, and abundance of each species. Please refer to the application for that information (see **ADDRESSES**). Additional information can also be found in the NMFS Stock Assessment Reports (SAR). The Alaska 2011 SAR is available at: *http://www.nmfs.noaa.gov/pr/pdfs/sars/ak2011.pdf.*

Brief Background on Marine Mammal Hearing

When considering the influence of various kinds of sound on the marine environment, it is necessary to understand that different kinds of marine life are sensitive to different frequencies of sound. Based on available behavioral data, audiograms have been derived using auditory evoked potentials, anatomical modeling, and other data. Southall *et al.* (2007) designate "functional hearing groups" for marine mammals and estimate the lower and upper frequencies of functional hearing of the groups. The functional groups and the associated frequencies are indicated below (though animals are less sensitive to sounds at the outer edge of their functional range and most sensitive to sounds of frequencies within a smaller range somewhere in the middle of their functional hearing range):

- Low frequency cetaceans (13 species of mysticetes): functional hearing is estimated to occur between approximately 7 Hz and 22 kHz (however, a study by An *et al.* (2006) of humpback whale songs indicate that the range may extend to at least 24 kHz);
- Mid-frequency cetaceans (32 species of dolphins, six species of larger toothed whales, and 19 species of beaked and bottlenose whales): functional hearing is estimated to occur between approximately 150 Hz and 160 kHz;

• High frequency cetaceans (eight species of true porpoises, six species of river dolphins, Kogia, the franciscana, and four species of cephalorhynchids): functional hearing is estimated to occur between approximately 200 Hz and 180 kHz; and

• Pinnipeds in Water: functional hearing is estimated to occur between approximately 75 Hz and 75 kHz, with the greatest sensitivity between approximately 700 Hz and 20 kHz.

As mentioned previously in this document, 12 marine mammal species (four pinniped and eight cetacean species) are likely to occur in the proposed drilling area. Of the eight cetacean species likely to occur in COP's project area, five are classified as low frequency cetaceans (i.e., bowhead, gray, humpback, minke, and fin whales), two are classified as mid-frequency cetaceans (i.e., beluga and killer whales), and one is classified as a high-frequency cetacean (i.e., harbor porpoise) (Southall *et al.*, 2007).

Underwater audiograms have been obtained using behavioral methods for four species of phocinid seals: the ringed, harbor, harp, and northern elephant seals (reviewed in Richardson *et al.*, 1995a; Kastak and Schusterman, 1998). Below 30–50 kHz, the hearing threshold of phocinids is essentially flat down to at least 1 kHz and ranges between 60 and 85 dB re 1 µPa. There are few published data on in-water hearing sensitivity of phocid seals below 1 kHz. However, measurements for one harbor seal indicated that, below 1 kHz, its thresholds deteriorated gradually to 96 dB re 1 µPa at 100 Hz from 80 dB re 1 µPa at 800 Hz and from 67 dB re 1 µPa at 1,600 Hz (Kastak and Schusterman, 1998). More recent data suggest that harbor seal hearing at low frequencies may be more sensitive than that and that earlier data were confounded by excessive background noise (Kastelein *et al.*, 2009a,b). If so, harbor seals have considerably better underwater hearing sensitivity at low frequencies than do small odontocetes like belugas (for which the threshold at 100 Hz is about 125 dB).

Pinniped call characteristics are relevant when assessing potential masking effects of man-made sounds. In addition, for those species whose hearing has not been tested, call characteristics are useful in assessing the frequency range within which hearing is likely to be most sensitive. The four species of seals present in the study area, all of which are in the phocid seal group, are all most vocal during the spring mating season and much less so during late summer. In each species, the calls are at frequencies from several hundred to several thousand hertz—above the frequency range of the dominant noise components from most of the proposed oil exploration activities.

Cetacean hearing has been studied in relatively few species and individuals. The auditory sensitivity of bowhead, gray, and other baleen whales has not been measured, but relevant anatomical and behavioral evidence is available. These whales appear to be specialized for low frequency hearing, with some directional hearing ability (reviewed in Richardson *et al.*, 1995a; Ketten, 2000). Their optimum hearing overlaps broadly with the low frequency range where exploration drilling activities, airguns, and associated vessel traffic emit most of their energy.

The beluga whale is one of the better-studied species in terms of its hearing ability. As mentioned earlier, the auditory bandwidth in mid-frequency odontocetes is believed to range from 150 Hz to 160 kHz (Southall *et al.*, 2007); however, belugas are most sensitive above 10 kHz. They have relatively poor sensitivity at the low frequencies (reviewed in Richardson *et al.*, 1995a) that dominate the sound from industrial activities and associated vessels. Nonetheless, the noise from strong low frequency sources is detectable by belugas many kilometers away (Richardson and Wursig, 1997). Also, beluga hearing at low frequencies in open-water conditions is apparently somewhat better than in the captive situations where most hearing studies were conducted (Ridgway and Carder, 1995; Au, 1997). If so, low frequency sounds emanating from drilling activities may be detectable somewhat farther away than previously estimated.

Call characteristics of cetaceans provide some limited information on their hearing abilities, although the auditory range often extends beyond the range of frequencies contained in the calls. Also, understanding the frequencies at which different marine mammal species communicate is relevant for the assessment of potential impacts from manmade sounds. A summary of the call characteristics for bowhead, gray, and beluga whales is provided next.

Most bowhead calls are tonal, frequency-modulated sounds at frequencies of 50–400 Hz. These calls overlap broadly in frequency with the underwater sounds emitted by many of the activities to be performed during COP's proposed exploration drilling program (Richardson *et al.*, 1995a). Source levels are quite variable, with the stronger calls having source levels up to about 180 dB re 1 µPa at 1 m. Gray whales make a wide variety of calls at frequencies from <100–2,000 Hz (Moore and Ljungblad, 1984; Dalheim, 1987).

Beluga calls include trills, whistles, clicks, bangs, chirps and other sounds (Schevill and Lawrence, 1949; Ouellet, 1979; Sjare and Smith, 1986a). Beluga whistles have dominant frequencies in the 2–6 kHz range (Sjare and Smith, 1986a). This is above the frequency range of most of the sound energy produced by the proposed exploratory drilling activities and associated vessels. Other beluga call types reported by Sjare and Smith (1986a,b) included sounds at mean frequencies ranging upward from 1 kHz.

The beluga also has a very well developed high frequency echolocation system, as reviewed by Au (1993). Echolocation signals have peak frequencies from 40–120 kHz and broadband source levels of up to 219 dB re 1 µPa-m (zero-peak). Echolocation calls are far above the frequency range of the sounds produced by the devices proposed for use during COP's Chukchi Sea exploratory drilling program. Therefore, those industrial sounds are not expected to interfere with echolocation.

Potential Effects of the Specified Activity on Marine Mammals

The likely or possible impacts of the proposed exploratory drilling program in the Chukchi Sea on marine mammals could involve both non-acoustic and acoustic effects. Potential non-acoustic effects could result from the physical presence of the equipment and personnel. Petroleum development and associated activities introduce sound into the marine environment. Impacts to marine mammals are expected to primarily be acoustic in nature. Potential acoustic effects on marine mammals relate to sound produced by drilling activity, supply and support vessels (DP), and aircraft, as well as the VSP airgun array. The potential effects of sound from the proposed exploratory drilling program might include one or more of the following: tolerance; masking of natural sounds; behavioral disturbance; non-auditory physical effects; and, at least in theory, temporary or permanent hearing impairment (Richardson *et al.*, 1995a). However, for reasons discussed later in this document, it is unlikely that there would be any cases of temporary, or especially permanent, hearing impairment resulting from these activities. As outlined in previous NMFS documents, the effects of noise on marine mammals are highly variable, and can be categorized as follows (based on Richardson *et al.*, 1995b):

(1) The noise may be too weak to be heard at the location of the animal (i.e., lower than the prevailing ambient noise level, the hearing threshold of the animal at relevant frequencies, or both);

(2) The noise may be audible but not strong enough to elicit any overt behavioral response;

(3) The noise may elicit reactions of variable conspicuousness and variable relevance to the wellbeing of the marine mammal; these can range from temporary alert responses to active avoidance reactions such as vacating an area at least until the noise event ceases but potentially for longer periods of time;

(4) Upon repeated exposure, a marine mammal may exhibit diminishing responsiveness (habituation), or disturbance effects may persist; the latter is most likely with sounds that are highly variable in characteristics, infrequent, and unpredictable in occurrence, and associated with situations that a marine mammal perceives as a threat;

(5) Any anthropogenic noise that is strong enough to be heard has the potential to reduce (mask) the ability of a marine mammal to hear natural sounds at similar frequencies, including calls from conspecifics, and underwater environmental sounds such as surf noise;

(6) If mammals remain in an area because it is important for feeding, breeding, or some other biologically important purpose even though there is chronic exposure to noise, it is possible that there could be noise-induced physiological stress; this might in turn have negative effects on the well-being or reproduction of the animals involved; and

(7) Very strong sounds have the potential to cause a temporary or permanent reduction in hearing sensitivity. In terrestrial mammals, and presumably marine mammals, received sound levels must far exceed the animal's hearing threshold for there to be any temporary threshold shift (TTS) in its hearing ability. For transient sounds, the sound level necessary to cause TTS is inversely related to the duration of the sound. Received sound levels must be even higher for there to be risk of permanent hearing impairment. In addition, intense acoustic or explosive events may cause trauma to tissues associated with organs vital for hearing, sound production, respiration and other functions. This trauma may include minor to severe hemorrhage.

Potential Acoustic Effects From Exploratory Drilling Activities

(1) Tolerance

Numerous studies have shown that underwater sounds from industry activities are often readily detectable by marine mammals in the water at distances of many kilometers. Numerous studies have also shown that marine mammals at distances more than a few kilometers away often show no apparent response to industry activities of various types (Miller *et al.*, 2005; Bain and Williams, 2006). This is often true even in cases when the sounds must be readily audible to the animals based on measured received levels and the hearing sensitivity of that mammal group. Although various baleen whales, toothed whales, and (less frequently) pinnipeds have been shown to react behaviorally to underwater sound such as airgun pulses or vessels under some conditions, at other times mammals of all three types have shown no overt reactions (e.g., Malme *et al.*, 1986; Richardson *et al.*, 1995; Madsen and Mohl, 2000; Croll *et al.*, 2001; Jacobs and Terhune, 2002; Madsen *et al.*, 2002; Miller *et al.*, 2005). In general, pinnipeds and small odontocetes seem to be more tolerant of exposure to some types of underwater sound than are baleen whales. Richardson *et al.* (1995b) found that vessel noise does not seem to strongly affect pinnipeds that are already in the water. Richardson *et al.* (1995b) went on to explain that seals on haul-outs sometimes respond strongly to the presence of vessels and at other times appear to show considerable tolerance of vessels, and Brueggeman *et al.* (1992, cited in Richardson *et al.*, 1995b) observed ringed seals hauled out on ice pans displaying short-term escape reactions when a ship approached within 0.25–0.5 mi (0.4–0.8 km).

(2) Masking

Masking is the obscuring of sounds of interest by other sounds, often at similar frequencies. Marine mammals are highly dependent on sound, and their ability to recognize sound signals amid other noise is important in communication, predator and prey detection, and, in the case of toothed whales, echolocation. Even in the absence of manmade sounds, the sea is usually noisy. Background ambient noise often interferes with or masks the ability of an animal to detect a sound signal even when that signal is above its absolute hearing threshold. Natural ambient noise includes contributions from wind, waves, precipitation, other animals, and (at frequencies above 30 kHz) thermal noise resulting from molecular agitation (Richardson *et al.*, 1995b). Background noise also can include sounds from human activities. Masking of natural sounds can result when human activities produce high levels of background noise. Conversely, if the background level of underwater noise is high (e.g., on a day with strong wind and high waves), an anthropogenic noise source will not be detectable as far away as would be possible under quieter conditions and will itself be masked.

Although some degree of masking is inevitable when high levels of manmade broadband sounds are introduced into the sea, marine mammals have evolved systems and behavior that function to reduce the impacts of masking. Structured signals, such as the echolocation click sequences of small toothed whales, may be readily detected even in the presence of strong background noise because their frequency content and temporal features usually differ strongly from those of the background noise (Au and Moore, 1988, 1990). The components of background noise that are similar in frequency to the sound signal in question primarily determine the degree of masking of that signal.

Redundancy and context can also facilitate detection of weak signals. These phenomena may help marine mammals detect weak sounds in the presence of natural or manmade noise. Most masking studies in marine mammals present the test signal and the masking noise from the same direction. The sound localization abilities of marine mammals suggest that, if signal and noise come from different directions, masking would not be as severe as the usual types of masking studies might suggest (Richardson *et al.*, 1995b). The dominant background noise may be highly directional if it comes from a particular anthropogenic source such as a ship or industrial site. Directional hearing may significantly reduce the masking effects of these noises by improving the effective signal-to-noise ratio. In the cases of high-frequency hearing by the bottlenose dolphin, beluga whale, and killer whale, empirical evidence confirms that masking depends strongly on the relative directions of arrival of sound signals and the masking noise (Penner *et al.*, 1986; Dubrovskiy, 1990; Bain *et al.*, 1993; Bain and Dahlheim, 1994). Toothed whales, and probably other marine mammals as well, have additional capabilities besides directional hearing that can facilitate detection of sounds in the presence of background noise. There is evidence

that some toothed whales can shift the dominant frequencies of their echolocation signals from a frequency range with a lot of ambient noise toward frequencies with less noise (Au *et al.*, 1974, 1985; Moore and Pawloski, 1990; Thomas and Turl, 1990; Romanenko and Kitain, 1992; Lesage *et al.*, 1999). A few marine mammal species are known to increase the source levels or alter the frequency of their calls in the presence of elevated sound levels (Dahlheim, 1987; Au, 1993; Lesage *et al.*, 1993, 1999; Terhune, 1999; Foote *et al.*, 2004; Parks *et al.*, 2007, 2009; Di Iorio and Clark, 2009; Holt *et al.*, 2009).

These data demonstrating adaptations for reduced masking pertain mainly to the very high frequency echolocation signals of toothed whales. There is less information about the existence of corresponding mechanisms at moderate or low frequencies or in other types of marine mammals. For example, Zaitseva *et al.* (1980) found that, for the bottlenose dolphin, the angular separation between a sound source and a masking noise source had little effect on the degree of masking when the sound frequency was 18 kHz, in contrast to the pronounced effect at higher frequencies. Directional hearing has been demonstrated at frequencies as low as 0.5–2 kHz in several marine mammals, including killer whales (Richardson *et al.*, 1995b). This ability may be useful in reducing masking at these frequencies. In summary, high levels of noise generated by anthropogenic activities may act to mask the detection of weaker biologically important sounds by some marine mammals. This masking may be more prominent for lower frequencies. For higher frequencies, such as that used in echolocation by toothed whales, several mechanisms are available that may allow them to reduce the effects of such masking.

Masking effects of underwater sounds from COP's proposed activities on marine mammal calls and other natural sounds are expected to be limited. For example, beluga whales primarily use high-frequency sounds to communicate and locate prey; therefore, masking by low-frequency sounds associated with drilling activities is not expected to occur (Gales, 1982, as cited in Shell, 2009). If the distance between communicating whales does not exceed their distance from the drilling activity, the likelihood of potential impacts from masking would be low (Gales, 1982, as cited in Shell, 2009). At distances greater than 660–1,300 ft (200–400 m), recorded sounds from drilling activities did not affect behavior of beluga whales, even though the sound energy level and frequency were such that it could be heard several kilometers away (Richardson *et al.*, 1995b). This exposure resulted in whales being deflected from the sound energy and changing behavior. These minor changes are not expected to affect the beluga whale population (Richardson *et al.*, 1991; Richard *et al.*, 1998). Brewer *et al.* (1993) observed belugas within 2.3 mi (3.7 km) of the drilling unit *Kulluk* during drilling; however, the authors do not describe any behaviors that may have been exhibited by those animals.

There is evidence of other marine mammal species continuing to call in the presence of industrial activity. Annual acoustical monitoring near BP's Northstar production facility during the fall bowhead migration westward through the Beaufort Sea has recorded thousands of calls each year (for examples, see Richardson *et al.*, 2007; Aerts and Richardson, 2008). Construction, maintenance, and operational activities have been occurring from this facility since the late 1990s. To compensate and reduce masking, some mysticetes may alter the frequencies of their communication sounds (Richardson *et al.*, 1995b; Parks *et al.*, 2007). Masking processes in baleen whales are not amenable to laboratory study, and no direct measurements on hearing sensitivity are available for these species. It is not currently possible to determine with precision the potential consequences of temporary or local background noise levels. However, Parks *et al.* (2007) found that right whales (a species closely related to the bowhead whale) altered their vocalizations, possibly in response to background noise levels. For species that can hear over a relatively broad frequency range, as is presumed to be the case for mysticetes, a narrow band source may only cause partial masking. Richardson *et al.* (1995b) note that a bowhead whale 12.4 mi (20 km) from a human sound source, such as that produced during oil and gas industry activities, might hear strong calls from other whales within approximately 12.4 mi (20 km), and a whale 3.1 mi (5 km) from the source might hear strong calls from whales within approximately 3.1 mi (5 km). Additionally, masking is more likely to occur closer to a sound source, and distant anthropogenic sound is less likely to mask short-distance acoustic communication (Richardson *et al.*, 1995b).

Although some masking by marine mammal species in the area may occur, the extent of the masking interference will depend on the spatial relationship of the animal and COP's activity. Almost all energy in the sounds emitted by drilling and other operational activities is at low frequencies, predominantly below 250 Hz with another peak centered around 1,000 Hz. Most energy in the sounds from the vessels and aircraft to be used during this project is below 1 kHz (Moore *et al.*, 1984; Greene and Moore, 1995; Blackwell *et al.*, 2004b; Blackwell and Greene, 2006). These frequencies are mainly used by mysticetes but not by odontocetes. Therefore, masking effects would potentially be more pronounced in the bowhead and gray whales that might occur in the proposed project area. If, as described later in this document, certain species avoid the proposed drilling locations, impacts from masking are anticipated to be low. Moreover, the very small radius of the 120 dB isopleth of the drill rig (670 ft [210 m]) will reduce the possibility of masking even further. The larger 120 dB isopleth of the drill rig while a support vessel is in DP mode beside it (5 mi [8 km]) and over the VSP airguns (3 mi [5 km]) are also not anticipated to result in substantial or long-term masking effects as these activities will only occur for a short time during the entire open-water season (696 hrs and 2–4 hrs total, respectively).

(3) Behavioral Disturbance Reactions

Behavioral responses to sound are highly variable and context-specific. Many different variables can influence an animal's perception of and response to (in both nature and magnitude) an acoustic event. An animal's prior experience with a sound or sound source affects whether it is less likely (habituation) or more likely (sensitization) to respond to certain sounds in the future (animals can also be innately pre-disposed to respond to certain sounds in certain ways; Southall *et al.*, 2007). Related to the sound itself, the perceived nearness of the sound, bearing of the sound (approaching vs. retreating), similarity of a sound to biologically relevant sounds in the animal's environment (i.e., calls of predators, prey, or conspecifics), and familiarity of the sound may affect the way an animal responds to the sound (Southall *et al.*, 2007). Individuals (of different age, gender, reproductive status, etc.) among most populations will have variable hearing capabilities and differing behavioral sensitivities to sounds that will be affected by prior conditioning, experience, and current activities of those individuals. Often, specific acoustic features of the sound and contextual variables (i.e., proximity, duration, or recurrence of the sound or the current behavior that the marine

mammal is engaged in or its prior experience), as well as entirely separate factors such as the physical presence of a nearby vessel, may be more relevant to the animal's response than the received level alone.

Exposure of marine mammals to sound sources can result in (but is not limited to) no response or any of the following observable responses: increased alertness; orientation or attraction to a sound source; vocal modifications; cessation of feeding; cessation of social interaction; alteration of movement or diving behavior; avoidance; habitat abandonment (temporary or permanent); and, in severe cases, panic, flight, stampede, or stranding, potentially resulting in death (Southall *et al.*, 2007). On a related note, many animals perform vital functions, such as feeding, resting, traveling, and socializing, on a diel cycle (24-hr cycle). Behavioral reactions to noise exposure (such as disruption of critical life functions, displacement, or avoidance of important habitat) are more likely to be significant if they last more than one diel cycle or recur on subsequent days (Southall *et al.*, 2007). Consequently, a behavioral response lasting less than one day and not recurring on subsequent days is not considered particularly severe unless it could directly affect reproduction or survival (Southall *et al.*, 2007).

Detailed studies regarding responses to anthropogenic sound have been conducted on humpback, gray, and bowhead whales and ringed seals. Less detailed data are available for some other species of baleen whales, sperm whales, small toothed whales, and sea otters. The following sub-sections provide examples of behavioral responses that provide an idea of the variability in behavioral responses that would be expected given the different sensitivities of marine mammal species to sound.

Baleen Whales—Richardson *et al.* (1995a) reported changes in surfacing and respiration behavior and the occurrence of turns during surfacing in bowhead whales exposed to playback of underwater sound from drilling activities. These behavioral effects were localized and occurred at distances up to 1.2–2.5 mi (2–4 km).

Some bowheads appeared to divert from their migratory path after exposure to projected icebreaker sounds. Other bowheads however, tolerated projected icebreaker sound at levels 20 dB and more above ambient sound levels. The source level of the projected sound however, was much less than that of an actual icebreaker, and reaction distances to actual icebreaking may be much greater than those reported here for projected sounds. However, icebreaking is not a component of COP's proposed operations.

Brewer *et al.* (1993) and Hall *et al.* (1994) reported numerous sightings of marine mammals including bowhead whales in the vicinity of offshore drilling operations in the Beaufort Sea. One bowhead whale sighting was reported within approximately 1,312 ft (400 m) of a drilling vessel although most other bowhead sightings were at much greater distances. Few bowheads were recorded near industrial activities by aerial observers. After controlling for spatial autocorrelation in aerial survey data from Hall *et al.* (1994) using a Mantel test, Schick and Urban (2000) found that the variable describing straight line distance between the rig and bowhead whale sightings was not significant but that a variable describing threshold distances between sightings and the rig was significant. Thus, although the aerial survey results suggested substantial avoidance of the operations by bowhead whales, observations by vessel-based observers indicate that at least some bowheads may have been closer to industrial activities than was suggested by results of aerial observations.

Richardson *et al.* (2008) reported a slight change in the distribution of bowhead whale calls in response to operational sounds on BP's Northstar Island. The southern edge of the call distribution ranged from 0.47 to 1.46 mi (0.76 to 2.35 km) farther offshore, apparently in response to industrial sound levels. This result however, was only achieved after intensive statistical analyses, and it is not clear that this represented a biologically significant effect.

Patenaude *et al.* (2002) reported fewer behavioral responses to aircraft overflights by bowhead compared to beluga whales. Behaviors classified as reactions consisted of short surfacings, immediate dives or turns, changes in behavior state, vigorous swimming, and breaching. Most bowhead reaction resulted from exposure to helicopter activity and little response to fixed-wing aircraft was observed. Most reactions occurred when the helicopter was at altitudes ≤492 ft (150 m) and lateral distances ≤820 ft (250 m; Nowacek *et al.*, 2007).

During their study, Patenaude *et al.* (2002) observed one bowhead whale cow-calf pair during four passes totaling 2.8 hours of the helicopter and two pairs during Twin Otter overflights. All of the helicopter passes were at altitudes of 49–98 ft (15–30 m). The mother dove both times she was at the surface, and the calf dove once out of the four times it was at the surface. For the cow-calf pair sightings during Twin Otter overflights, the authors did not note any behaviors specific to those pairs. Rather, the reactions of the cow-calf pairs were lumped with the reactions of other groups that did not consist of calves.

Richardson *et al.* (1995a) and Moore and Clarke (2002) reviewed a few studies that observed responses of gray whales to aircraft. Cow-calf pairs were quite sensitive to a turboprop survey flown at 1,000 ft (305 m) altitude on the Alaskan summering grounds. In that survey, adults were seen swimming over the calf, or the calf swam under the adult (Ljungblad *et al.*, 1983, cited in Richardson *et al.*, 1995b and Moore and Clarke, 2002). However, when the same aircraft circled for more than 10 minutes at 1,050 ft (320 m) altitude over a group of mating gray whales, no reactions were observed (Ljungblad *et al.*, 1987, cited in Moore and Clarke, 2002). Malme *et al.* (1984, cited in Richardson *et al.*, 1995b and Moore and Clarke, 2002) conducted playback experiments on migrating gray whales. They exposed the animals to underwater noise recorded from a Bell 212 helicopter (estimated altitude=328 ft [100 m]), at an average of three simulated passes per minute. The authors observed that whales changed their swimming course and sometimes slowed down in response to the playback sound but proceeded to migrate past the transducer. Migrating gray whales did not react overtly to a Bell 212 helicopter at greater than 1,394 ft (425 m) altitude, occasionally reacted when the helicopter was at 1,000–1,198 ft (305–365 m), and usually reacted when it was below 825 ft (250 m; Southwest Research Associates, 1988, cited in Richardson *et al.*, 1995b and Moore and Clarke, 2002). Reactions noted in that study included abrupt turns or dives or both. Green *et al.* (1992, cited in Richardson *et al.*, 1995b) observed that migrating gray whales rarely exhibited noticeable reactions to a straight-line overflight by a Twin Otter at 197 ft (60 m) altitude. Restrictions on aircraft altitude will be part of the proposed mitigation measures (described in the "Proposed Mitigation" section later in this document) during the proposed drilling activities, and overflights are likely to have little or no disturbance effects on baleen whales. Any disturbance that may occur would likely be temporary and localized.

Southall *et al.* (2007, Appendix C) reviewed a number of papers describing the responses of marine mammals to non-pulsed sound, such as that produced during exploratory drilling

operations. In general, little or no response was observed in animals exposed at received levels from 90–120 dB re 1 µPa (rms). Probability of avoidance and other behavioral effects increased when received levels were from 120–160 dB re 1 µPa (rms). Some of the relevant reviews contained in Southall *et al.* (2007) are summarized next.

Baker *et al.* (1982) reported some avoidance by humpback whales to vessel noise when received levels were 110–120 dB (rms) and clear avoidance at 120–140 dB (sound measurements were not provided by Baker but were based on measurements of identical vessels by Miles and Malme, 1983).

Malme *et al.* (1983, 1984) used playbacks of sounds from helicopter overflight and drilling rigs and platforms to study behavioral effects on migrating gray whales. Received levels exceeding 120 dB induced avoidance reactions. Malme *et al.* (1984) calculated 10%, 50%, and 90% probabilities of gray whale avoidance reactions at received levels of 110, 120, and 130 dB, respectively. Malme *et al.* (1986) observed the behavior of feeding gray whales during four experimental playbacks of drilling sounds (50 to 315 Hz; 21- min overall duration and 10% duty cycle; source levels of 156–162 dB). In two cases for received levels of 100–110 dB, no behavioral reaction was observed. However, avoidance behavior was observed in two cases where received levels were 110–120 dB.

Richardson *et al.* (1990) performed 12 playback experiments in which bowhead whales in the Alaskan Arctic were exposed to drilling sounds. Whales generally did not respond to exposures in the 100 to 130 dB range, although there was some indication of minor behavioral changes in several instances.

McCauley *et al.* (1996) reported several cases of humpback whales responding to vessels in Hervey Bay, Australia. Results indicated clear avoidance at received levels between 118 to 124 dB in three cases for which response and received levels were observed/measured.

Palka and Hammond (2001) analyzed line transect census data in which the orientation and distance off transect line were reported for large numbers of minke whales. The authors developed a method to account for effects of animal movement in response to sighting platforms. Minor changes in locomotion speed, direction, and/or diving profile were reported at ranges from 1,847 to 2,352 ft (563 to 717 m) at received levels of 110 to 120 dB.

Biassoni *et al.* (2000) and Miller *et al.* (2000) reported behavioral observations for humpback whales exposed to a low-frequency sonar stimulus (160- to 330-Hz frequency band; 42-s tonal signal repeated every 6 min; source levels 170 to 200 dB) during playback experiments. Exposure to measured received levels ranging from 120 to 150 dB resulted in variability in humpback singing behavior. Croll *et al.* (2001) investigated responses of foraging fin and blue whales to the same low frequency active sonar stimulus off southern California. Playbacks and control intervals with no transmission were used to investigate behavior and distribution on time scales of several weeks and spatial scales of tens of kilometers. The general conclusion was that whales remained feeding within a region for which 12 to 30 percent of exposures exceeded 140 dB.

Frankel and Clark (1998) conducted playback experiments with wintering humpback whales using a single speaker producing a low-frequency "M-sequence" (sine wave with multiple-phase reversals) signal in the 60 to 90 Hz band with output of 172 dB at 1 m. For 11 playbacks, exposures were between 120 and 130 dB re 1 µPa (rms) and included sufficient information regarding individual responses. During eight of the trials, there were no measurable differences in tracks or bearings relative to control conditions, whereas on three occasions, whales either moved slightly away from (n = 1) or towards (n = 2) the playback speaker during exposure. The presence of the source vessel itself had a greater effect than did the M-sequence playback.

Finally, Nowacek *et al.* (2004) used controlled exposures to demonstrate behavioral reactions of northern right whales to various non-pulse sounds. Playback stimuli included ship noise, social sounds of conspecifics, and a complex, 18-min "alert" sound consisting of repetitions of three different artificial signals. Ten whales were tagged with calibrated instruments that measured received sound characteristics and concurrent animal movements in three dimensions. Five out of six exposed whales reacted strongly to alert signals at measured received levels between 130 and 150 dB (i.e., ceased foraging and swam rapidly to the surface). Two of these individuals were not exposed to ship noise, and the other four were exposed to both stimuli. These whales reacted mildly to conspecific signals. Seven whales, including the four exposed to the alert stimulus, had no measurable response to either ship sounds or actual vessel noise.

Toothed Whales—Most toothed whales have the greatest hearing sensitivity at frequencies much higher than that of baleen whales and may be less responsive to low-frequency sound commonly associated with oil and gas industry exploratory drilling activities. Richardson *et al.* (1995a) reported that beluga whales did not show any apparent reaction to playback of underwater drilling sounds at distances greater than 656–1,312 ft (200–400 m). Reactions included slowing down, milling, or reversal of course after which the whales continued past the projector, sometimes within 164–328 ft (50–100 m). The authors concluded (based on a small sample size) that the playback of drilling sounds had no biologically significant effects on migration routes of beluga whales migrating through pack ice and along the seaward side of the nearshore lead east of Point Barrow in spring.

At least six of 17 groups of beluga whales appeared to alter their migration path in response to underwater playbacks of icebreaker sound (Richardson *et al.*, 1995a). Received levels from the icebreaker playback were estimated at 78–84 dB in the 1/3-octave band centered at 5,000 Hz, or 8–14 dB above ambient. If beluga whales reacted to an actual icebreaker at received levels of 80 dB, reactions would be expected to occur at distances on the order of 6.2 mi (10 km). Finley *et al.* (1990) also reported beluga avoidance of icebreaker activities in the Canadian High Arctic at distances of 22–31 mi (35–50 km). In addition to avoidance, changes in dive behavior and pod integrity were also noted.

Patenaude *et al.* (2002) reported that beluga whales appeared to be more responsive to aircraft overflights than bowhead whales. Changes were observed in diving and respiration behavior, and some whales veered away when a helicopter passed at ≤820 ft (250 m) lateral distance at altitudes up to 492 ft (150 m). However, some belugas showed no reaction to the helicopter. Belugas appeared to show less response to fixed-wing aircraft than to helicopter overflights.

In reviewing responses of cetaceans with best hearing in mid-frequency ranges, which includes toothed whales, Southall *et al.* (2007) reported that combined field and laboratory data for mid-frequency cetaceans exposed to non-pulse sounds did not lead to a clear conclusion about received levels coincident with various behavioral responses. In some settings, individuals in the field showed profound (significant) behavioral responses to exposures from 90–120 dB, while others failed to exhibit such responses for exposure to received levels from 120–

150 dB. Contextual variables other than exposure received level, and probable species differences, are the likely reasons for this variability. Context, including the fact that captive subjects were often directly reinforced with food for tolerating noise exposure, may also explain why there was great disparity in results from field and laboratory conditions—exposures in captive settings generally exceeded 170 dB before inducing behavioral responses. A summary of some of the relevant material reviewed by Southall *et al.* (2007) is next.

LGL and Greeneridge (1986) and Finley *et al.* (1990) documented belugas and narwhals congregated near ice edges reacting to the approach and passage of icebreaking ships. Beluga whales responded to oncoming vessels by (1) Fleeing at speeds of up to 12.4 mi/hr (20 km/hr) from distances of 12.4–50 mi (20–80 km), (2) abandoning normal pod structure, and (3) modifying vocal behavior and/or emitting alarm calls. Narwhals, in contrast, generally demonstrated a "freeze" response, lying motionless or swimming slowly away (as far as 23 mi [37 km] down the ice edge), huddling in groups, and ceasing sound production. There was some evidence of habituation and reduced avoidance 2 to 3 days after onset.

The 1982 season observations by LGL and Greeneridge (1986) involved a single passage of an icebreaker with both ice-based and aerial measurements on June 28, 1982. Four groups of narwhals (n = 9 to 10, 7, 7, and 6) responded when the ship was 4 mi (6.4 km) away (received levels of approximately 100 dB in the 150- to 1,150-Hz band). At a later point, observers sighted belugas moving away from the source at more than 12.4 mi (20 km; received levels of approximately 90 dB in the 150- to 1,150-Hz band). The total number of animals observed fleeing was about 300, suggesting approximately 100 independent groups (of three individuals each). No whales were sighted the following day, but some were sighted on June 30, with ship noise audible at spectrum levels of approximately 55 dB/Hz (up to 4 kHz).

Observations during 1983 (LGL and Greeneridge, 1986) involved two icebreaking ships with aerial survey and ice-based observations during seven sampling periods. Narwhals and belugas generally reacted at received levels ranging from 101 to 121 dB in the 20- to 1,000-Hz band and at a distance of up to 40.4 mi (65 km). Large numbers (100s) of beluga whales moved out of the area at higher received levels. As noise levels from icebreaking operations diminished, a total of 45 narwhals returned to the area and engaged in diving and foraging behavior. During the final sampling period, following an 8-h quiet interval, no reactions were seen from 28 narwhals and 17 belugas (at received levels ranging up to 115 dB).

The final season (1984) reported in LGL and Greeneridge (1986) involved aerial surveys before, during, and after the passage of two icebreaking ships. During operations, no belugas and few narwhals were observed in an area approximately 16.8 mi (27 km) ahead of the vessels, and all whales sighted over 12.4–50 mi (20–80 km) from the ships were swimming strongly away. Additional observations confirmed the spatial extent of avoidance reactions to this sound source in this context.

Buckstaff (2004) reported elevated dolphin whistle rates with received levels from oncoming vessels in the 110 to 120 dB range in Sarasota Bay, Florida. These hearing thresholds were apparently lower than those reported by a researcher listening with towed hydrophones. Morisaka *et al.* (2005) compared whistles from three populations of Indo-Pacific bottlenose dolphins. One population was exposed to vessel noise with spectrum levels of approximately 85 dB/Hz in the 1- to 22-kHz band (broadband received levels approximately 128 dB) as opposed to approximately 65 dB/Hz in the same band (broadband received levels approximately 108 dB) for the other two sites. Dolphin whistles in the noisier environment had lower fundamental frequencies and less frequency modulation, suggesting a shift in sound parameters as a result of increased ambient noise.

Morton and Symonds (2002) used census data on killer whales in British Columbia to evaluate avoidance of non-pulse acoustic harassment devices (AHDs). Avoidance ranges were about 2.5 mi (4 km). Also, there was a dramatic reduction in the number of days "resident" killer whales were sighted during AHD-active periods compared to pre- and post-exposure periods and a nearby control site.

Monteiro-Neto *et al.* (2004) studied avoidance responses of tucuxi (*Sotalia fluviatilis*) to Dukane® Netmark acoustic deterrent devices. In a total of 30 exposure trials, approximately five groups each demonstrated significant avoidance compared to 20 pinger off and 55 no-pinger control trials over two quadrats of about 0.19 mi^2 (0.5 km^2). Estimated exposure received levels were approximately 115 dB.

Awbrey and Stewart (1983) played back semi-submersible drillship sounds (source level: 163 dB) to belugas in Alaska. They reported avoidance reactions at 984 and 4,921 ft (300 and 1,500 m) and approach by groups at a distance of 2.2 mi (3.5 km; received levels were approximately 110 to 145 dB over these ranges assuming a 15 log R transmission loss). Similarly, Richardson *et al.* (1990) played back drilling platform sounds (source level: 163 dB) to belugas in Alaska. They conducted aerial observations of eight individuals among approximately 100 spread over an area several hundred meters to several kilometers from the sound source and found no obvious reactions. Moderate changes in movement were noted for three groups swimming within 656 ft (200 m) of the sound projector.

Two studies deal with issues related to changes in marine mammal vocal behavior as a function of variable background noise levels. Foote *et al.* (2004) found increases in the duration of killer whale calls over the period 1977 to 2003, during which time vessel traffic in Puget Sound, and particularly whale-watching boats around the animals, increased dramatically. Scheifele *et al.* (2005) demonstrated that belugas in the St. Lawrence River increased the levels of their vocalizations as a function of the background noise level (the "Lombard Effect").

Several researchers conducting laboratory experiments on hearing and the effects of non-pulse sounds on hearing in mid-frequency cetaceans have reported concurrent behavioral responses. Nachtigall *et al.* (2003) reported that noise exposures up to 179 dB and 55-min duration affected the trained behaviors of a bottlenose dolphin participating in a TTS experiment. Finneran and Schlundt (2004) provided a detailed, comprehensive analysis of the behavioral responses of belugas and bottlenose dolphins to 1-s tones (received levels 160 to 202 dB) in the context of TTS experiments. Romano *et al.* (2004) investigated the physiological responses of a bottlenose dolphin and a beluga exposed to these tonal exposures and demonstrated a decrease in blood cortisol levels during a series of exposures between 130 and 201 dB. Collectively, the laboratory observations suggested the onset of a behavioral response at higher received levels than did field studies. The differences were likely related to the very different conditions and contextual variables between untrained, free-ranging individuals vs. laboratory subjects that were rewarded with food for tolerating noise exposure.

Pinnipeds—Pinnipeds generally seem to be less responsive to exposure to

industrial sound than most cetaceans. Pinniped responses to underwater sound from some types of industrial activities such as seismic exploration appear to be temporary and localized (Harris *et al.*, 2001; Reiser *et al.*, 2009).

Blackwell *et al.* (2004) reported little or no reaction of ringed seals in response to pile-driving activities during construction of a man-made island in the Beaufort Sea. Ringed seals were observed swimming as close as 151 ft (46 m) from the island and may have been habituated to the sounds which were likely audible at distances <9,842 ft (3,000 m) underwater and 0.3 mi (0.5 km) in air. Moulton *et al.* (2003) reported that ringed seal densities on ice in the vicinity of a man-made island in the Beaufort Sea did not change significantly before and after construction and drilling activities.

Southall *et al.* (2007) reviewed literature describing responses of pinnipeds to non-pulsed sound and reported that the limited data suggest exposures between approximately 90 and 140 dB generally do not appear to induce strong behavioral responses in pinnipeds exposed to non-pulse sounds in water; no data exist regarding exposures at higher levels. It is important to note that among these studies, there are some apparent differences in responses between field and laboratory conditions. In contrast to the mid-frequency odontocetes, captive pinnipeds responded more strongly at lower levels than did animals in the field. Again, contextual issues are the likely cause of this difference.

Jacobs and Terhune (2002) observed harbor seal reactions to AHDs (source level in this study was 172 dB) deployed around aquaculture sites. Seals were generally unresponsive to sounds from the AHDs. During two specific events, individuals came within 141 and 144 ft (43 and 44 m) of active AHDs and failed to demonstrate any measurable behavioral response; estimated received levels based on the measures given were approximately 120 to 130 dB.

Costa *et al.* (2003) measured received noise levels from an Acoustic Thermometry of Ocean Climate (ATOC) program sound source off northern California using acoustic data loggers placed on translocated elephant seals. Subjects were captured on land, transported to sea, instrumented with archival acoustic tags, and released such that their transit would lead them near an active ATOC source (at 939-m depth; 75-Hz signal with 37.5- Hz bandwidth; 195 dB maximum source level, ramped up from 165 dB over 20 min) on their return to a haul-out site. Received exposure levels of the ATOC source for experimental subjects averaged 128 dB (range 118 to 137) in the 60- to 90-Hz band. None of the instrumented animals terminated dives or radically altered behavior upon exposure, but some statistically significant changes in diving parameters were documented in nine individuals. Translocated northern elephant seals exposed to this particular non-pulse source began to demonstrate subtle behavioral changes at exposure to received levels of approximately 120 to 140 dB.

Kastelein *et al.* (2006) exposed nine captive harbor seals in an approximately 82 × 98 ft (25 × 30 m) enclosure to non-pulse sounds used in underwater data communication systems (similar to acoustic modems). Test signals were frequency modulated tones, sweeps, and bands of noise with fundamental frequencies between 8 and 16 kHz; 128 to 130 [± 3] dB source levels; 1- to 2-s duration [60–80 percent duty cycle]; or 100 percent duty cycle. They recorded seal positions and the mean number of individual surfacing behaviors during control periods (no exposure), before exposure, and in 15-min experimental sessions (n = 7 exposures for each sound type). Seals generally swam away from each source at received levels of approximately 107 dB, avoiding it by approximately 16 ft (5 m), although they did not haul out of the water or change surfacing behavior. Seal reactions did not appear to wane over repeated exposure (i.e., there was no obvious habituation), and the colony of seals generally returned to baseline conditions following exposure. The seals were not reinforced with food for remaining in the sound field.

Potential effects to pinnipeds from aircraft activity could involve both acoustic and non-acoustic effects. It is uncertain if the seals react to the sound of the helicopter or to its physical presence flying overhead. Typical reactions of hauled out pinnipeds to aircraft that have been observed include looking up at the aircraft, moving on the ice or land, entering a breathing hole or crack in the ice, or entering the water. Ice seals hauled out on the ice have been observed diving into the water when approached by a low-flying aircraft or helicopter (Burns and Harbo, 1972, cited in Richardson *et al.*, 1995a; Burns and Frost, 1979, cited in Richardson *et al.*, 1995a). Richardson *et al.* (1995a) note that responses can vary based on differences in aircraft type, altitude, and flight pattern. Additionally, a study conducted by Born *et al.* (1999) found that wind chill was also a factor in level of response of ringed seals hauled out on ice, as well as time of day and relative wind direction.

Blackwell *et al.* (2004a) observed 12 ringed seals during low-altitude overflights of a Bell 212 helicopter at Northstar in June and July 2000 (9 observations took place concurrent with pipe-driving activities). One seal showed no reaction to the aircraft while the remaining 11 (92%) reacted, either by looking at the helicopter (n=10) or by departing from their basking site (n=1). Blackwell *et al.* (2004a) concluded that none of the reactions to helicopters were strong or long lasting, and that seals near Northstar in June and July 2000 probably had habituated to industrial sounds and visible activities that had occurred often during the preceding winter and spring. There have been few systematic studies of pinniped reactions to aircraft overflights, and most of the available data concern pinnipeds hauled out on land or ice rather than pinnipeds in the water (Richardson *et al.*, 1995a; Born *et al.*, 1999).

Born *et al.* (1999) determined that 49 percent of ringed seals escaped (i.e., left the ice) as a response to a helicopter flying at 492 ft (150 m) altitude. Seals entered the water when the helicopter was 4,101 ft (1,250 m) away if the seal was in front of the helicopter and at 1,640 ft (500 m) away if the seal was to the side of the helicopter. The authors noted that more seals reacted to helicopters than to fixed-wing aircraft. The study concluded that the risk of scaring ringed seals by small-type helicopters could be substantially reduced if they do not approach closer than 4,921 ft (1,500 m).

Spotted seals hauled out on land in summer are unusually sensitive to aircraft overflights compared to other species. They often rush into the water when an aircraft flies by at altitudes up to 984–2,461 ft (300–750 m). They occasionally react to aircraft flying as high as 4,495 ft (1,370 m) and at lateral distances as far as 1.2 mi (2 km) or more (Frost and Lowry, 1990; Rugh *et al.*, 1997).

(4) Hearing Impairment and Other Physiological Effects

Temporary or permanent hearing impairment is a possibility when marine mammals are exposed to very strong sounds. Non-auditory physiological effects might also occur in marine mammals exposed to strong underwater sound. Possible types of non-auditory physiological effects or injuries that theoretically might occur in mammals close to a strong sound source include stress, neurological effects, bubble formation, and other types of organ or tissue damage. It is possible that some

marine mammal species (i.e., beaked whales) may be especially susceptible to injury and/or stranding when exposed to strong pulsed sounds. However, as discussed later in this document, there is no definitive evidence that any of these effects occur even for marine mammals in close proximity to industrial sound sources, and beaked whales do not occur in the proposed activity area. Additional information regarding the possibilities of TTS, permanent threshold shift (PTS), and non-auditory physiological effects, such as stress, is discussed for both exploratory drilling activities and VSP surveys in the following section (*"Potential Effects from VSP Activities"*).

Potential Effects from VSP Activities

(1) Tolerance

Numerous studies have shown that pulsed sounds from airguns are often readily detectable in the water at distances of many kilometers. Weir (2008) observed marine mammal responses to seismic pulses from a 24 airgun array firing a total volume of either 5,085 in^3 or 3,147 in^3 in Angolan waters between August 2004 and May 2005. Weir recorded a total of 207 sightings of humpback whales (n = 66), sperm whales (n = 124), and Atlantic spotted dolphins (n = 17) and reported that there were no significant differences in encounter rates (sightings/hr) for humpback and sperm whales according to the airgun array's operational status (i.e., active versus silent). For additional information on tolerance of marine mammals to anthropogenic sound, see the previous subsection in this document (*"Potential Effects from Exploratory Drilling Activities"*).

(2) Masking

As stated earlier in this document, masking is the obscuring of sounds of interest by other sounds, often at similar frequencies. For full details about masking, see the previous subsection in this document (*"Potential Effects from Exploratory Drilling Activities"*). Some additional information regarding pulsed sounds is provided here.

There is evidence of some marine mammal species continuing to call in the presence of industrial activity. McDonald *et al.* (1995) heard blue and fin whale calls between seismic pulses in the Pacific. Although there has been one report that sperm whales cease calling when exposed to pulses from a very distant seismic ship (Bowles *et al.*, 1994), a more recent study reported that sperm whales off northern Norway continued calling in the presence of seismic pulses (Madsen *et al.*, 2002). Similar results were also reported during work in the Gulf of Mexico (Tyack *et al.*, 2003). Bowhead whale calls are frequently detected in the presence of seismic pulses, although the numbers of calls detected may sometimes be reduced (Richardson *et al.*, 1986; Greene *et al.*, 1999; Blackwell *et al.*, 2009a). Bowhead whales in the Beaufort Sea may decrease their call rates in response to seismic operations, although movement out of the area might also have contributed to the lower call detection rate (Blackwell *et al.*, 2009a,b). Additionally, there is increasing evidence that, at times, there is enough reverberation between airgun pulses such that detection range of calls may be significantly reduced. In contrast, Di Iorio and Clark (2009) found evidence of increased calling by blue whales during operations by a lower-energy seismic source, a sparker.

There is little concern regarding masking due to the brief duration of these pulses and relatively longer silence between airgun shots (9–12 seconds) near the sound source. However, at long distances (over tens of kilometers away) in deep water, due to multipath propagation and reverberation, the durations of airgun pulses can be "stretched" to seconds with long decays (Madsen *et al.*, 2006; Clark and Gagnon, 2006). Therefore it could affect communication signals used by low frequency mysticetes when they occur near the noise band and thus reduce the communication space of animals (e.g., Clark *et al.*, 2009a,b) and cause increased stress levels (e.g., Foote *et al.*, 2004; Holt *et al.*, 2009). Nevertheless, the intensity of the noise is also greatly reduced at long distances. Therefore, masking effects are anticipated to be limited, especially in the case of odontocetes, given that they typically communicate at frequencies higher than those of the airguns. Moreover, because of the extremely short time period over which airguns will be used during operations (a total of 2 hrs per well), masking is not anticipated to occur.

(3) Behavioral Disturbance Reactions

As was described in more detail in the previous sub-section (*"Potential Effects of Exploratory Drilling Activities"*), behavioral responses to sound are highly variable and context-specific. Summaries of observed reactions and studies are provided next.

Baleen Whales—Baleen whale responses to pulsed sound (e.g., seismic airguns) have been studied more thoroughly than responses to continuous sound (e.g., drillships). Baleen whales generally tend to avoid operating airguns, but avoidance radii are quite variable. Whales are often reported to show no overt reactions to pulses from large arrays of airguns at distances beyond a few kilometers, even though the airgun pulses remain well above ambient noise levels out to much greater distances (Miller *et al.*, 2005). However, baleen whales exposed to strong noise pulses often react by deviating from their normal migration route (Richardson *et al.*, 1999). Migrating gray and bowhead whales were observed avoiding the sound source by displacing their migration route to varying degrees but within the natural boundaries of the migration corridors (Schick and Urban, 2000; Richardson *et al.*, 1999; Malme *et al.*, 1983). Baleen whale responses to pulsed sound however may depend on the type of activity in which the whales are engaged. Some evidence suggests that feeding bowhead whales may be more tolerant of underwater sound than migrating bowheads (Miller *et al.*, 2005; Lyons *et al.*, 2009; Christie *et al.*, 2010).

Results of studies of gray, bowhead, and humpback whales have determined that received levels of pulses in the 160–170 dB re 1 µPa rms range seem to cause obvious avoidance behavior in a substantial fraction of the animals exposed. In many areas, seismic pulses from large arrays of airguns diminish to those levels at distances ranging from 2.8–9 mi (4.5–14.5 km) from the source. For the much smaller airgun array used during the VSP survey (total discharge volume of 760 in^3), distances to received levels in the 170–160 dB re 1 µPa rms range are estimated to be 1.44–3 mi (2.31–5 km). Baleen whales within those distances may show avoidance or other strong disturbance reactions to the airgun array. Subtle behavioral changes sometimes become evident at somewhat lower received levels, and recent studies have shown that some species of baleen whales, notably bowhead and humpback whales, at times show strong avoidance at received levels lower than 160–170 dB re 1 µPa rms. Bowhead whales migrating west across the Alaskan Beaufort Sea in autumn, in particular, are unusually responsive, with avoidance occurring out to distances of 12.4–18.6 mi (20–30 km) from a medium-sized airgun source (Miller *et al.*, 1999; Richardson *et al.*, 1999). However, more recent research on bowhead whales (Miller *et al.*, 2005) corroborates earlier evidence that, during the summer feeding season, bowheads are not as sensitive to seismic sources. In summer, bowheads typically

begin to show avoidance reactions at a received level of about 160–170 dB re 1 µPa rms (Richardson et al., 1986; Ljungblad *et al.*, 1988; Miller *et al.*, 2005).

Malme *et al.* (1986, 1988) studied the responses of feeding eastern gray whales to pulses from a single 100 in^3 airgun off St. Lawrence Island in the northern Bering Sea. They estimated, based on small sample sizes, that 50% of feeding gray whales ceased feeding at an average received pressure level of 173 dB re 1 µPa on an (approximate) rms basis, and that 10% of feeding whales interrupted feeding at received levels of 163 dB. Those findings were generally consistent with the results of experiments conducted on larger numbers of gray whales that were migrating along the California coast and on observations of the distribution of feeding Western Pacific gray whales off Sakhalin Island, Russia, during a seismic survey (Yazvenko *et al.*, 2007).

Data on short-term reactions (or lack of reactions) of cetaceans to impulsive noises do not necessarily provide information about long-term effects. While it is not certain whether impulsive noises affect reproductive rate or distribution and habitat use in subsequent days or years, certain species have continued to use areas ensonified by airguns and have continued to increase in number despite successive years of anthropogenic activity in the area. Gray whales continued to migrate annually along the west coast of North America despite intermittent seismic exploration and much ship traffic in that area for decades (Appendix A in Malme *et al.*, 1984). Bowhead whales continued to travel to the eastern Beaufort Sea each summer despite seismic exploration in their summer and autumn range for many years (Richardson *et al.*, 1987). Populations of both gray whales and bowhead whales grew substantially during this time. Bowhead whales have increased by approximately 3.4% per year for the last 10 years in the Beaufort Sea (Allen and Angliss, 2012). In any event, the brief exposures to sound pulses from the proposed airgun source (the airguns will only be fired for a period of 2 hrs for each of the two wells) are highly unlikely to result in prolonged effects.

Toothed Whales—Few systematic data are available describing reactions of toothed whales to noise pulses. Few studies similar to the more extensive baleen whale/seismic pulse work summarized earlier in this document have been reported for toothed whales. However, systematic work on sperm whales is underway (Tyack *et al.*, 2003), and there is an increasing amount of information about responses of various odontocetes to seismic surveys based on monitoring studies (e.g., Stone, 2003; Smultea *et al.*, 2004; Moulton and Miller, 2005).

Seismic operators and marine mammal observers sometimes see dolphins and other small toothed whales near operating airgun arrays, but, in general, there seems to be a tendency for most delphinids to show some limited avoidance of seismic vessels operating large airgun systems. However, some dolphins seem to be attracted to the seismic vessel and floats, and some ride the bow wave of the seismic vessel even when large arrays of airguns are firing. Nonetheless, there have been indications that small toothed whales sometimes move away or maintain a somewhat greater distance from the vessel when a large array of airguns is operating than when it is silent (e.g., Goold, 1996a, b, c; Calambokidis and Osmek, 1998; Stone, 2003). The beluga may be a species that (at least at times) shows long-distance avoidance of seismic vessels. Aerial surveys during seismic operations in the southeastern Beaufort Sea recorded much lower sighting rates of beluga whales within 6.2–12.4 mi (10–20 km) of an active seismic vessel. These results were consistent with the low number of beluga sightings reported by observers aboard the seismic vessel, suggesting that some belugas might be avoiding the seismic operations at distances of 6.2–12.4 mi (10–20 km) (Miller *et al.*, 2005).

Captive bottlenose dolphins and (of more relevance in this project) beluga whales exhibit changes in behavior when exposed to strong pulsed sounds similar in duration to those typically used in seismic surveys (Finneran *et al.*, 2002, 2005). However, the animals tolerated high received levels of sound (p–p level >200 dB re 1 µPa) before exhibiting aversive behaviors.

Reactions of toothed whales to large arrays of airguns are variable and, at least for delphinids, seem to be confined to a smaller radius than has been observed for mysticetes. However, based on the limited existing evidence, belugas should not be grouped with delphinids in the "less responsive" category.

Pinnipeds—Pinnipeds are not likely to show a strong avoidance reaction to the airgun sources proposed for use. Visual monitoring from seismic vessels has shown only slight (if any) avoidance of airguns by pinnipeds and only slight (if any) changes in behavior. Ringed seals frequently do not avoid the area within a few hundred meters of operating airgun arrays (Harris *et al.*, 2001; Moulton and Lawson, 2002; Miller *et al.*, 2005). Monitoring work in the Alaskan Beaufort Sea during 1996–2001 provided considerable information regarding the behavior of seals exposed to seismic pulses (Harris *et al.*, 2001; Moulton and Lawson, 2002). These seismic projects usually involved arrays of 6 to 16 airguns with total volumes of 560 to 1,500 in^3. The combined results suggest that some seals avoid the immediate area around seismic vessels. In most survey years, ringed seal sightings tended to be farther away from the seismic vessel when the airguns were operating than when they were not (Moulton and Lawson, 2002). However, these avoidance movements were relatively small, on the order of 328 ft (100 m) to a few hundreds of meters, and many seals remained within 328–656 ft (100–200 m) of the trackline as the operating airgun array passed by. Seal sighting rates at the water surface were lower during airgun array operations than during no-airgun periods in each survey year except 1997. Similarly, seals are often very tolerant of pulsed sounds from seal-scaring devices (Mate and Harvey, 1987; Jefferson and Curry, 1994; Richardson *et al.*, 1995a). However, initial telemetry work suggests that avoidance and other behavioral reactions by two other species of seals to small airgun sources may at times be stronger than evident to date from visual studies of pinniped reactions to airguns (Thompson *et al.*, 1998). Even if reactions of the species occurring in the present study area are as strong as those evident in the telemetry study, reactions are expected to be confined to relatively small distances and durations, with no long-term effects on pinniped individuals or populations. Additionally, the airguns are only proposed to be used for a very short time during the entire exploration drilling program (approximately 2 hrs for each well, for a total of 4 hrs over the entire open-water season, which lasts for approximately 4 months, if both wells are drilled).

(4) Hearing Impairment and Other Physiological Effects

TTS—TTS is the mildest form of hearing impairment that can occur during exposure to a strong sound (Kryter, 1985). While experiencing TTS, the hearing threshold rises, and a sound must be stronger in order to be heard. At least in terrestrial mammals, TTS can last from minutes or hours to (in cases of strong TTS) days, can be limited to a particular frequency range, and can be in varying degrees (i.e., a loss of a certain number of dBs of sensitivity). For sound exposures at or somewhat

above the TTS threshold, hearing sensitivity in both terrestrial and marine mammals 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, and none of the published data concern TTS elicited by exposure to multiple pulses of sound.

Marine mammal hearing plays a critical role in communication with conspecifics and in interpretation of environmental cues for purposes such as predator avoidance and prey capture. Depending on the degree (elevation of threshold in dB), duration (i.e., recovery time), and frequency range of TTS and the context in which it is experienced, TTS can have effects on marine mammals ranging from discountable to serious. For example, a marine mammal may be able to readily compensate for a brief, relatively small amount of TTS in a non-critical frequency range that takes place during a time when the animal is traveling through the open ocean, where ambient noise is lower and there are not as many competing sounds present. Alternatively, a larger amount and longer duration of TTS sustained during a time when communication is critical for successful mother/calf interactions could have more serious impacts if it were in the same frequency band as the necessary vocalizations and of a severity that it impeded communication. The fact that animals exposed to levels and durations of sound that would be expected to result in this physiological response would also be expected to have behavioral responses of a comparatively more severe or sustained nature is also notable and potentially of more importance than the simple existence of a TTS.

Researchers have derived TTS information for odontocetes from studies on the bottlenose dolphin and beluga. For the one harbor porpoise tested, the received level of airgun sound that elicited onset of TTS was lower (Lucke *et al.*, 2009). If these results from a single animal are representative, it is inappropriate to assume that onset of TTS occurs at similar received levels in all odontocetes (*cf.* Southall *et al.*, 2007). Some cetaceans apparently can incur TTS at considerably lower sound exposures than are necessary to elicit TTS in the beluga or bottlenose dolphin.

For baleen whales, there are no data, direct or indirect, on levels or properties of sound that are required to induce TTS. The frequencies to which baleen whales are most sensitive are assumed to be lower than those to which odontocetes are most sensitive, and natural background noise levels at those low frequencies tend to be higher. As a result, auditory thresholds of baleen whales within their frequency band of best hearing are believed to be higher (less sensitive) than are those of odontocetes at their best frequencies (Clark and Ellison, 2004), meaning that baleen whales require sounds to be louder (i.e., higher dB levels) than odontocetes in the frequency ranges at which each group hears the best. From this, it is suspected that received levels causing TTS onset may also be higher in baleen whales (Southall *et al.*, 2007). Since current NMFS practice assumes the same thresholds for the onset of hearing impairment in both odontocetes and mysticetes, NMFS' onset of TTS threshold is likely conservative for mysticetes. For this proposed activity, COP expects no cases of TTS given the strong likelihood that baleen whales would avoid the airguns before being exposed to levels high enough for TTS to occur. The source levels of the drillship are far lower than those of the airguns.

In pinnipeds, TTS thresholds associated with exposure to brief pulses (single or multiple) of underwater sound have not been measured. However, systematic TTS studies on captive pinnipeds have been conducted (Bowles *et al.*, 1999; Kastak *et al.*, 1999, 2005, 2007; Schusterman *et al.*, 2000; Finneran *et al.*, 2003; Southall *et al.*, 2007). Initial evidence from more prolonged (non-pulse) exposures suggested that some pinnipeds (harbor seals in particular) incur TTS at somewhat lower received levels than do small odontocetes exposed for similar durations (Kastak *et al.*, 1999, 2005; Ketten *et al.*, 2001; cf. Au *et al.*, 2000). The TTS threshold for pulsed sounds has been indirectly estimated as being an SEL of approximately 171 dB re 1 $\mu Pa^2 \cdot s$ (Southall *et al.*, 2007) which would be equivalent to a single pulse with a received level of approximately 181 to 186 dB re 1 µPa (rms), or a series of pulses for which the highest rms values are a few dB lower. Corresponding values for California sea lions and northern elephant seals are likely to be higher (Kastak *et al.*, 2005). For harbor seal, which is closely related to the ringed seal, TTS onset apparently occurs at somewhat lower received energy levels than for odonotocetes. The sound level necessary to cause TTS in pinnipeds depends on exposure duration, as in other mammals; with longer exposure, the level necessary to elicit TTS is reduced (Schusterman *et al.*, 2000; Kastak *et al.*, 2005, 2007). For very short exposures (e.g., to a single sound pulse), the level necessary to cause TTS is very high (Finneran *et al.*, 2003). For pinnipeds exposed to in-air sounds, auditory fatigue has been measured in response to single pulses and to non-pulse noise (Southall *et al.*, 2007), although high exposure levels were required to induce TTS-onset (SEL: 129 dB re: 20 $\mu Pa^2 \cdot s$; Bowles *et al.*, unpub. data).

NMFS has established acoustic thresholds that identify the received sound levels above which hearing impairment or other injury could potentially occur, which are 180 and 190 dB re 1 µPa (rms) for cetaceans and pinnipeds, respectively (NMFS 1995, 2000). The established 180- and 190-dB re 1 µPa (rms) criteria are the received levels above which, in the view of a panel of bioacoustics specialists convened by NMFS before additional TTS measurements for marine mammals became available, one could not be certain that there would be no injurious effects, auditory or otherwise, to marine mammals. TTS is considered by NMFS to be a type of Level B (non-injurious) harassment. The 180- and 190-dB levels are shutdown criteria applicable to cetaceans and pinnipeds, respectively, as specified by NMFS (2000) and are used to establish exclusion zones (EZs), as appropriate. Additionally, based on the summary provided here and the fact that modeling indicates the source level of the drill rig will be below the 180 dB threshold (O'Neill *et al.*, 2012), TTS is not expected to occur in any marine mammal species that may occur in the proposed drilling area since the source level will not reach levels thought to induce even mild TTS. While the source level of the airgun is higher than the 190-dB threshold level, an animal would have to be in very close proximity to be exposed to such levels. Additionally, the 180- and 190-dB radii for the airgun are 0.6 mi (920 m) and 525 ft (160 m), respectively, from the source. Because of the short duration that the airguns will be used (no more than 4 hrs throughout the entire open-water season) and mitigation and monitoring measures described later in this document, hearing impairment is not anticipated.

PTS—When PTS occurs, there is physical damage to the sound receptors in the ear. In some cases, there can be total or partial deafness, whereas in other cases, the animal has an impaired ability to hear sounds in specific frequency ranges (Kryter, 1985).

There is no specific evidence that exposure to underwater industrial sound associated with oil exploration can cause PTS in any marine mammal (see Southall *et al.*, 2007). However,

given the possibility that mammals might incur TTS, there has been further speculation about the possibility that some individuals occurring very close to such activities might incur PTS (e.g., Richardson *et al.*, 1995, p. 372*ff*; Gedamke *et al.*, 2008). Single or occasional occurrences of mild TTS are not indicative of permanent auditory damage in terrestrial mammals. Relationships between TTS and PTS thresholds have not been studied in marine mammals but are assumed to be similar to those in humans and other terrestrial mammals (Southall *et al.*, 2007; Le Prell, in press). PTS might occur at a received sound level at least several decibels above that inducing mild TTS. Based on data from terrestrial mammals, a precautionary assumption is that the PTS threshold for impulse sounds (such as airgun pulses as received close to the source) is at least 6 dB higher than the TTS threshold on a peak-pressure basis and probably greater than 6 dB (Southall *et al.*, 2007).

It is highly unlikely that marine mammals could receive sounds strong enough (and over a sufficient duration) to cause PTS during the proposed exploratory drilling program. As mentioned previously in this document, the source levels of the drillship are not considered strong enough to cause even slight TTS. Given the higher level of sound necessary to cause PTS, it is even less likely that PTS could occur. In fact, based on the modeled source levels for the drillship, the levels immediately adjacent to the drillship may not be sufficient to induce PTS, even if the animals remain in the immediate vicinity of the activity. Modeled source levels for a jack-up drill rig suggest that marine mammals located immediately adjacent to the rig would likely not be exposed to received sound levels of a magnitude strong enough to induce PTS, even if the animals remain in the immediate vicinity of the proposed activity location for a prolonged period of time. Because the source levels do not reach the thresholds of 190 dB currently used for pinnipeds and 180 dB currently used for cetaceans, it is highly unlikely that any type of hearing impairment, temporary or permanent, would occur as a result of the exploration drilling activities. Additionally, Southall *et al.* (2007) proposed that the thresholds for injury of marine mammals exposed to "discrete" noise events (either single or multiple exposures over a 24-hr period) are higher than the 180- and 190-dB re 1 µPa (rms) in-water threshold currently used by NMFS. Table 1 in this document summarizes the sound pressure levels (SPL) and SEL levels thought to cause auditory injury to cetaceans and pinnipeds in-water. For more information, please refer to Southall *et al.* (2007).

TABLE 1—INJURY CRITERIA FOR CETACEANS AND PINNIPEDS EXPOSED TO "DISCRETE" NOISE EVENTS (EITHER SINGLE PULSES, MULTIPLE PULSES, OR NON-PULSES WITHIN A 24-HR PERIOD; CITED IN SOUTHALL ET AL., 2007). THIS TABLE REFLECTS THRESHOLDS BASED ON STUDIES REVIEWED IN SOUTHALL ET AL. (2007) BUT DO NOT INFLUENCE THE ESTIMATION OF TAKE IN THIS PROPOSED IHA NOTICE AS NO INJURY IS ANTICIPATED TO OCCUR

	Single pulses	Multiple pulses	Non pulses
Low-frequency cetaceans			
Sound pressure level	230 dB re 1 µPa (peak) (flat)	230 dB re 1 µPa (peak) (flat)	230 dB re 1 µPa (peak) (flat)
Sound exposure level	198 dB re 1 µPa^2-s (M_{lf})	198 dB re 1 µPa^2-s (M_{lf})	215 dB re 1 µPa^2-s (M_{lf})
Mid-frequency cetaceans			
Sound pressure level	230 dB re 1 µPa (peak) (flat)	230 dB re 1 µPa (peak) (flat)	230 dB re 1 µPa (peak) (flat)
Sound exposure level	198 dB re 1 µPa^2-s (M_{lf})	198 dB re 1 µPa^2-s (M_{lf})	215 dB re 1 µPa^2-s (M_{lf})
High-frequency cetaceans			
Sound pressure level	230 dB re 1 µPa (peak) (flat)	230 dB re 1 µPa (peak) (flat)	230 dB re 1 µPa (peak) (flat)
Sound exposure level	198 dB re 1 µPa^2-s (M_{lf})	198 dB re 1 µPa^2-s (M_{lf})	215 dB re 1 µPa^2-s (M_{lf})
Pinnipeds (in water)			
Sound pressure level	218 dB re 1 µPa (peak) (flat)	218 dB re 1 µPa (peak) (flat)	218 dB re 1 µPa (peak) (flat)
Sound exposure level	186 dB re 1 µPa^2-s (M_{pw})	186 dB re 1 µPa^2-s (M_{pw})	203 dB re 1 µPa^2-s (M_{pw})

Non-auditory Physiological Effects—Non-auditory physiological effects or injuries that theoretically might occur in marine mammals exposed to strong underwater sound include stress, neurological effects, bubble formation, and other types of organ or tissue damage (Cox *et al.*, 2006; Southall *et al.*, 2007). Studies examining any such effects are limited. If any such effects do occur, they probably would be limited to unusual situations when animals might be exposed at close range for unusually long periods. It is doubtful that any single marine mammal would be exposed to strong sounds for sufficiently long that significant physiological stress would develop.

Classic stress responses begin when an animal's central nervous system perceives a potential threat to its homeostasis. That perception triggers stress responses regardless of whether a stimulus actually threatens the animal; the mere perception of a threat is sufficient to trigger a stress response (Moberg, 2000; Sapolsky *et al.*, 2005; Seyle, 1950). Once an animal's central nervous system perceives a threat, it mounts a biological response or defense that consists of a combination of the four general biological defense responses: behavioral responses; autonomic nervous system responses; neuroendocrine responses; or immune responses.

In the case of many stressors, an animal's first and most economical (in terms of biotic costs) response is behavioral avoidance of the potential stressor or avoidance of continued exposure to a stressor. An animal's second line of defense to stressors involves the sympathetic part of the autonomic nervous system and the classical "fight or flight" response, which includes the cardiovascular system, the gastrointestinal system, the exocrine glands, and the adrenal medulla to produce changes in heart

rate, blood pressure, and gastrointestinal activity that humans commonly associate with "stress." These responses have a relatively short duration and may or may not have significant long-term effects on an animal's welfare.

An animal's third line of defense to stressors involves its neuroendocrine or sympathetic nervous systems; the system that has received the most study has been the hypothalmus-pituitary-adrenal system (also known as the HPA axis in mammals or the hypothalamus-pituitary-interrenal axis in fish and some reptiles). Unlike stress responses associated with the autonomic nervous system, virtually all neuroendocrine functions that are affected by stress—including immune competence, reproduction, metabolism, and behavior—are regulated by pituitary hormones. Stress-induced changes in the secretion of pituitary hormones have been implicated in failed reproduction (Moberg, 1987; Rivier, 1995), altered metabolism (Elasser *et al.*, 2000), reduced immune competence (Blecha, 2000), and behavioral disturbance. Increases in the circulation of glucocorticosteroids (cortisol, corticosterone, and aldosterone in marine mammals; see Romano *et al.*, 2004) have been equated with stress for many years.

The primary distinction between stress (which is adaptive and does not normally place an animal at risk) and distress is the biotic cost of the response. During a stress response, an animal uses glycogen stores that can be quickly replenished once the stress is alleviated. In such circumstances, the cost of the stress response would not pose a risk to the animal's welfare. However, when an animal does not have sufficient energy reserves to satisfy the energetic costs of a stress response, energy resources must be diverted from other biotic functions, which impair those functions that experience the diversion. For example, when mounting a stress response diverts energy away from growth in young animals, those animals may experience stunted growth. When mounting a stress response diverts energy from a fetus, an animal's reproductive success and fitness will suffer. In these cases, the animals will have entered a pre-pathological or pathological state which is called "distress" (sensu Seyle, 1950) or "allostatic loading" (sensu McEwen and Wingfield, 2003). This pathological state will last until the animal replenishes its biotic reserves sufficient to restore normal function. Note that these examples involved a long-term (days or weeks) stress response exposure to stimuli.

Relationships between these physiological mechanisms, animal behavior, and the costs of stress responses have also been documented fairly well through controlled experiment; because this physiology exists in every vertebrate that has been studied, it is not surprising that stress responses and their costs have been documented in both laboratory and free-living animals (for examples see, Holberton *et al.*, 1996; Hood *et al.*, 1998; Jessop *et al.*, 2003; Krausman *et al.*, 2004; Lankford *et al.*, 2005; Reneerkens *et al.*, 2002; Thompson and Hamer, 2000). Although no information has been collected on the physiological responses of marine mammals to anthropogenic sound exposure, studies of other marine animals and terrestrial animals would lead us to expect some marine mammals to experience physiological stress responses and, perhaps, physiological responses that would be classified as "distress" upon exposure to anthropogenic sounds.

For example, Jansen (1998) reported on the relationship between acoustic exposures and physiological responses that are indicative of stress responses in humans (e.g., elevated respiration and increased heart rates). Jones (1998) reported on reductions in human performance when faced with acute, repetitive exposures to acoustic disturbance. Trimper *et al.* (1998) reported on the physiological stress responses of osprey to low-level aircraft noise while Krausman *et al.* (2004) reported on the auditory and physiology stress responses of endangered Sonoran pronghorn to military overflights. Smith *et al.* (2004a, 2004b) identified noise-induced physiological transient stress responses in hearing-specialist fish (i.e., goldfish) that accompanied short- and long-term hearing losses. Welch and Welch (1970) reported physiological and behavioral stress responses that accompanied damage to the inner ears of fish and several mammals.

Hearing is one of the primary senses marine mammals use to gather information about their environment and communicate with conspecifics. Although empirical information on the relationship between sensory impairment (TTS, PTS, and acoustic masking) on marine mammals remains limited, it seems reasonable to assume that reducing an animal's ability to gather information about its environment and to communicate with other members of its species would be stressful for animals that use hearing as their primary sensory mechanism. Therefore, we assume that acoustic exposures sufficient to trigger onset PTS or TTS would be accompanied by physiological stress responses because terrestrial animals exhibit those responses under similar conditions (NRC, 2003). More importantly, marine mammals might experience stress responses at received levels lower than those necessary to trigger onset TTS. Based on empirical studies of the time required to recover from stress responses (Moberg, 2000), NMFS also assumes that stress responses could persist beyond the time interval required for animals to recover from TTS and might result in pathological and pre-pathological states that would be as significant as behavioral responses to TTS. However, as stated previously in this document, the source level of the drill rig is not loud enough to induce PTS or even TTS.

Resonance effects (Gentry, 2002) and direct noise-induced bubble formations (Crum *et al.*, 2005) are implausible in the case of exposure to an impulsive broadband source like an airgun array. If seismic surveys disrupt diving patterns of deep-diving species, this might result in bubble formation and a form of the bends, as speculated to occur in beaked whales exposed to sonar. However, there is no specific evidence of this upon exposure to airgun pulses. Additionally, no beaked whale species occur in the proposed exploration drilling area.

In general, very little is known about the potential for strong, anthropogenic underwater sounds to cause non-auditory physical effects in marine mammals. Such effects, if they occur at all, would presumably be limited to short distances and to activities that extend over a prolonged period. The available data do not allow identification of a specific exposure level above which non-auditory effects can be expected (Southall *et al.*, 2007) or any meaningful quantitative predictions of the numbers (if any) of marine mammals that might be affected in those ways. The low levels of continuous sound that will be produced by the drillship are not expected to cause such effects. Additionally, marine mammals that show behavioral avoidance of the proposed activities, including most baleen whales, some odontocetes (including belugas), and some pinnipeds, are especially unlikely to incur auditory impairment or other physical effects.

Stranding and Mortality

Marine mammals close to underwater detonations of high explosives can be killed or severely injured, and the auditory organs are especially susceptible to injury (Ketten *et al.*, 1993; Ketten, 1995). However, explosives are

no longer used for marine waters for commercial seismic surveys; they have been replaced entirely by airguns or related non-explosive pulse generators. Underwater sound from drilling, support activities, and airgun arrays is less energetic and has slower rise times, and there is no proof that they can cause serious injury, death, or stranding, even in the case of large airgun arrays. However, the association of mass strandings of beaked whales with naval exercises involving mid-frequency active sonar, and, in one case, a Lamont-Doherty Earth Observatory (L–DEO) seismic survey (Malakoff, 2002; Cox *et al.*, 2006), has raised the possibility that beaked whales exposed to strong pulsed sounds may be especially susceptible to injury and/or behavioral reactions that can lead to stranding (e.g., Hildebrand, 2005; Southall *et al.*, 2007).

Specific sound-related processes that lead to strandings and mortality are not well documented, but may include:

(1) Swimming in avoidance of a sound into shallow water;

(2) A change in behavior (such as a change in diving behavior) that might contribute to tissue damage, gas bubble formation, hypoxia, cardiac arrhythmia, hypertensive hemorrhage or other forms of trauma;

(3) A physiological change, such as a vestibular response leading to a behavioral change or stress-induced hemorrhagic diathesis, leading in turn to tissue damage; and

(4) Tissue damage directly from sound exposure, such as through acoustically-mediated bubble formation and growth or acoustic resonance of tissues.

Some of these mechanisms are unlikely to apply in the case of impulse sounds. However, there are indications that gas-bubble disease (analogous to "the bends"), induced in supersaturated tissue by a behavioral response to acoustic exposure, could be a pathologic mechanism for the strandings and mortality of some deep-diving cetaceans exposed to sonar. However, the evidence for this remains circumstantial and is associated with exposure to naval mid-frequency sonar, not seismic surveys or exploratory drilling programs (Cox *et al.*, 2006; Southall *et al.*, 2007).

Both seismic pulses and continuous drillship sounds are quite different from mid-frequency sonar signals, and some mechanisms by which sonar sounds have been hypothesized to affect beaked whales are unlikely to apply to airgun pulses or drill rigs. Sounds produced by airgun arrays are broadband impulses with most of the energy below 1 kHz, and the low-energy continuous sounds produced by drill rigs have most of the energy between 20 and 1,000 Hz. Additionally, the non-impulsive, continuous sounds produced by the jack-up rig proposed to be used by COP does not have rapid rise times. Rise time is the fluctuation in sound levels of the source. The type of sound that would be produced during the proposed drilling program will be constant and will not exhibit any sudden fluctuations or changes. Typical military mid-frequency sonar emits non-impulse sounds at frequencies of 2–10 kHz, generally with a relatively narrow bandwidth at any one time. A further difference between them is that naval exercises can involve sound sources on more than one vessel. Thus, it is not appropriate to assume that there is a direct connection between the effects of military sonar and oil and gas industry operations on marine mammals. However, evidence that sonar signals can, in special circumstances, lead (at least indirectly) to physical damage and mortality (e.g., Balcomb and Claridge, 2001; NOAA and USN, 2001; Jepson *et al.*, 2003; Fernández *et al.*, 2004, 2005; Hildebrand, 2005; Cox *et al.*, 2006) suggests that caution is warranted when dealing with exposure of marine mammals to any high-intensity "pulsed" sound.

There is no conclusive evidence of cetacean strandings or deaths at sea as a result of exposure to seismic surveys, but a few cases of strandings in the general area where a seismic survey was ongoing have led to speculation concerning a possible link between seismic surveys and strandings. Suggestions that there was a link between seismic surveys and strandings of humpback whales in Brazil (Engel *et al.*, 2004) were not well founded (IAGC, 2004; IWC, 2007). In September 2002, there was a stranding of two Cuvier's beaked whales in the Gulf of California, Mexico, when the L–DEO vessel R/V *Maurice Ewing* was operating a 20 airgun (8,490 in^3) array in the general area. The link between the stranding and the seismic surveys was inconclusive and not based on any physical evidence (Hogarth, 2002; Yoder, 2002). Nonetheless, the Gulf of California incident, plus the beaked whale strandings near naval exercises involving use of mid-frequency sonar, suggests a need for caution in conducting seismic surveys in areas occupied by beaked whales until more is known about effects of seismic surveys on those species (Hildebrand, 2005). No injuries of beaked whales are anticipated during the proposed exploratory drilling program because none occur in the proposed area.

Oil Spill Response Preparedness and Potential Impacts of an Oil Spill

As noted above, the specified activity involves the drilling of exploratory wells and associated activities in the Chukchi Sea during the 2012 open-water season. The impacts to marine mammals that are reasonably expected to occur will be acoustic in nature. The likelihood of a large or very large oil spill occurring during COP's proposed exploratory drilling program is remote. A total of 35 exploration wells have been drilled between 1982 and 2003 in the Chukchi and Beaufort seas, and there have been no blowouts. In addition, no blowouts have occurred from the approximately 98 exploration wells drilled within the Alaskan OCS (MMS, 2007a). BOEM's Supplemental Environmental Impact Statement for the Chukchi Sea Oil and Gas Lease Sale 193 (BOEM, 2011) provides a discussion of the extremely low likelihood of an oil spill occurring (available on the Internet at: *http://www.boem.gov/About-BOEM/BOEM-Regions/Alaska-Region/Environment/Environmental-Analysis/OCS-EIS/EA-BOEMRE-2011-041.aspx*). For more recent updates on occurrence rates for offshore oil spills from drilling platforms, including spills greater than or equal to 1,000 barrels (bbls) and greater than or equal to 10,000 bbls, we refer to the BOEM-funded study of McMahon-Anders *et al.* (2012). However, this study did not focus solely on the Alaskan OCS. Another BOEM-directed study discusses most recent oil spill occurrence estimators and their variability for the Beaufort and Chukchi Seas for various sizes of spills as small as 50 bbls (Bercha, 2011). Bercha (2011) notes that because of the difference in oil spill indicators between non-Arctic OCS areas and the Beaufort and Chukchi Seas OCS areas, the non-Arctic areas are likely to result in a somewhat higher oil spill occurrence probability than comparable developments in the Chukchi or Beaufort Seas.

COP will have various measures and protocols in place that will be implemented to prevent oil releases from the wellbore, such as:

- Using information from previous wells in addition to recent data collected from 3D seismic and shallow hazard surveys, where applicable, to increase knowledge of the subsurface environment;
- Using skilled personnel and providing them with project-specific training, implementing frequent drills to keep personnel alert;
- Implementation of visual and automated procedures for the early detection of a spill;

The drilling operation will be monitored continuously by Pit-Volume Totalizer equipment and visual monitoring of the mud circulating system.

Alarms will be sounded if there is a significant volume increase of drilling mud in the pits due to an influx into the wellbore.

Multiple walk-through inspections of the rig are performed every day by each crew to inspect and verify all control systems are functioning properly.

Mobile Offshore Drilling Unit's (MODU) Central Control & Radio Room monitors all safety aspects of the rig and is manned 24 hrs per day by qualified rig personnel.

Established emergency shutdown philosophies will be documented in the Contractor's Operations manuals and the crews will be trained accordingly. An emergency shutdown can be initiated manually by operators at the instrument/control panels or automatically under certain conditions.

• Maintaining a minimum of two barriers; the jack-up rig has the capability of utilizing advanced well control barriers:

Surface blow out preventer (BOP) located on the rig in a place that is easily accessible. This BOP can close in well on drill pipe or open hole.

Thick walled high strength riser designed to contain full well pressure.

Pre-Positioned Capping Device (PCD) will be installed above the wellhead on the sea floor. The PCD can keep the well isolated with pressure containment, even if the rig is moved off location. The PCD can be triggered remotely from the drill rig or from support vessels.

Mechanical containment and recovery is COP's primary form of response. Actual spill response decisions depend on safety considerations, weather, and other environmental conditions. It is the discretion of the Incident Commander and Unified Command to select any sequence, response measure, or take as much time as necessary, to employ an effective response. COP's spill response fleet is mobile and capable of responding to incidents affecting open-water, nearshore, and shoreline environments. Offshore spill response would be provided by the following vessels:

• Oil Spill Response Vessel (OSRV), the primary offshore oil spill response platform, located within about 5.5 mi (9 km) of the drilling rig;

• Offshore Supply Vessel (OSV), a vessel of opportunity response platform, located within about 5.5 mi (9 km) of the drilling rig;

• Four workboats, two are located on the OSRV and two on the OSV; and

• One Oil Spill Tanker (OST), with a storage capacity of at least 520,000 barrels, also located within about 5.5 mi (9 km) from the drilling rig.

Alaska Clean Seas personnel will be stationed on OSRV, OSV, and the drill rig. OSRV is the primary spill response vessel; it will also be used to support refueling of the jack-up rig. In the event of an emergency, OSV will provide oil spill response and fast response craft capability near the ware vessel. During non-emergency operations, OSV will provide operational drill rig support, including standby support during vessel refueling operations. From the standby locations, it will take about 30 min for the vessels to arrive at the rig.

Spill response support for nearshore operations will be located about 5.5 mi (9 km) from the drill rig location and approximately 5 mi (8 km) offshore of Wainwright. Nearshore spill response operations are provided by the following vessels:

• One Oil Spill Response Barge (OSRB) and tug with a storage capacity of 40,000 bbls;

• Four workboats, located on the OSRB;

• One large landing craft, located adjacent to the OSRB; and

• Four 32-foot shallow draft landing craft located on the large landing craft.

The OSRB and large landing craft are designed to carry and deploy a majority of the nearshore and onshore spill response assets. In the event of a spill, additional responders would be mobilized to man the OSRB, large landing craft, and other support vessels. From 5 mi (8 km) offshore of Wainwright it will take about 24 hrs for the OSRB to arrive at the rig, assuming a travel speed of 5 knots and including notification time. However, because this barge is equipped primarily for nearshore response, it is unlikely to be needed offshore near the rig.

Despite concluding that the risk of serious injury or mortality from an oil spill in this case is extremely remote, NMFS has nonetheless evaluated the potential effects of an oil spill on marine mammals. While an oil spill is not a component of COP's specified activity for which NMFS is proposing to authorize take, potential impacts on marine mammals from an oil spill are discussed in more detail below and will be addressed further in the Environmental Assessment.

Potential Effects of Oil on Cetaceans

The specific effects an oil spill would have on cetaceans are not well known. While mortality is unlikely, exposure to spilled oil could lead to skin irritation, baleen fouling (which might reduce feeding efficiency), respiratory distress from inhalation of hydrocarbon vapors, consumption of some contaminated prey items, and temporary displacement from contaminated feeding areas. Geraci and St. Aubin (1990) summarize effects of oil on marine mammals, and Bratton *et al.* (1993) provides a synthesis of knowledge of oil effects on bowhead whales. The number of cetaceans that might be contacted by a spill would depend on the size, timing, and duration of the spill and where the oil is in relation to the animals. Whales may not avoid oil spills, and some have been observed feeding within oil slicks (Goodale *et al.*, 1981). These topics are discussed in more detail next.

In the case of an oil spill occurring during migration periods, disturbance of the migrating cetaceans from cleanup activities may have more of an impact than the oil itself. Human activity associated with cleanup efforts could deflect whales away from the path of the oil. However, noise created from cleanup activities likely will be short term and localized. In fact, whale avoidance of clean-up activities may benefit whales by displacing them from the oil spill area.

There is no direct evidence that oil spills, including the much studied Santa Barbara Channel and Exxon Valdez spills, have caused any deaths of cetaceans (Geraci, 1990; Brownell, 1971; Harvey and Dahlheim, 1994). It is suspected that some individually identified killer whales that disappeared from Prince William Sound during the time of the Exxon Valdez spill were casualties of that spill. However, no clear cause and effect relationship between the spill and the disappearance could be established (Dahlheim and Matkin, 1994). The AT–1 pod of transient killer whales that sometimes inhabits Prince William Sound has continued to decline after the Exxon Valdez oil spill (EVOS). Matkin *et al.* (2008) tracked the AB resident pod and the AT–1 transient group of killer whales from 1984 to 2005. The results of their photographic surveillance indicate a much higher than usual mortality rate for both populations the year following the spill (33% for AB Pod and 41% for AT–1 Group) and lower than average rates of increase in the 16 years after the spill (annual increase of about 1.6% for AB Pod compared to an annual increase of about 3.2% for other Alaska killer whale pods). In killer whale pods, mortality rates are usually higher for non-reproductive animals and very low for reproductive animals and adolescents

(Olesiuk *et al.*, 1990, 2005; Matkin *et al.*, 2005). No effects on humpback whales in Prince William Sound were evident after the EVOS (von Ziegesar *et al.*, 1994). There was some temporary displacement of humpback whales out of Prince William Sound, but this could have been caused by oil contamination, boat and aircraft disturbance, displacement of food sources, or other causes.

Migrating gray whales were apparently not greatly affected by the Santa Barbara spill of 1969. There appeared to be no relationship between the spill and mortality of marine mammals. The higher than usual counts of dead marine mammals recorded after the spill represented increased survey effort and therefore cannot be conclusively linked to the spill itself (Brownell, 1971; Geraci, 1990). The conclusion was that whales were either able to detect the oil and avoid it or were unaffected by it (Geraci, 1990).

(1) Oiling of External Surfaces

Whales rely on a layer of blubber for insulation, so oil would have little if any effect on thermoregulation by whales. Effects of oiling on cetacean skin appear to be minor and of little significance to the animal's health (Geraci, 1990). Histological data and ultrastructural studies by Geraci and St. Aubin (1990) showed that exposures of skin to crude oil for up to 45 minutes in four species of toothed whales had no effect. They switched to gasoline and applied the sponge up to 75 minutes. This produced transient damage to epidermal cells in whales. Subtle changes were evident only at the cell level. In each case, the skin damage healed within a week. They concluded that a cetacean's skin is an effective barrier to the noxious substances in petroleum. These substances normally damage skin by getting between cells and dissolving protective lipids. In cetacean skin, however, tight intercellular bridges, vital surface cells, and the extraordinary thickness of the epidermis impeded the damage. The authors could not detect a change in lipid concentration between and within cells after exposing skin from a white-sided dolphin to gasoline for 16 hours in vitro.

Bratton *et al.* (1993) synthesized studies on the potential effects of contaminants on bowhead whales. They concluded that no published data proved oil fouling of the skin of any free-living whales, and conclude that bowhead whales contacting fresh or weathered petroleum are unlikely to suffer harm. Although oil is unlikely to adhere to smooth skin, it may stick to rough areas on the surface (Henk and Mullan, 1997). Haldiman *et al.* (1985) found the epidermal layer to be as much as seven to eight times thicker than that found on most whales. They also found that little or no crude oil adhered to preserved bowhead skin that was dipped into oil up to three times, as long as a water film stayed on the skin's surface. Oil adhered in small patches to the surface and vibrissae (stiff, hairlike structures), once it made enough contact with the skin. The amount of oil sticking to the surrounding skin and epidermal depression appeared to be in proportion to the number of exposures and the roughness of the skin's surface. It can be assumed that if oil contacted the eyes, effects would be similar to those observed in ringed seals; continued exposure of the eyes to oil could cause permanent damage (St. Aubin, 1990).

(2) Ingestion

Whales could ingest oil if their food is contaminated, or oil could also be absorbed through the respiratory tract. Some of the ingested oil is voided in vomit or feces but some is absorbed and could cause toxic effects (Geraci, 1990). When returned to clean water, contaminated animals can depurate this internal oil (Engelhardt, 1978, 1982). Oil ingestion can decrease food assimilation of prey eaten (St. Aubin, 1988). Cetaceans may swallow some oil-contaminated prey, but it likely would be only a small part of their food. It is not known if whales would leave a feeding area where prey was abundant following a spill. Some zooplankton eaten by bowheads and gray whales consume oil particles and bioaccumulation can result. Tissue studies by Geraci and St. Aubin (1990) revealed low levels of naphthalene in the livers and blubber of baleen whales. This result suggests that prey have low concentrations in their tissues, or that baleen whales may be able to metabolize and excrete certain petroleum hydrocarbons. Whales exposed to an oil spill are unlikely to ingest enough oil to cause serious internal damage (Geraci and St. Aubin, 1980, 1982) and this kind of damage has not been reported (Geraci, 1990).

(3) Fouling of Baleen

Baleen itself is not damaged by exposure to oil and is resistant to effects of oil (St. Aubin *et al.*, 1984). Crude oil could coat the baleen and reduce filtration efficiency; however, effects may be temporary (Braithwaite, 1983; St. Aubin *et al.*, 1984). If baleen is coated in oil for long periods, it could cause the animal to be unable to feed, which could lead to malnutrition or even death. Most of the oil that would coat the baleen is removed after 30 min, and less than 5% would remain after 24 hr (Bratton *et al.*, 1993). Effects of oiling of the baleen on feeding efficiency appear to be minor (Geraci, 1990). However, a study conducted by Lambertsen *et al.* (2005) concluded that their results highlight the uncertainty about how rapidly oil would depurate at the near zero temperatures in arctic waters and whether baleen function would be restored after oiling.

(4) Avoidance

Some cetaceans can detect oil and sometimes avoid it, but others enter and swim through slicks without apparent effects (Geraci, 1990; Harvey and Dahlheim, 1994). Bottlenose dolphins in the Gulf of Mexico apparently could detect and avoid slicks and mousse but did not avoid light sheens on the surface (Smultea and Wursig, 1995). After the Regal Sword spill in 1979, various species of baleen and toothed whales were observed swimming and feeding in areas containing spilled oil southeast of Cape Cod, MA (Goodale *et al.*, 1981). For months following EVOS, there were numerous observations of gray whales, harbor porpoises, Dall's porpoises, and killer whales swimming through light-to-heavy crude-oil sheens (Harvey and Dalheim, 1994, cited in Matkin *et al.*, 2008). However, if some of the animals avoid the area because of the oil, then the effects of the oiling would be less severe on those individuals.

(5) Factors Affecting the Severity of Effects

Effects of oil on cetaceans in open water are likely to be minimal, but there could be effects on cetaceans where both the oil and the whales are at least partly confined in leads or at ice edges (Geraci, 1990). In spring, bowhead and beluga whales migrate through leads in the ice. At this time, the migration can be concentrated in narrow corridors defined by the leads, thereby creating a greater risk to animals caught in the spring lead system should oil enter the leads. This situation would only occur if there were an oil spill late in the season and COP could not complete cleanup efforts prior to ice covering the area. The oil would likely then be trapped in the ice until it began to thaw in the spring.

In fall, the migration route of bowheads can be close to shore (Blackwell *et al.*, 2009c). If fall migrants were moving through leads in the pack ice or were concentrated in nearshore waters, some bowhead whales might not be able to avoid oil slicks and could be

subject to prolonged contamination. However, the autumn migration through the Chukchi Sea extends over several weeks, and some of the whales travel along routes north or inland of the area, thereby reducing the number of whales that could approach patches of spilled oil. Additionally, vessel activity associated with spill cleanup efforts may deflect whales traveling near the Devils Paw prospect in the Chukchi Sea, thereby reducing the likelihood of contact with spilled oil.

Bowhead and beluga whales overwinter in the Bering Sea (mainly from November to March). In the summer, the majority of the bowhead whales are found in the Canadian Beaufort Sea, although some have recently been observed in the U.S. Beaufort and Chukchi Seas during the summer months (June to August). Data from the Barrow-based boat surveys in 2009 (George and Sheffield, 2009) showed that bowheads were observed almost continuously in the waters near Barrow, including feeding groups in the Chukchi Sea at the beginning of July. The majority of belugas in the Beaufort stock migrate into the Beaufort Sea in April or May, although some whales may pass Point Barrow as early as late March and as late as July (Braham *et al.*, 1984; Ljungblad *et al.*, 1984; Richardson *et al.*, 1995a). Therefore, a spill in summer would not be expected to have major impacts on these species. Additionally, humpback and fin whales are only sighted in the Chukchi Sea in small numbers in the summer, as this is thought to be the extreme northern edge of their range. Therefore, impacts to these species from an oil spill would be extremely limited.

Potential Effects of Oil on Pinnipeds

Ice seals are present in open-water areas during summer and early autumn. Externally oiled phocid seals often survive and become clean, but heavily oiled seal pups and adults may die, depending on the extent of oiling and characteristics of the oil. Prolonged exposure could occur if fuel or crude oil was spilled in or reached nearshore waters, was spilled in a lead used by seals, or was spilled under the ice when seals have limited mobility (NMFS, 2000). Adult seals may suffer some temporary adverse effects, such as eye and skin irritation, with possible infection (MMS, 1996). Such effects may increase stress, which could contribute to the death of some individuals. Ringed seals may ingest oil-contaminated foods, but there is little evidence that oiled seals will ingest enough oil to cause lethal internal effects. There is a likelihood that newborn seal pups, if contacted by oil, would die from oiling through loss of insulation and resulting hypothermia. These potential effects are addressed in more detail in subsequent paragraphs.

Reports of the effects of oil spills have shown that some mortality of seals may have occurred as a result of oil fouling; however, large scale mortality had not been observed prior to the EVOS (St. Aubin, 1990). Effects of oil on marine mammals were not well studied at most spills because of lack of baseline data and/or the brevity of the post-spill surveys. The largest documented impact of a spill, prior to EVOS, was on young seals in January in the Gulf of St. Lawrence (St. Aubin, 1990). Brownell and Le Boeuf (1971) found no marked effects of oil from the Santa Barbara oil spill on California sea lions or on the mortality rates of newborn pups.

Intensive and long-term studies were conducted after the EVOS in Alaska. There may have been a long-term decline of 36% in numbers of molting harbor seals at oiled haul-out sites in Prince William Sound following EVOS (Frost *et al.*, 1994a). However, in a reanalysis of those data and additional years of surveys, along with an examination of assumptions and biases associated with the original data, Hoover-Miller *et al.* (2001) concluded that the EVOS effect had been overestimated. The decline in attendance at some oiled sites was more likely a continuation of the general decline in harbor seal abundance in Prince William Sound documented since 1984 (Frost *et al.*, 1999) rather than a result of EVOS. The results from Hoover-Miller *et al.* (2001) indicate that the effects of EVOS were largely indistinguishable from natural decline by 1992. However, while Frost *et al.* (2004) concluded that there was no evidence that seals were displaced from oiled sites, they did find that aerial counts indicated 26% fewer pups were produced at oiled locations in 1989 than would have been expected without the oil spill. Harbor seal pup mortality at oiled beaches was 23% to 26%, which may have been higher than natural mortality, although no baseline data for pup mortality existed prior to EVOS (Frost *et al.*, 1994a). There was no conclusive evidence of spill effects on Steller sea lions (Calkins *et al.*, 1994). Oil did not persist on sea lions themselves (as it did on harbor seals), nor did it persist on sea lion haul-out sites and rookeries (Calkins *et al.*, 1994). Sea lion rookeries and haul out sites, unlike those used by harbor seals, have steep sides and are subject to high wave energy (Calkins *et al.*, 1994).

(1) Oiling of External Surfaces

Adult seals rely on a layer of blubber for insulation, and oiling of the external surface does not appear to have adverse thermoregulatory effects (Kooyman *et al.*, 1976, 1977; St. Aubin, 1990). Contact with oil on the external surfaces can potentially cause increased stress and irritation of the eyes of ringed seals (Geraci and Smith, 1976; St. Aubin, 1990). These effects seemed to be temporary and reversible, but continued exposure of eyes to oil could cause permanent damage (St. Aubin, 1990). Corneal ulcers and abrasions, conjunctivitis, and swollen nictitating membranes were observed in captive ringed seals placed in crude oil-covered water (Geraci and Smith, 1976) and in seals in the Antarctic after an oil spill (Lillie, 1954).

Newborn seal pups rely on their fur for insulation. Newborn ringed seal pups in lairs on the ice could be contaminated through contact with oiled mothers. There is the potential that newborn ringed seal pups that were contaminated with oil could die from hypothermia. However, COP's activities will not occur during pupping season or when lairs are built.

(2) Ingestion

Marine mammals can ingest oil if their food is contaminated. Oil can also be absorbed through the respiratory tract (Geraci and Smith, 1976; Engelhardt *et al.*, 1977). Some of the ingested oil is voided in vomit or feces but some is absorbed and could cause toxic effects (Engelhardt, 1981). When returned to clean water, contaminated animals can depurate this internal oil (Engelhardt, 1978, 1982, 1985). In addition, seals exposed to an oil spill are unlikely to ingest enough oil to cause serious internal damage (Geraci and St. Aubin, 1980, 1982).

(3) Avoidance and Behavioral Effects

Although seals may have the capability to detect and avoid oil, they apparently do so only to a limited extent (St. Aubin, 1990). Seals may abandon the area of an oil spill because of human disturbance associated with cleanup efforts, but they are most likely to remain in the area of the spill. One notable behavioral reaction to oiling is that oiled seals are reluctant to enter the water, even when intense cleanup activities are conducted nearby (St. Aubin, 1990; Frost *et al.*, 1994b, 2004).

(4) Factors Affecting the Severity of Effects

Seals that are under natural stress, such as lack of food or a heavy infestation by parasites, could

potentially die because of the additional stress of oiling (Geraci and Smith, 1976; St. Aubin, 1990; Spraker *et al.*, 1994). Female seals that are nursing young would be under natural stress, as would molting seals. In both cases, the seals would have reduced food stores and may be less resistant to effects of oil than seals that are not under some type of natural stress. Seals that are not under natural stress (e.g., fasting, molting) would be more likely to survive oiling.

In general, seals do not exhibit large behavioral or physiological reactions to limited surface oiling or incidental exposure to contaminated food or vapors (St. Aubin, 1990; Williams *et al.*, 1994). Effects could be severe if seals surface in heavy oil slicks in leads or if oil accumulates near haul-out sites (St. Aubin, 1990). An oil spill in open-water is less likely to impact seals.

Potential Effects Conclusion

The potential effects to marine mammals described in this section of the document do not take into consideration the proposed monitoring and mitigation measures described later in this document (see the "Proposed Mitigation" and "Proposed Monitoring and Reporting" sections).

Anticipated Effects on Marine Mammal Habitat

The primary potential impacts to marine mammals and other marine species are associated with elevated sound levels produced by the exploratory drilling program (i.e. the drill rig and the airguns). However, other potential impacts are also possible to the surrounding habitat from physical disturbance, discharges, and an oil spill (should one occur). This section describes the potential impacts to marine mammal habitat from the specified activity. Because the marine mammals in the area feed on fish and/or invertebrates there is also information on the species typically preyed upon by the marine mammals in the area.

Common Marine Mammal Prey in the Area

All of the marine mammal species that may occur in the proposed project area prey on either marine fish or invertebrates. The ringed seal feeds on fish and a variety of benthic species, including crabs and shrimp. Bearded seals feed mainly on benthic organisms, primarily crabs, shrimp, and clams. Spotted seals feed on pelagic and demersal fish, as well as shrimp and cephalopods. They are known to feed on a variety of fish including herring, capelin, sand lance, Arctic cod, saffron cod, and sculpins. Ribbon seals feed primarily on pelagic fish and invertebrates, such as shrimp, crabs, squid, octopus, cod, sculpin, pollack, and capelin. Juveniles feed mostly on krill and shrimp.

Bowhead whales feed in the eastern Beaufort Sea during summer and early autumn but continue feeding to varying degrees while on their migration through the central and western Beaufort Sea in the late summer and fall (Richardson and Thomson [eds.], 2002). Aerial surveys in recent years have sighted bowhead whales feeding in Camden Bay on their westward migration through the Beaufort Sea. When feeding in relatively shallow areas, bowheads feed throughout the water column. However, feeding is concentrated at depths where zooplankton is concentrated (Wursig *et al.*, 1984, 1989; Richardson [ed.], 1987; Griffiths *et al.*, 2002). Lowry and Sheffield (2002) found that copepods and euphausiids were the most common prey found in stomach samples from bowhead whales harvested in the Kaktovik area from 1979 to 2000. Areas to the east of Barter Island in the Beaufort Sea appear to be used regularly for feeding as bowhead whales migrate slowly westward across the Beaufort Sea (Thomson and Richardson, 1987; Richardson and Thomson [eds.], 2002). However, in some years, sizable groups of bowhead whales have been seen feeding as far west as the waters just east of Point Barrow (which is more than 200 mi [322 km] east of COP's proposed drill sites in the Chukchi Sea) near the Plover Islands (Braham *et al.*, 1984; Ljungblad *et al.*, 1985; Landino *et al.*, 1994). The situation in September–October 1997 was unusual in that bowheads fed widely across the Alaskan Beaufort Sea, including higher numbers in the area east of Barrow than reported in any previous year (S. Treacy and D. Hansen, MMS, pers. comm.). However, by the time most bowhead whales reach the Chukchi Sea (October), they will likely no longer be feeding, or if it occurs it will be very limited. The location near Point Barrow is currently under intensive study as part of the BOWFEST program (BOWFEST, 2011).

Beluga whales feed on a variety of fish, shrimp, squid, and octopus (Burns and Seaman, 1985). Like several of the other species in the area, harbor porpoise feed on demersal and benthic species, mainly schooling fish and cephalopods. Killer whales from resident stocks primarily feed on salmon while killer whales from transient stocks feed on other marine mammals, such as harbor seals, harbor porpoises, gray whale calves and other pinniped and cetacean species.

Gray whales are primarily bottom feeders, and benthic amphipods and isopods form the majority of their summer diet, at least in the main summering areas west of Alaska (Oliver *et al.*, 1983; Oliver and Slattery, 1985). Farther south, gray whales have also been observed feeding around kelp beds, presumably on mysid crustaceans, and on pelagic prey such as small schooling fish and crab larvae (Hatler and Darling, 1974). Based on data collected from recent Aerial Survey of Arctic Marine Mammals (ASAMM, formerly referred to as BWASP for the Beaufort Sea or COMIDA for the Chukchi Sea) flights (Clarke and Ferguson, 2010; Clarke *et al.*, in prep.; Clarke *et al.*, 2011; Clarke *et al.*, 2012) three primary feeding grounds have been identified as currently used by gray whales in the Chukchi Sea: (1) Between Point Barrow and Icy Cape within approximately 56 mi (90 km) of shore; (2) nearshore from south of Point Hope to east of Cape Lisburne; and (3) in the south-central Chukchi Sea. These latter two locations are located substantial distances from COP's operating area. With the exception of vessel transits, the first feeding area is also located outside of COP's drilling area.

Three other baleen whale species may occur in the proposed project area, although likely in very small numbers: minke, humpback, and fin whales. Minke whales opportunistically feed on crustaceans (e.g., krill), plankton (e.g., copepods), and small schooling fish (e.g., anchovies, dogfish, capelin, coal fish, cod, eels, herring, mackerel, salmon, sand lance, saury, and wolfish) (Reeves *et al.*, 2002). Fin whales tend to feed in northern latitudes in the summer months on plankton and shoaling pelagic fish (Jonsgard, 1966a,b). Like many of the other species in the area, humpback whales primarily feed on euphausiids, copepods, and small schooling fish (e.g., herring, capelin, and sand lance) (Reeves *et al.*, 2002). However, the primary feeding grounds for these species do not occur in the northern Chukchi Sea.

Two kinds of fish inhabit marine waters in the study area: (1) true marine fish that spend all of their lives in salt water, and (2) anadromous species that reproduce in fresh water and spend parts of their life cycles in salt water.

Most arctic marine fish species are small, benthic forms that do not feed high in the water column. The majority of these species are circumpolar and are found in habitats ranging from deep offshore water to water as shallow as

t6.4–33 ft (5–10 m; Fechhelm *et al.*, 1995). The most important pelagic species, and the only abundant pelagic species, is the Arctic cod. The Arctic cod is a major vector for the transfer of energy from lower to higher trophic levels (Bradstreet *et al.*, 1986). In summer, Arctic cod can form very large schools in both nearshore and offshore waters (Craig *et al.*, 1982; Bradstreet *et al.*, 1986). Locations and areas frequented by large schools of Arctic cod cannot be predicted but can be almost anywhere. The Arctic cod is a major food source for beluga whales, ringed seals, and numerous species of seabirds (Frost and Lowry, 1984; Bradstreet *et al.*, 1986).

Anadromous Dolly Varden char and some species of whitefish winter in rivers and lakes, migrate to the sea in spring and summer, and return to fresh water in autumn. Anadromous fish form the basis of subsistence, commercial, and small regional sport fisheries. Dolly Varden char migrate to the sea from May through mid-June (Johnson, 1980) and spend about 1.5–2.5 months there (Craig, 1989). They return to rivers beginning in late July or early August with the peak return migration occurring between mid-August and early September (Johnson, 1980). At sea, most anadromous coregonids (whitefish) remain in nearshore waters within several kilometers of shore (Craig, 1984, 1989). They are often termed "amphidromous" fish in that they make repeated annual migrations into marine waters to feed, returning each fall to overwinter in fresh water.

Benthic organisms are defined as bottom dwelling creatures. Infaunal organisms are benthic organisms that live within the substrate and are often sedentary or sessile (bivalves, polychaetes). Epibenthic organisms live on or near the bottom surface sediments and are mobile (amphipods, isopods, mysids, and some polychaetes). The northeastern Chukchi Sea supports a higher biomass of benthic organisms than do surrounding areas (Grebmeier and Dunton, 2000). Some benthic-feeding marine mammals, such as walruses and gray whales, take advantage of the abundant food resources and congregate in these highly productive areas. Harold and Hanna Shoals are two known highly productive areas in the Chukchi Sea rich with benthic animals.

Many of the nearshore benthic marine invertebrates of the Arctic are circumpolar and are found over a wide range of water depths (Carey *et al.*, 1975). Species identified include polychaetes (*Spio filicornis, Chaetozone setosa, Eteone longa*), bivalves (*Cryrtodaria kurriana, Nucula tenuis, Liocyma fluctuosa*), an isopod (*Saduria entomon*), and amphipods (*Pontoporeia femorata, P. affinis*). Additionally, kelp beds occur in at least two areas in the nearshore areas of the Chukchi Sea (Mohr *et al.*, 1957; Phillips *et al.*, 1982; Phillips and Reiss, 1985), but they are located within about 15.5 mi (25 km) of the coast, which is much closer nearshore than COP's proposed activities.

Potential Impacts From Seafloor Disturbance on Marine Mammal Habitat

There is a possibility of seafloor disturbance or increased turbidity in the vicinity of the drill sites. Seafloor disturbance could occur with bottom founding of the drill rig legs and anchoring system and also with the anchoring systems of support vessels. These activities could lead to direct effects on bottom fauna, through either displacement or mortality. Increase in suspended sediments from seafloor disturbance also has the potential to indirectly affect bottom fauna and fish. The amount and duration of disturbed or turbid conditions will depend on sediment material.

Placement of the drill rig onto the seabed will include firm establishment of its legs onto the seafloor. No anchors are required to be deployed for stabilization of the rig. Displacement or mortality of bottom organisms will likely occur in the area covered by the spud can of the legs. The area of seabed that will be covered by these spud cans is about 2,165 ft^2 (200 m^2) per spud, which is a total of 6,500 ft^2 (600 m^2) for three legs or 8,660 ft^2 (800 m^2) for four legs. The mean abundance of benthic organisms in the Klondike area was about 800 individuals/m^2 (Blanchard *et al.*, 2010) and consisted mostly of polychaete worms and mollusks. The drill rig is a temporary structure that will be removed at the end of the field season. Because of the placement of the spud cans, benthic organisms are expected to decolonize the relatively small disturbed patches from adjacent areas. Impacts to marine mammals from such disturbance are anticipated to be inconsequential.

Placement and demobilization of the drill rig can lead to an increase in suspended sediment in the water column, with the potential to affect zooplankton, including fish eggs and larvae. The magnitude of any impact strongly depends on the concentration of suspended sediments, the type of sediment, the duration of exposure, and also of the natural turbidity in the area. Fish eggs and larvae have been found to exhibit greater sensitivity to suspended sediments (Wilber and Clarke, 2001) and other stresses than adult fish, which is thought to be related to their relative lack of motility (Auld and Schubel, 1978). Sedimentation could potentially affect fish by causing egg morbidity of demersal fish feeding near or on the ocean floor (Wilber and Clarke, 2001). However, the increase in suspended sediments from drill rig placement, demobilization and anchor handling is very limited, localized and temporary, and will likely be indistinguishable from natural variations in turbidity and sedimentation. No impacts on zooplankton are therefore expected considering the high inter-annual variability in abundance and biomass in the Devils Paw Prospect, influenced by timing of sea ice melt, water temperatures, northward transport of water masses, and nutrients and chlorophyll (Hopcroft *et al.*, 2011).

Benthic organisms inhabiting the Devils Paw Prospect will likely be displaced or smothered. However, due to the limited area and duration of the proposed drilling program and because the area is mainly characterized as a pelagic system (Day *et al.*, 2012) with a low density of benthic feeding marine mammals, the limited loss or modification of habitat is not expected to result in impacts to marine mammals or their populations. Less than 0.0000001 percent of the fish habitat in the Lease Sale 193 area would be directly affected by the bottom founding of the drill rig legs and anchoring.

Potential Impacts from Sound Generation

With regard to fish as a prey source for odontocetes and seals, fish are known to hear and react to sounds and to use sound to communicate (Tavolga *et al.*, 1981) and possibly avoid predators (Wilson and Dill, 2002). Experiments have shown that fish can sense both the strength and direction of sound (Hawkins, 1981). Primary factors determining whether a fish can sense a sound signal, and potentially react to it, are the frequency of the signal and the strength of the signal in relation to the natural background noise level.

Fishes produce sounds that are associated with behaviors that include territoriality, mate search, courtship, and aggression. It has also been speculated that sound production may provide the means for long distance communication and communication under poor underwater visibility conditions (Zelick *et al.*, 1999), although the fact that fish communicate at low-frequency sound levels where the masking effects of ambient noise are naturally highest suggests that very long

distance communication would rarely be possible. Fishes have evolved a diversity of sound generating organs and acoustic signals of various temporal and spectral contents. Fish sounds vary in structure, depending on the mechanism used to produce them (Hawkins, 1993). Generally, fish sounds are predominantly composed of low frequencies (less than 3 kHz).

Since objects in the water scatter sound, fish are able to detect these objects through monitoring the ambient noise. Therefore, fish are probably able to detect prey, predators, conspecifics, and physical features by listening to environmental sounds (Hawkins, 1981). There are two sensory systems that enable fish to monitor the vibration-based information of their surroundings. The two sensory systems, the inner ear and the lateral line, constitute the acoustico-lateralis system.

Although the hearing sensitivities of very few fish species have been studied to date, it is becoming obvious that the intra- and inter-specific variability is considerable (Coombs, 1981). Nedwell *et al.* (2004) compiled and published available fish audiogram information. A noninvasive electrophysiological recording method known as auditory brainstem response is now commonly used in the production of fish audiograms (Yan, 2004). Generally, most fish have their best hearing in the low-frequency range (i.e., less than 1 kHz). Even though some fish are able to detect sounds in the ultrasonic frequency range, the thresholds at these higher frequencies tend to be considerably higher than those at the lower end of the auditory frequency range.

Literature relating to the impacts of sound on marine fish species can be divided into the following categories: (1) Pathological effects; (2) physiological effects; and (3) behavioral effects. Pathological effects include lethal and sub-lethal physical damage to fish; physiological effects include primary and secondary stress responses; and behavioral effects include changes in exhibited behaviors of fish. Behavioral changes might be a direct reaction to a detected sound or a result of the anthropogenic sound masking natural sounds that the fish normally detect and to which they respond. The three types of effects are often interrelated in complex ways. For example, some physiological and behavioral effects could potentially lead to the ultimate pathological effect of mortality. Hastings and Popper (2005) reviewed what is known about the effects of sound on fishes and identified studies needed to address areas of uncertainty relative to measurement of sound and the responses of fishes. Popper *et al.* (2003/2004) also published a paper that reviews the effects of anthropogenic sound on the behavior and physiology of fishes.

Potential effects of exposure to continuous sound on marine fish include TTS, physical damage to the ear region, physiological stress responses, and behavioral responses such as startle response, alarm response, avoidance, and perhaps lack of response due to masking of acoustic cues. Most of these effects appear to be either temporary or intermittent and therefore probably do not significantly impact the fish at a population level. The studies that resulted in physical damage to the fish ears used noise exposure levels and durations that were far more extreme than would be encountered under conditions similar to those expected during COP's proposed exploratory drilling activities.

The level of sound at which a fish will react or alter its behavior is usually well above the detection level. Fish have been found to react to sounds when the sound level increased to about 20 dB above the detection level of 120 dB (Ona, 1988); however, the response threshold can depend on the time of year and the fish's physiological condition (Engas *et al.*, 1993). In general, fish react more strongly to pulses of sound rather than a continuous signal (Blaxter *et al.*, 1981), such as the type of sound that will be produced by the drillship, and a quicker alarm response is elicited when the sound signal intensity rises rapidly compared to sound rising more slowly to the same level.

Investigations of fish behavior in relation to vessel noise (Olsen *et al.*, 1983; Ona, 1988; Ona and Godo, 1990) have shown that fish react when the sound from the engines and propeller exceeds a certain level. Avoidance reactions have been observed in fish such as cod and herring when vessels approached close enough that received sound levels are 110 dB to 130 dB (Nakken, 1992; Olsen, 1979; Ona and Godo, 1990; Ona and Toresen, 1988). However, other researchers have found that fish such as polar cod, herring, and capeline are often attracted to vessels (apparently by the noise) and swim toward the vessel (Rostad *et al.*, 2006). Typical sound source levels of vessel noise in the audible range for fish are 150 dB to 170 dB (Richardson *et al.*, 1995a). (Based on models, the 160 dB radius for the jack-up rig would extend approximately 33 ft [10 m] approximately 0.4 mi [710 m] when a support vessel is in DP mode next to the drill rig; therefore, fish would need to be in close proximity to the drill rig for the noise to be audible). In calm weather, ambient noise levels in audible parts of the spectrum lie between 60 dB to 100 dB.

Sound will also occur in the marine environment from the various support vessels. Reported source levels for vessels during ice-management have ranged from 175 dB to 185 dB (Brewer *et al.*, 1993, Hall *et al.*, 1994). However, ice management activities are not expected to be necessary throughout most of the drilling season, so impacts from that activity would occur less frequently than sound from the drill rig. Sounds generated by drilling and ice-management are generally low frequency and within the frequency range detectable by most fish.

COP also proposes to conduct seismic surveys with an airgun array for a short period of time during the drilling season (a total of approximately 2–4 hours over the course of the entire proposed drilling program). Airguns produce impulsive sounds as opposed to continuous sounds at the source. Short, sharp sounds can cause overt or subtle changes in fish behavior. Chapman and Hawkins (1969) tested the reactions of whiting (hake) in the field to an airgun. When the airgun was fired, the fish dove from 82 to 180 ft (25 to 55 m) depth and formed a compact layer. The whiting dove when received sound levels were higher than 178 dB re 1 µPa (Pearson *et al.*, 1992).

Pearson *et al.* (1992) conducted a controlled experiment to determine effects of strong noise pulses on several species of rockfish off the California coast. They used an airgun with a source level of 223 dB re 1 µPa. They noted:

- Startle responses at received levels of 200–205 dB re 1 µPa and above for two sensitive species, but not for two other species exposed to levels up to 207 dB;
- Alarm responses at 177–180 dB for the two sensitive species, and at 186 to 199 dB for other species;
- An overall threshold for the above behavioral response at about 180 dB;
- An extrapolated threshold of about 161 dB for subtle changes in the behavior of rockfish; and
- A return to pre-exposure behaviors within the 20–60 minute exposure period.

In summary, fish often react to sounds, especially strong and/or intermittent sounds of low frequency. Sound pulses at received levels of 160 dB re 1 µPa may cause subtle changes in behavior. Pulses at levels of 180 dB may cause noticeable changes in behavior (Chapman and Hawkins, 1969;

Pearson *et al.*, 1992; Skalski *et al.*, 1992). It also appears that fish often habituate to repeated strong sounds rather rapidly, on time scales of minutes to an hour. However, the habituation does not endure, and resumption of the strong sound source may again elicit disturbance responses from the same fish. Underwater sound levels from the drill rig and other vessels produce sounds lower than the response threshold reported by Pearson *et al.* (1992), and are not likely to result in major effects to fish near the proposed drill sites.

Based on a sound level of approximately 140 dB, there may be some avoidance by fish of the area near the jack-up while drilling, around ice management vessels in transit and during ice management, and around other support and supply vessels when underway. Any reactions by fish to these sounds will last only minutes (Mitson and Knudsen, 2003; Ona *et al.*, 2007) longer than the vessel is operating at that location or the drillship is drilling. Any potential reactions by fish would be limited to a relatively small area within about 33 ft (10 m) of the drill rig during drilling. Avoidance by some fish or fish species could occur within portions of this area. No important spawning habitats are known to occur at or near the drilling locations.

Some of the fish species found in the Arctic are prey sources for odontocetes and pinnipeds. A reaction by fish to sounds produced by COP's proposed operations would only be relevant to marine mammals if it caused concentrations of fish to vacate the area. Pressure changes of sufficient magnitude to cause that type of reaction would probably occur only very close to the sound source, if any would occur at all due to the low energy sounds produced by the majority of equipment proposed for use. Impacts on fish behavior are predicted to be inconsequential. Thus, feeding odontocetes and pinnipeds would not be adversely affected by this minimal loss or scattering, if any, which is not expected to result in reduced prey abundance.

Some mysticetes, including bowhead whales, feed on concentrations of zooplankton. Bowhead whales primarily feed off Point Barrow in September and October. Reactions of zooplankton to sound are, for the most part, not known. Their ability to move significant distances is limited or nil, depending on the type of zooplankton. A reaction by zooplankton to sounds produced by the exploratory drilling program would only be relevant to whales if it caused concentrations of zooplankton to scatter. Pressure changes of sufficient magnitude to cause that type of reaction would probably occur only very close to the sound source, if any would occur at all due to the low energy sounds produced by the drillship. However, Barrow is located approximately 200 mi (322 km) east of COP's Devils Paw prospect. Impacts on zooplankton behavior are predicted to be inconsequential. Thus, bowhead whales feeding off Point Barrow would not be adversely affected.

Gray whales are bottom feeders and suck sediment and the benthic amphipods that are their prey from the seafloor. The species primary feeding habitats are in the northern Bering Sea and Chukchi Sea (Nerini, 1984; Moore *et al.*, 1986; Weller *et al.*, 1999). As noted earlier in this document, most gray whale feeding locations in the Chukchi Sea are located closer to shore. Several of the primary feeding grounds are located much further south in the Chukchi Sea than COP's proposed activity area. Additionally, Yazvenko *et al.* (2007) studied the impacts of seismic surveys off Sakhalin Island, Russia, on feeding gray whales and found that the seismic activity had no measurable effect on bottom feeding gray whales in the area.

Potential Impacts From Drill Cuttings

Discharging drill cuttings or other liquid waste streams generated by the drilling vessel could potentially affect marine mammal habitat. Toxins could persist in the water column, which could have an impact on marine mammal prey species. However, despite a considerable amount of investment in research on exposures of marine mammals to organochlorines or other toxins, there have been no marine mammal deaths in the wild that can be conclusively linked to the direct exposure to such substances (O'Shea, 1999).

Drilling muds and cuttings discharged to the seafloor can lead to localized increased turbidity and increase in background concentrations of barium and occasionally other metals in sediments and may affect lower trophic organisms. Drilling muds are composed primarily of bentonite (clay), and the toxicity is therefore low. Heavy metals in the mud may be absorbed by benthic organisms, but studies have shown that heavy metals do not bio-magnify in marine food webs (Neff *et al.*, 1989). There have been no field monitoring studies of effects of water-based muds and cuttings discharges on biological communities of the Alaskan Chukchi Sea and only a few in the development area of the Alaskan Beaufort Sea (Neff *et al.*, 2010). However, the results of these studies are consistent with the results of many more comprehensive microcosm and ecological investigations near cuttings discharge sites in cold-water environments of the North Sea, the Barents Sea, off Sakhalin Island in the Russian Far East, and in the Canadian Beaufort Sea off the Mackenzie River (Neff *et al.*, 2010). All the studies show that water-based muds and cuttings discharges have no, or minimal and very short-lived effects on zooplankton communities. This might, in part, be due to the large inter-annual differences observed in the planktonic communities. In the Chukchi Sea the inter-annual variability of zooplankton biomass and community structure is influenced by differences in ice melt timing, water temperatures, and the northward rate of transport of water masses, and nutrients and chlorophyll (Hopcroft *et al.*, 2011). Effects on benthic communities are nearly always restricted to a zone within about 328 to 492 ft (100 to 150 m) of the discharge, where cuttings accumulations are greatest.

Discharges and drill cuttings could impact fish by displacing them from the affected area. Additionally, sedimentation could impact fish, as demersal fish eggs could be smothered if discharges occur in a spawning area during the period of egg production. However, this is unlikely in deeper offshore locations, and no specific demersal fish spawning locations have been identified at the Devils Paw well locations. The most abundant and trophically important marine fish, the Arctic cod, spawns with planktonic eggs and larvae under the sea ice during winter and will therefore have little exposure to discharges. Based on this information, drilling muds and cutting wastes are not anticipated to have long-term impacts to marine mammals or their prey.

Potential Impacts From Drill Rig Presence

The horizontal dimensions of the jack-up rig will be approximately 230 x 225 ft (70 x 68 m). Maximum dimension of one leg spud can, which is the part on the seafloor, is about 60 ft (18 m). The dimensions of the drill rig (less than one football field on either side) are not significant enough to cause a large-scale diversion from the animals' normal swim and migratory paths. Additionally, the eastward spring bowhead whale migration will occur prior to the beginning of COP's proposed exploratory drilling program. Moreover, any deflection of bowhead whales or other marine mammal species

due to the physical presence of the drillship or its support vessels would be very minor. The drill rig's physical footprint is small relative to the size of the geographic region it will occupy and will likely not cause marine mammals to deflect greatly from their typical migratory route. Also, even if animals may deflect because of the presence of the drill rig, the Chukchi Sea is much larger in size than the length of the drill rig (many dozens to hundreds of miles vs. less than one football field), and animals would have other means of passage around the drill rig. While there are other vessels that will be on location to support the drill rig, most of those vessels will remain within a 5.5 mi (9 km) of the drill rig (with the exception of the ice management vessels which will remain approximately 75 mi [121 km] from the drill rig when conducting ice reconnaissance). In sum, the physical presence of the drill rig is not likely to cause a significant deflection to migrating marine mammals.

Potential Impacts From an Oil Spill

Lower trophic organisms and fish species are primary food sources for Arctic marine mammals. However, as noted earlier in this document, the offshore areas of the Chukchi Sea are not primary feeding grounds for many of the marine mammals that may pass through the area. Therefore, impacts to lower trophic organisms (such as zooplankton) and marine fishes from an oil spill in the proposed drilling area would not be likely to have long-term or significant consequences to marine mammal prey. Impacts would be greater if the oil moves closer to shore, as many of the marine mammals in the area have been seen feeding at nearshore sites (such as bowhead and gray whales).

Due to their wide distribution, large numbers, and rapid rate of regeneration, the recovery of marine invertebrate populations is expected to occur soon after the surface oil passes. Spill response activities are not likely to disturb the prey items of whales or seals sufficiently to cause more than minor effects. Spill response activities could cause marine mammals to avoid the disturbed habitat that is being cleaned. However, by causing avoidance, animals would avoid impacts from the oil itself. Additionally, the likelihood of an oil spill is expected to be very low, as discussed earlier in this document.

Potential Impacts From Ice Management Activities

Ice management activities include the physical pushing or moving of ice to create more open-water in the proposed drilling area and to prevent ice floes from striking the drill rig. Based on extensive satellite data analyses of historic and present ice conditions in the northeastern Chukchi Sea, it is unlikely that hazardous ice will be present in the vicinity of the jack-up rig. COP therefore expects that physical management of ice will not be required. However, to ensure safe drilling operations, COP has developed an Ice Alerts Plan designed to form an integral part of the drilling operations. The Ice Alerts Plan contains procedures that will allow early predictions in advance of potential hazardous ice that could cause damage if it were to come into contact with the jack-up rig.

The first method of prevention is to identify the presence of hazardous ice at a large distance from the rig (tens of miles). The ice edge position will be tracked in near real time using observations from satellite images and from vessels. Generally, the ice management vessel will remain within 5.5 mi (9 km) of the drill rig, unless deployed to investigate migrating ice floes. When investigating ice, vessels will likely not travel farther than 75 mi (121 km) from the rig. The Ice Alerts Plan contains procedures for determining how close hazardous ice can approach before the well needs to be secured and the jack-up moved. This critical distance is a function of rig operations at that time, the speed and direction of the ice, the weather forecast, and the method of ice management.

Based on available historical and more recent ice data, there is low probability of ice entering the drilling area during the open-water season. However, if hazardous ice is on a trajectory to approach the rig, the ice management vessel will be available to respond. One option for responding is to use the vessel's fire monitor (water cannon) to modify the trajectory of the floe. Another option is to redirect the ice by applying pressure with the bow of the ice management vessel, slowly pushing the ice away from the direction of the drill rig. At these slow speeds, the vessel uses low power and slow propeller rotation speed, thereby reducing noise generation from propeller rotation effects in the water. In case the jack-up rig needs to be moved due to approaching ice, the support vessels will tow the rig to a secure location.

Ringed, bearded, spotted, and ribbon seals (along with the walrus) are dependent on sea ice for at least part of their life history. Sea ice is important for life functions such as resting, breeding, and molting. These species are dependent on two different types of ice: Pack ice and landfast ice. Should ice management activities be necessary during the proposed drilling program, COP would only manage pack ice. Landfast ice would not be present during COP's proposed operations.

The ringed seal is the most common pinniped species in the proposed project area. While ringed seals use ice year-round, they do not construct lairs for pupping until late winter/early spring on the landfast ice. Therefore, since COP plans to conclude drilling by October 31, COP's activities would not impact ringed seal lairs or habitat needed for breeding and pupping in the Chukchi Sea. Aerial surveys in the eastern Chukchi Sea conducted in late May-early June 1999–2000 found that ringed seals were four to ten times more abundant in nearshore fast and pack ice environments than in offshore pack ice (Bengtson *et al.*, 2005). Ringed seals can be found on the pack ice surface in the late spring and early summer in the northern Chukchi Sea, the latter part of which may overlap with the start of COP's proposed drilling activities. If an ice floe is pushed into one that contains hauled out seals, the animals may become startled and enter the water when the two ice floes collide.

Bearded seals breed in the Bering and Chukchi Seas from mid-March through early May (several months prior to the start of COP's operations). Bearded seals require sea ice for molting during the late spring and summer period. Because this species feeds on benthic prey, bearded seals occur over the pack ice front over the Chukchi Sea shelf in summer (Burns and Frost, 1979) but were not associated with the ice front when it receded over deep water (Kingsley *et al.*, 1985).

The spotted seal does not breed in the Chukchi Sea. Spotted seals molt most intensely during May and June and then move to the coast after the sea ice has melted. Ribbon seals are not known to breed in the Chukchi Sea. From July–October, when sea ice is absent, the ribbon seal is entirely pelagic, and its distribution is not well known (Burns, 1981; Popov, 1982). Therefore, ice used by bearded, spotted, and ribbon seals needed for life functions such as breeding and molting would not be impacted as a result of COP's drilling program since these life functions do not occur in the proposed project area or at the same time as COP's operations. For ringed seals, ice management activities would occur during a time when life functions such as breeding, pupping, and molting do not occur in the proposed activity area. Additionally, these life functions normally occur on

landfast ice, which will not be impacted by COP's activity.

Based on the preceding discussion of potential types of impacts to marine mammal habitat, overall, the proposed specified activity is not expected to cause significant impacts on habitats used by the marine mammal species in the proposed project area or on the food sources that they utilize.

Proposed Mitigation

In order to issue an incidental take authorization (ITA) under Sections 101(a)(5)(A) and (D) of the MMPA, NMFS must, where applicable, set forth the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for taking for certain subsistence uses (where relevant). This section summarizes the mitigation measures proposed for implementation by COP. Later in this document in the "Proposed Incidental Harassment Authorization" section, NMFS lays out the proposed conditions for review, as they would appear in the final IHA (if issued).

Exclusion radii for marine mammals around sound sources are customarily defined as the distances within which received sound levels are greater than or equal to 180 dB re 1 µPa (rms) for cetaceans and greater than or equal to 190 dB re 1 µPa (rms) for pinnipeds. These exclusion criteria are based on an assumption that sounds at lower received levels will not injure these animals or impair their hearing abilities, but that higher received levels might have such effects. It should be understood that marine mammals inside these exclusion zones will not necessarily be injured, as the received sound thresholds which determine these zones were established prior to the current understanding that significantly higher levels of sound would be required before injury would likely occur (see Southall *et al.*, 2007). With respect to Level B harassment, NMFS' practice has been to apply the 120 dB re 1 µPa (rms) received level threshold for underwater continuous sound levels and the 160 dB re 1 µPa (rms) received level threshold for underwater impulsive sound levels. As noted earlier in this document and in O'Neill *et al.* (2012), the source level of the drill rig does not meet the criteria requiring exclusion zones. Therefore, mitigation measures similar to those required for seismic surveys are not proposed for the drilling only portion of the program.

General Mitigation Measures

COP proposes to implement several mitigation measures regarding operation of vessels and aircraft. These measures would limit speed and vessel movements in the presence of marine mammals and restrict flight altitudes except during takeoff, landing, and in emergency situations. The exact measures (as proposed) can be found later in this document in the "Proposed Incidental Harassment Authorization" section.

VSP Airgun Mitigation Measures

COP proposes to implement standard mitigation measures used in previous seismic surveys, including ramp-ups, power downs, and shutdowns. The received sound levels have been estimated using an acoustic model (see Attachment A of COP's IHA application). These modeled distances will be used to establish exclusion zones for the implementation of the mitigation measures during the first VSP data acquisition run. The exclusion zones (i.e., 180 dB rms for cetaceans and 190 dB rms for pinnipeds) might change for subsequent VSP data acquisition runs after the distances have been verified based on acoustic field measures (more details are provided in the "Proposed Monitoring and Reporting" section later in this document). The VSP data acquisition runs will start during daylight hours.

A ramp up of an airgun array provides a gradual increase in sound levels and involves a step-wise increase in the number and total volume of airguns firing until the full volume is achieved. The purpose of a ramp up (or "soft start") is to "warn" cetaceans and pinnipeds in the vicinity of the airguns and to provide the time for them to leave the area and thus avoid any potential injury or impairment of their hearing abilities.

Ramp-up will begin with the smallest airgun in the array. COP intends to double the number of operating airguns at 1-min intervals. Since the airgun operation at each geophone station only lasts about 1 min, this interval should be adequate and also reduces the total emission of airgun sounds. During the ramp-up, observers will scan the exclusion zone for the full airgun array for presence of marine mammals.

The entire exclusion zone must be visible during the 30-minute lead-in to a full ramp up. If the entire exclusion zone is not visible, then ramp up from a cold start cannot begin. If a marine mammal(s) is sighted within the exclusion zone during the 30-minute watch prior to ramp up, ramp up will be delayed until the marine mammal(s) is sighted outside of the applicable exclusion zone or the animal(s) is not sighted for at least 15 minutes for small odontocetes and pinnipeds or 30 minutes for baleen whales. No ramp-up of airguns will be conducted between 1-min airgun operations at subsequent geophone stations (i.e., following the relocation of the geophone within the wellbore) if the duration of the relocation is 30 min or less, if the exclusion zone of the full array has been visible, and no marine mammals have been sighted within the applicable exclusion zones or during poor visibility or darkness if one airgun has been operating continuously during the geophone relocation period.

A power down is the immediate reduction in the number of operating energy sources from all firing to some smaller number. A shutdown is the immediate cessation of firing of all energy sources. The arrays will be immediately powered down whenever a marine mammal is sighted approaching close to or within the applicable exclusion zone of the full arrays but is outside the applicable exclusion zone of the single source. If a marine mammal is sighted within the applicable exclusion zone of the single energy source, the entire array will be shutdown (i.e., no sources firing). The same 15 and 30 minute sighting times described for ramp up also apply to starting the airguns again after either a power down or shutdown.

Oil Spill Response Plan

In accordance with BSEE regulations, COP has developed an Oil Spill Response Plan (OSRP) for its Chukchi Sea exploration drilling program. The OSRP is currently under review by DOI and will be shared with other agencies, including NOAA, for their review as well. A final determination on the adequacy of the COP's OSRP is expected prior to the start of drilling operations. In the unlikely event of a large or very large oil spill, COP would work with the Unified Command, including representatives of the local communities, to use methods that would mitigate impacts of a response on subsistence activities.

Proposed Mitigation Measure Conclusion

NMFS has carefully evaluated COP's proposed mitigation measures and considered a range of other measures in the context of ensuring that NMFS prescribes the means of effecting the least practicable impact on the affected marine mammal species and stocks and their habitat. Our evaluation of potential

measures included consideration of the following factors in relation to one another:

- The manner in which, and the degree to which, the successful implementation of the measure is expected to minimize adverse impacts to marine mammals;
- The proven or likely efficacy of the specific measure to minimize adverse impacts as planned; and
- The practicability of the measure for applicant implementation.

Proposed measures to ensure availability of such species or stock for taking for certain subsistence uses is discussed later in this document (see "Impact on Availability of Affected Species or Stock for Taking for Subsistence Uses" section).

Proposed Monitoring and Reporting

In order to issue an ITA for an activity, Section 101(a)(5)(D) of the MMPA states that NMFS must, where applicable, set forth "requirements pertaining to the monitoring and reporting of such taking". The MMPA implementing regulations at 50 CFR 216.104 (a)(13) indicate that requests for ITAs must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the proposed action area.

Monitoring Measures Proposed by COP

The monitoring plan proposed by COP can be found in the Marine Mammal Monitoring and Mitigation Plan (4MP; Attachment B of COP's application; see **ADDRESSES**). The plan may be modified or supplemented based on comments or new information received from the public during the public comment period or from the peer review panel (see the "Monitoring Plan Peer Review" section later in this document). A summary of the primary components of the plan follows. Later in this document in the "Proposed Incidental Harassment Authorization" section, NMFS lays out the proposed monitoring and reporting conditions, as well as the mitigation conditions, for review, as they would appear in the final IHA (if issued).

(1) Visual Observers

The distances at which received sound levels occur that have the potential to cause Level B behavioral harassment (120 dB rms for continuous sounds) are 689 ft (210 m) for drilling only and about 5 mi (8 km) for drilling and support vessel activity (O'Neill *et al.*, 2011). Protected Species Observers (PSOs) at the drill rig will monitor this zone, using big eye binoculars, documenting presence and behavior of marine mammals during these activities. At least four PSOs will be located on the drill rig to collect marine mammal data during drilling and resupply operations. The PSOs will also collect data and implement mitigation measures during the VSP data acquisition runs. Two PSOs will be present on the ice management vessel, which will be on standby within 5.5 mi (9 km) of the drill rig, except when conducting ice reconnaissance.

Biologist-observers will have previous marine mammal observation experience, and field crew leaders will be highly experienced with previous vessel-based marine mammal monitoring projects. Resumes for those individuals will be provided to NMFS so that NMFS can review and accept their qualifications. Inupiat observers will be experienced in the region, familiar with the marine mammals of the area, and complete a NMFS approved observer training course designed to familiarize individuals with monitoring and data collection procedures. A handbook, adapted for the specifics of the planned COP drilling program, will be prepared and distributed beforehand to all PSOs.

PSOs will watch for marine mammals from the best available vantage point on the drillship and support vessels. PSOs will scan systematically with the unaided eye and 7 x 50 reticle binoculars, supplemented with "Big-eye" binoculars. Personnel on the bridge will assist the PSOs in watching for marine mammals.

When a marine mammal sighting is made, the following information will be recorded:

- Species, group size, number of juveniles (where possible), behavior when first sighted and after initial sighting, heading (if consistent), bearing and distance from PSO, apparent reaction to activities, and pace;
- Time, location, vessel speed and activity (where applicable), sea state, ice cover, visibility, and sun glare;
- Positions of other vessels in the vicinity of the PSO location or the position and distance of the jack-up rig from the vessel, where applicable; and
- Ship's position and speed (for PSO on vessels) or the drill rig activity (i.e. drilling or not, for PSOs on the drill rig), water depth, sea state, ice cover, visibility, and sun glare during the watch.

During helicopter transfers to and from the drill rig, PSOs will observe and record marine mammal sightings according to a standardized protocol.

PSOs may use a laser rangefinder to test and improve their abilities for visually estimating distances to objects in the water. However, previous experience showed that a Class 1 eye-safe device was not able to measure distances to seals more than about 230 ft (70 m) away. The device was very useful in improving the distance estimation abilities of the observers at distances up to about 1968 ft (600 m)—the maximum range at which the device could measure distances to highly reflective objects such as other vessels. Humans observing objects of more-or-less known size via a standard observation protocol, in this case from a standard height above water, quickly become able to estimate distances within about ±20% when given immediate feedback about actual distances during training.

(2) Acoustic Monitoring

Sound levels from drilling activities and vessels are expected to vary significantly with time due to variations in the operations and the different types of equipment used at different times onboard the drill rig. The goals of the project-specific acoustic monitoring program are to (1) Quantify the absolute sound levels produced by drilling and to monitor their variations with time, distance and direction from the drill rig; (2) measure the sound levels produced by vessels operating in support of drilling operations; (3) measure sounds from VSP data acquisition runs; and (4) detect vocalization of marine mammals. To accomplish these goals, implementation of autonomous monitoring using bottom-founded acoustic recorders is proposed during exploration drilling.

COP proposes that monitoring of sound levels from drilling and vessel activities, as well as from the VSP airguns, will occur on a continuous basis throughout the entire drilling season with a set of bottom-founded acoustic recorders. At least four recorders will be deployed on the seafloor at distances of approximately 0.31 mi (0.5 km), 0.62 mi (1 km), 2.5 mi (4 km), and 6.2 mi (10 km) from the drill rig. The bottom-founded recorders will be set to record at a sample rate of 16 or 32 kilohertz (kHz), providing useful acoustic bandwidth to 8 or 16 kHz. Calibrated reference hydrophones will be used for the measurements, capable of measuring absolute broadband sound levels between 90 and 200 dB re µPa rms. The deployment of the bottom-founded acoustic monitoring equipment will occur just prior to placement of the drill rig at the location(s) where COP intends to drill an exploration well.

After the first VSP data acquisition run, the recorders will be retrieved and the data downloaded. Recorders will then be deployed again and will remain in place until completion of all drilling activities. The three main objectives of the bottom-founded autonomous hydrophones are: (1) Provide long duration recordings capturing sound levels of all operations performed at the drill rig and of all vessel movements in the vicinity through post-season analyses; (2) calculate source levels, and distances to sound levels of 160 dB and 120 dB re 1μPa rms from drilling activities and vessels supporting the drill rig and distances to 160 dB from VSP airgun sounds; and (3) record marine mammal vocalizations during the drilling season to be compared with visual observations during post-season analyses.

Additional details on data analysis for the types of monitoring described here (i.e., visual PSO and acoustic) can be found in the 4MP in COP's application (see **ADDRESSES**).

Monitoring Plan Peer Review

The MMPA requires that monitoring plans be independently peer reviewed "where the proposed activity may affect the availability of a species or stock for taking for subsistence uses" (16 U.S.C. 1371(a)(5)(D)(ii)(III)). Regarding this requirement, NMFS' implementing regulations state, "Upon receipt of a complete monitoring plan, and at its discretion, [NMFS] will either submit the plan to members of a peer review panel for review or within 60 days of receipt of the proposed monitoring plan, schedule a workshop to review the plan" (50 CFR 216.108(d)).

NMFS convened an independent peer review panel, comprised of experts in the fields of marine mammal ecology and underwater acoustics, to review COP's 4MP for Offshore Exploration Drilling in the Devils Paw Prospect, Chukchi Sea, Alaska. The panel met on January 8–9, 2013. NMFS anticipates receipt of the panel's report containing their recommendations on the 4MP shortly. NMFS will consider all recommendations made by the panel, incorporate appropriate changes into the monitoring requirements of the IHA (if issued), and publish the panel's findings and recommendations in the final IHA notice of issuance or denial document.

Reporting Measures

(1) Sound Source Verification and Characterization Report

COP will be required to submit a report of the acoustic monitoring results noting the source levels and received levels (in 10 dB increments down to 120 dB) from the jack-up rig, support vessels (also while in DP mode), and of the VSP airgun array. Additional information to be reported is contained in COP's 4MP. Initial measurements must be provided to NMFS within 120 hr of collection and analysis of those data. This report will specify the distances of the exclusion zones that were adopted for the VSP data acquisition runs. Prior to completion of these measurements, COP will use the radii outlined in their application and elsewhere in this document.

(2) Technical Reports

The results of COP's 2014 Chukchi Sea exploratory drilling monitoring program (i.e., vessel-based, aerial, and acoustic) will be presented in the "90-day" and Final Technical reports, as required by NMFS under the proposed IHA. COP proposes that the Technical Reports will include: (1) Summaries of monitoring effort (e.g., total hours of effort for rig-based observations or observations from the ice management vessel when stationary and total kilometer of effort for non-stationary vessel-based observations); (2) effective area of observation and marine mammal distribution through study period (accounting for sea state and other factors affecting visibility and detectability of marine mammals); (3) analyses of the effects of various factors influencing detectability of marine mammals (e.g., sea state, number of observers, and fog/glare); (4) species composition, occurrence, and distribution of marine mammal sightings, including date, numbers, age/size/gender categories (if determinable), group sizes, and ice cover; (5) sighting rates of marine mammals during periods with and without drilling activities (and other variables that could affect detectability); (6) initial sighting distances and closest point of approach versus drilling state; (7) observed behaviors and types of movements versus drilling state; (8) numbers of sightings/individuals seen versus drilling state; (9) distribution around the drill rig and support vessels versus drilling state; and (10) estimates of take by harassment.

The initial technical report is due to NMFS within 90 days of the completion of COP's Chukchi Sea exploratory drilling program. The "90-day" report will be subject to review and comment by NMFS. Any recommendations made by NMFS must be addressed in the final report prior to acceptance by NMFS.

(3) Notification of Injured or Dead Marine Mammals

COP will be required to notify NMFS' Office of Protected Resources and NMFS' Stranding Network of any sighting of an injured or dead marine mammal. Based on different circumstances, COP may or may not be required to stop operations upon such a sighting. COP will provide NMFS with the species or description of the animal(s), the condition of the animal(s) (including carcass condition if the animal is dead), location, time of first discovery, observed behaviors (if alive), and photo or video (if available). The specific language describing what COP must do upon sighting a dead or injured marine mammal can be found in the "Proposed Incidental Harassment Authorization" section of this document.

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]. Only take by Level B behavioral harassment is anticipated as a result of the proposed drilling program. Noise propagation from the drill rig, associated support vessels in DP mode, and the airgun array are expected to harass, through behavioral disturbance, affected marine mammal species or stocks. Additional disturbance to marine mammals may result from aircraft overflights and visual disturbance of the drill rig or support vessels. However, based on the flight paths and altitude, impacts from aircraft operations are anticipated to be localized and minimal in nature.

The full suite of potential impacts to marine mammals from various industrial activities was described in detail in the "Potential Effects of the Specified Activity on Marine Mammals" section found earlier in this document. The potential effects of sound from the proposed exploratory drilling program might include one or more of the following: tolerance; masking of natural sounds; behavioral disturbance; non-auditory physical effects; and, at least in theory, temporary or permanent hearing impairment (Richardson *et al.*, 1995b).

As discussed earlier in this document, NMFS estimates that COP's activities will most likely result in behavioral disturbance, including avoidance of the ensonified area or changes in speed, direction, and/or diving profile of one or more marine mammals. For reasons discussed previously in this document, hearing impairment (TTS and PTS) is highly unlikely to occur based on the fact that most of the equipment to be used during COP's proposed drilling program does not have source levels high enough to elicit even mild TTS and/or the fact that certain species are expected to avoid the ensonified areas close to the operations. Additionally, non-auditory physiological effects are anticipated to be minor, if any would occur at all. Finally, based on the proposed mitigation and monitoring measures described earlier in this document and the fact that the source level for the drill rig is estimated to be below 170 dB re 1 μPa (rms), no injury or mortality of marine mammals is anticipated as a result of COP's proposed exploratory drilling program.

For continuous sounds, such as those produced by drilling operations and during DP, NMFS uses a received level of 120-dB (rms) to indicate the onset of Level B harassment. For impulsive sounds, such as those produced by the airgun array during the VSP surveys, NMFS uses a received level of 160-dB (rms) to indicate the onset of Level B harassment. COP provided calculations for the 120-dB isopleths produced by the jack-up rig and the support vessels in DP and then used those isopleths to estimate takes by harassment. Additionally, COP provided calculations for the 160-dB isopleth produced by the airgun array and then used that isopleth to estimate takes by harassment. COP provides a full description of the methodology used to estimate takes by harassment in its IHA application (see **ADDRESSES**), which is also provided in the following sections.

COP has requested authorization to take bowhead, gray, fin, humpback, minke, killer, and beluga whales, harbor porpoise, and ringed, spotted, bearded, and ribbon seals incidental to exploration drilling, support vessels operating in DP mode, ice management, and VSP activities.

COP's density estimates are based on the best available peer reviewed scientific data, when available. In cases where the best available data were collected in regions, habitats, or seasons that differ from the proposed survey activities, adjustments to reported population or density estimates were made to account for these differences insofar as possible. In cases where the best available peer reviewed data were based on data from more than a decade old, more recent information was used. Species abundance information in the northeastern Chukchi Sea from the 2008–2010 COMIDA (now referred to as ASAMM) marine mammal aerial surveys (Clarke and Ferguson, 2010; Clarke *et al.*, 2011) and the 2008–2010 vessel-based Chukchi Sea Environmental Studies Program (CSESP; Aerts *et al.*, 2011) contain current knowledge of some whale and seal species. The data from the COMIDA aerial survey have undergone several reviews, so although not officially peer reviewed, these recent abundance and distribution data were determined to be more representative than older peer reviewed publications for bowhead and gray whales. The CSESP data are as of yet preliminary so are presently only used as a comparison to available peer reviewed data, unless no other information was available. In those cases the CSESP data were used to estimate densities. After reviewing the density estimates, NMFS determined that the data used are appropriate.

Because most cetacean species show a distinct seasonal distribution, density estimates for the northeastern Chukchi Sea have been derived for two time periods: the summer period (covering July and August) and the fall period (covering September and October). Animal densities encountered in the Chukchi Sea during both of these time periods will further depend on the presence of ice. However, if ice is present close to the project area, drilling operations will not start or will be halted, so cetacean densities related to ice conditions are not included in COP's IHA application. Pinniped species in the Chukchi Sea do not show a distinct seasonal distribution during the period July–October (Aerts *et al.*, 2011) and as such density estimates derived for seal species are used for both the summer and fall periods.

Some sources from which densities were used include correction factors to account for perception and availability bias in the reported densities. Perception bias is associated with diminishing probability of sighting with increasing lateral distance from the trackline, where an animal is present at the surface but could be missed. Availability bias refers to the fact that the animal might be present but is not available at the surface. In cases where correction factors were not included in the reported densities, the best available correction factors were applied.

To account for variability in marine mammal presence, COP derived maximum density estimates were in addition to average density estimates. Except where specifically noted, the maximum estimates have been calculated as double the average estimates. COP determined that this factor was large enough to allow for chance encounters with unexpected large groups of animals or for overall higher densities than expected. Table 8 in COP's IHA application indicates that the "average estimate" for humpback, fin, minke, and killer whales is either zero or one. Additionally, Table 8 in the application indicates that the "average estimate" for harbor porpoise and beluga whales is low. Therefore, to account for the fact that these species listed as being potentially taken by harassment in this document may occur in COP's proposed drilling sites during active operations, NMFS either used the "maximum estimates" or made an estimate based on typical group size for a particular species.

Estimated densities of marine mammals in the Chukchi Sea project area during the summer (July–August) and fall (September–October) periods are presented in Table 4 in COP's application and Table 1 here. Descriptions of the individual density estimates shown in the tables are presented next.

Cetacean Densities

Eight cetacean species are known to occur in the northeastern Chukchi Sea. Of these, bowhead, beluga, gray, and killer whales and harbor porpoise are likely to be encountered in the proposed project area. Fin, humpback, and minke whales may occur but likely in lower numbers than the other cetacean species.

(1) Beluga Whales

Summer densities of belugas in offshore waters of the Chukchi Sea are expected to be low, with higher densities at the ice-margin and in nearshore areas. Aerial surveys have recorded few belugas in the offshore Chukchi Sea during the summer months (Moore *et al.*, 2000b). COMIDA aerial surveys flown in 2008, 2009, and 2010 reported a total of 733 beluga sightings during >32,202 mi (51,824 km) of on-transect effort, resulting in 0.0141 beluga whales per km (Clarke *et al.*, 2011). Belugas were seen every month except September, with most sightings in July.

There was one sighting of nearly 300 belugas nearshore between Wainwright and Icy Cape in 2009, and several hundred belugas were sighted in Elson Lagoon, east of Pt. Barrow in 2010. Group size ranged from 1 to 480 individuals. Highest sighting rate per

depth zone was in shallow water (≤ 115 ft [35 m] depth), which was likely due to the large groups described above. No beluga whales were sighted during the 2008–2010 vessel-based marine mammal CSESP surveys that covered the Devils Paw prospect and two other lease areas in the northeastern Chukchi Sea (Brueggeman *et al.*, 2009b, 2010; Aerts *et al.*, 2011). Some beluga vocalizations were detected in October 2009 around Barrow and in the Burger lease area by acoustic recorders deployed as part of the CSESP program, but none in the Devils Paw prospect (Delarne *et al.*, 2011). Also, no beluga sightings were reported during >11,185 mi (18,000 km) of vessel-based effort in good visibility conditions during 2006–2008 industry operations in the northeastern Chukchi Sea (Haley *et al.*, 2010).

The COMIDA aerial survey summer and fall data (Clarke *et al.*, 2011) were used to calculate expected average densities in the Devils Paw prospect. Because the reported densities (Whales Per Unit Effort) are not corrected for perception or availability bias, a f(0) value of 2.841 and g(0) value of 0.58 from Harwood *et al.* (1996) were applied to arrive at estimated corrected densities, using the equation from Buckland *et al.* (2001). In the months July and August, two on-transect beluga sightings of five animals were observed in water depths of 118–164 ft (36–50 m) along 7,447 mi (11,985 km) line transect. After applying the correction factors mentioned above, this resulted in a density of 0.0010 whales/km^2 (Table 4 in COP's application and Table 1 here). The three on-transect beluga sightings of six animals recorded in the period September–October along 6,236 mi (10,036 km) effort resulted in a corrected density of 0.0015 whales/km^2.

The absence of any beluga sightings during the 2008–2010 CSESP marine mammal research (Brueggeman *et al.*, 2009b, 2010; Aerts *et al.*, 2011), the 2006–2008 industry programs (Haley *et al.*, 2010), and the low number of acoustic detections in the vicinity of the project area (Delarne *et al.*, 2011), are consistent with the relative low summer and fall densities in water depths of 118–164 ft (36–50 m) as calculated with the COMIDA aerial survey data.

(2) Bowhead Whales

Most bowhead whales that will be observed in the northeastern Chukchi Sea are either migrating north to feeding grounds in the eastern Beaufort Sea during spring (prior to the start of COP's proposed activities), or migrating south to their wintering grounds in the Bering Sea during the fall. By July, most bowhead whales have passed Point Barrow, although some have been visually and acoustically detected during the entire summer in low numbers in the northeastern Chukchi Sea (Moore *et al.*, 2010; Thomas *et al.*, 2010; Quakenbush *et al.*, 2010; Clarke and Ferguson, in prep.). Bowheads are more widely scattered in the northeastern Chukchi Sea during the fall migration but generally keep an offshore route. During aerial surveys in the COMIDA area from 1982–1991 and 2008–2010, a total of 88 on-effort sightings of 121 bowhead whales were observed. Bowhead whales were seen in all months from June to October, with the greatest number of sightings occurring in October (Clarke *et al.*, 2011; Clarke and Ferguson, in prep.). Similarly, bowhead whales were sighted in July–August during nearshore aerial surveys conducted in 2006–2008 in the northeastern Chukchi Sea but with increasing number of sightings in September and October (Thomas *et al.*, 2010). Vessel-based CSESP marine mammal surveys conducted in Devils Paw prospect and two other lease areas in the northeastern Chukchi Sea recorded a total of 40 sightings of 59 animals during 2008–2010 with all but one sighting in October (Brueggeman *et al.*, 2009, 2010; Aerts *et al.*, 2011).

The estimate of summer and fall bowhead whale density in the Chukchi Sea was calculated using the 2008–2010 COMIDA aerial survey data (Clarke and Ferguson, in prep.). No bowhead whales were sighted during the 7,447 mi (11,985 km) of survey effort in waters of 118–164 ft (36–50 m) during July–August. However, for density estimates in this IHA, COP assumed there was one sighting of one bowhead. To improve the understanding of what factors significantly affect bowhead whale detections from aerial surveys, a distance detection function was estimated using 25 years of aerial line transect surveys in the Bering, Chukchi and Beaufort Seas (Givens *et al.*, 2010). Because the correction factor from this study is lower than the estimates by Thomas *et al.* (2002), COP used the higher values to estimate densities for the purpose of this IHA. When applying a f(0) value of 2 and a g(0) value of 0.07 from Thomas *et al.* (2002), the summer density was estimated to be 0.0012 whales/km^2 (Table 4 in COP's application and Table 1 here). Clarke and Ferguson (in prep.) reported 14 sightings of 15 individuals during 6,236 mi (10,036 km) of on transect aerial survey effort in September and October 2008–2010. Applying the same f(0) and g(0) values as for the summer density estimate, the bowhead density estimate for the fall is 0.0214 whales/km^2 (Table 4 in COP's application and Table 1 here). A total of 36 on-transect sightings of 55 bowheads were observed along 8,169 mi (13,146 km) transect effort during the vessel-based CSESP marine mammal surveys in September and October. Applying the same correction factors as above resulted in a corrected bowhead density of 0.0598 whales/km^2. This high density coincided with a peak in whale migration the first week of October, which was also apparent on the acoustic records (Delarne *et al.*, 2011). Although none of these sightings were in the Devils Paw prospect, the maximum fall bowhead density estimate has been calculated as triple the average estimates, to cover for such migration peaks.

(3) Gray Whales

Gray whale densities are expected to be highest in nearshore areas during the summer months with decreasing numbers in the fall. Moore *et al.* (2000b) reported a scattered distribution of gray whales generally limited to nearshore areas where most whales were observed in water less than 115 ft (35 m) deep. Nearshore aerial surveys along the Chukchi coast also reported substantial declines in the sighting rates of gray whales in the fall (Thomas *et al.*, 2010). The average open-water summer and fall densities presented in Table 4 in COP's application and Table 1 here were calculated from the 2008–2010 COMIDA aerial survey data (Clarke and Ferguson, in prep.). The summer data for water depths 118–164 ft (36–50 m) included 54 sightings of 73 individuals during 7,447 mi (11,985 km) of on-transect effort. Applying the correction factors f(0) = 2.49 and g(0) = 0.95 (Forney and Barlow, 1998 Table 1, based on aerial survey data) resulted in a summer density of 0.0080 whales/km^2 (Table 4 in COP's application and Table 1 here). The number of gray whale sightings in the offshore study areas during the 2008–2010 CSESP marine mammal survey were limited in July and August; eight sightings of nine animals along 4,223 mi (6,796 km) on-transect effort. Most of these animals were observed nearshore of Wainwright (Brueggeman *et al.*, 2009, 2010; Aerts *et al.*, 2011) and only two sightings of three animals were recorded in the Devils Paw Prospect. Densities from vessel based surveys in the Chukchi Sea during non-seismic periods and locations in July and August of 2006–2008 (Haley *et al.*, 2010) ranged from 0.0021 to 0.0080 whales/km^2 with a maximum 95 percent CI of 0.0336.

In the fall, gray whales may be dispersed more widely through the northern Chukchi Sea (Moore *et al.*, 2000b; Clarke and Ferguson, in prep.), but overall densities are likely to be decreasing as the whales begin migrating south. The average fall density was calculated from 15 sightings of 19 individuals during 6,236 mi (10,036 km) of on-transect effort in water 118–164 ft (36–50 m) deep during September and October (Clarke and Ferguson, in prep.). Applying the same f(0) and g(0) values as for the summer density, resulted in 0.0025 whales/km² (Table 4 in COP's application and Table 1 here). During the CSESP survey in September and October, 25 gray whale sightings of 36 individuals were observed along 8,169 mi (13,146 km) of on-transect effort, resulting in an uncorrected density of 0.0027 whales/km². Most of these whales were, however, observed nearshore of Wainwright (within 31 mi [50 km] from the coast) and none in the Devils Paw Prospect. Densities from vessel based surveys in the Chukchi Sea during non-seismic periods and locations in July and August of 2006–2008 (Haley *et al.*, 2010) ranged from 0.0026 to 0.0042 whales/km² with a maximum 95% CI of 0.0277.

(4) Harbor Porpoise

Distribution and abundance data of harbor porpoise were very limited prior to 2006, and presence of the harbor porpoise was expected to be very low in the northeastern Chukchi Sea.

Starting in 2006, several vessel-based marine mammal observer programs took place in the northeastern Chukchi Sea as part of seismic and shallow hazard survey monitoring and mitigation plans (Haley *et al.*, 2010). During these surveys, 37 sightings of 61 harbor porpoises were reported. Three on-transect sightings of seven harbor porpoises were observed in the Devils Paw prospect in July and August along 4,223 mi (6,796 km) of on-transect effort during the CSESP marine mammal surveys. No harbor porpoises were observed in the fall (Brueggeman *et al.*, 2009, 2010; Aerts *et al.*, 2011). COP used the 2008–2010 CSESP data to calculate densities for the purpose of this IHA. The uncorrected average density for the summer based on the three year CSESP data is 0.0010 porpoises/km² (Table 4 in COP's application and Table 1 here). As a comparison, summer density estimates from 2006–2008 marine mammal monitoring and mitigation programs during non-seismic periods ranged from 0.0008 to 0.0015 animals/km² with a maximum 95 percent CI of 0.0079 animals/km² (Haley *et al.*, 2010).

Assuming that one sighting of one animal would have been observed along 8,169 mi (13,146 km) transect effort during the 2008–2010 CSESP surveys in the fall, the average uncorrected fall density is 0.0001 porpoises/km² (Table 4 in COP's application and Table 1 here). Harbor porpoise densities recorded during non-seismic periods in the fall months of 2006–2008 ranged from 0.0002 to 0.0011 animals/km² with a maximum 95 percent CI of 0.0093 animals/km². The maximum value of 0.0011 animals/km² from these surveys was used as the maximum fall density estimate for this IHA (Table 4 in COP's application and Table 1 here).

(5) Other Cetaceans

The remaining cetacean species that could be encountered in the Chukchi Sea during COP's planned activities include the humpback, fin, minke, and killer whales. The northeastern Chukchi Sea is at the northern edge of the known distribution range of most of these animals, although in recent years several sightings of some of these cetaceans were recorded in the area. During the 2008–2010 marine mammal aerial surveys in the COMIDA area, one humpback and one fin whale were observed, but none were observed in 1982–1991 in the same area (Clarke *et al.*, 2011). Two sightings of four fin whales were recorded in 2008 in the northeastern Chukchi Sea during 2006–2008 marine mammal monitoring programs from seismic and shallow hazard survey vessels (Haley *et al.*, 2010). During the vessel-based 2008–2010 CSESP marine mammal surveys, two killer whale pods of 9 individuals were observed in the Devils Paw prospect and also one minke whale (Brueggeman *et al.*, 2009, 2010; Aerts *et al.*, 2011). Although there is evidence of the occurrence of these animals in the Chukchi Sea, it is unlikely that more than a few individuals will be encountered during the proposed activities. The expected average densities of these species for the purpose of this IHA are therefore estimated at 0.0001 animal/km². The maximum density estimates have been calculated as quadruple the average estimates to account for the increasing trend in number of observations during recent years (Table 4 in COP's application and Table 1 here).

Pinniped Densities

Four species of pinnipeds under NMFS jurisdiction occur in the Chukchi Sea during COP's proposed activities of which three are most likely to be encountered: ringed seal, bearded seal, and spotted seal. Each of these species is associated with presence of ice and the nearshore area. For ringed and bearded seals the ice margin is considered preferred habitat during most seasons (as compared to the nearshore areas). Spotted seals are considered to be predominantly a coastal species except in the spring when they may be found in the southern margin of the retreating sea ice. Satellite tagging studies have shown that spotted seals sometimes undertake long excursions into offshore waters during summer (Lowry *et al.*, 1994, 1998). Ribbon seals were observed during the vessel-based CSESP surveys in 2008, when ice was present in the area (Brueggeman *et al.*, 2009), and they were also reported in very small numbers within the northeastern Chukchi Sea by observers on industry vessels (Haley *et al.*, 2010).

TABLE 1—ESTIMATED DENSITIES OF CETACEANS AND PINNIPEDS IN THE NORTHEASTERN CHUKCHI SEA EXPECTED DURING THE PROPOSED DRILLING OPERATIONS IN THE DEVILS PAW PROSPECT DURING THE 2014 OPEN-WATER SEASON

Density in numbers per square km	July/August		September/October	
	Avg	Max	Avg	Max
Beluga whale	0.0010	0.0020	0.0015	0.0030
Killer whale	0.0001	0.0004	0.0001	0.0004
Harbor porpoise	0.0010	0.0020	0.0001	0.0011
Bowhead whale	*0.0012*	*0.0024*	*0.0214*	*0.0641*
Gray whale	0.0080	0.0160	0.0025	0.0050
Humpback whale	*0.0001*	*0.0004*	*0.0001*	*0.0004*
Fin whale	*0.0001*	*0.0004*	*0.0001*	*0.0004*
Minke whale	0.0001	0.0004	0.0001	0.0004

TABLE 1—ESTIMATED DENSITIES OF CETACEANS AND PINNIPEDS IN THE NORTHEASTERN CHUKCHI SEA EXPECTED DURING THE PROPOSED DRILLING OPERATIONS IN THE DEVILS PAW PROSPECT DURING THE 2014 OPEN-WATER SEASON—Continued

Density in numbers per square km	July/August		September/October	
	Avg	Max	Avg	Max
Bearded seal	0.0135	0.0248	0.0135	0.0248
Ringed seal	0.0516	0.1256	0.0516	0.1256
Spotted seal	0.0244	0.0355	0.0244	0.0355
Ribbon seal	0.0020	0.0060	0.0020	0.0060

Note: Species listed under the U.S. ESA as Endangered are in italics.

TABLE 2—MODELED DISTANCES TO RECEIVED SOUND PRESSURE LEVEL CRITERIA USED BY NMFS FOR THE RELEVANT SOUND SOURCES OF THE PROPOSED PROJECT AND THE AREAS USED TO ESTIMATE THE NUMBER OF POTENTIAL TAKES BY HARASSMENT

Sound source	Received SPL (dB re 1 μPa)	Modeled distance (km)	Area (km^2) used*
Continuous sound source			
Drilling	160 db	<0.01	.....
	120 dB	0.21	.....
Support vessel in dynamic positioning	160 dB	0.71	.....
	120 dB	7.90	201
Ice management	160 dB	0.71	.....
	120 dB	7.90	201
Pulsed sound source			
VSP airguns	190 dB	0.16	.....
	180 dB	0.92	.....
	160 dB	4.90	78.5
	120 dB	**71.0	.....

*Areas ensonified with continuous sound levels of 120 dB and pulsed sound levels of 160 dB displayed in this column were used to estimate the number of marine mammals potentially exposed to these levels (see Section 6.2.1).—means not applicable

** Contours of 120 dB re 1 μPa for airgun sounds extended beyond the modeling area and as such the distance shown is based on extrapolation of the data and therefore uncertain.

Aerial survey data from Bengston *et al.* (2005) were initially used for bearded and ringed seal densities. However, because these surveys were conducted in the spring during the seal basking season, the reported densities might not be applicable for the open-water summer and fall period. Therefore, the 2008–2010 CSESP vessel-based marine mammal survey data were used to calculate seal densities. The densities for spotted and ribbon seals were also based on the 2008–2010 CSESP marine mammal survey data (Aerts *et al.*, 2011). Perception bias was accounted for in the CSESP densities, but the number of animals missed because they were not available for detection was not taken into account. The assumption was made that all animals available at distance zero from the observer, this is on the transect line, were detected [g(0)=1]. The amount of animals missed due to perception bias was calculated using distance sampling methodology (Buckland *et al.*, 2001; Buckland *et al.*, 2004). Program Distance 6.1 release 1 (Thomas *et al.*, 2010) was used to analyze effects of distance and environmental factors (e.g., sea state, visibility) on the probability of detecting marine mammal species.

During the CSESP studies, a relatively large percentage of seal sightings were classified as ringed/spotted seals (meaning it was either a spotted or a ringed seal) and unidentified seals (meaning it could be any of the four seal species observed). These sightings had to be taken into account to avoid an underestimation of densities for each separate seal species. The ratio of ringed versus spotted seal densities for each study area and year was used to estimate the proportional density of each of these two species from the combined ringed/spotted seal densities. This estimated proportional density was then added to the observed densities. The same method was used to proportionally divide the unidentified seal sightings over spotted, ringed, and bearded seal sightings. Applying the ratio of identified seal species to the unidentified individuals assumes that the disability of identification is similar for each species. Considering the conditions of these occurrences (animals either far away or only at the surface for a very brief moment), this is likely to be true. The above described adjustment increased densities for each species but did not change observed trends in occurrence.

(1) Bearded Seals

Densities from 1999–2000 spring surveys in the offshore pack ice zone (zone 12P) of the northern Chukchi Sea (Bengtson *et al.*, 2005) were initially consulted for bearded seal average and maximum summer densities. A correction factor for bearded seal availability bias, based on haul out and diving patterns was not available and therefore not included in the reported densities. Average density of bearded seals on the offshore pack ice in zone 12P was 0.018 seals/km^2, with a maximum density of 0.027 seals/km^2 (Bengston *et al.*, 2005). During the 2008–2010 CSESP marine mammal survey, bearded seal density in the Devils Paw prospect from July-October was 0.025 seals/km^2 in 2008, 0.004 seals/km^2 in 2009, and 0.011 seals/km^2 in 2010 (Aerts *et al.*, 2011). The average density over these three years was 0.014 seals/km^2, and the maximum density was 0.025 seals/km^2. The average

density of the CSESP surveys is about 30% lower than reported by Bengston *et al.* (2005) and the maximum CSESP densities about 10% lower. It was decided to use the CSESP average and maximum densities data as these were gathered in the area of operation during the same season as the proposed operations (Table 4 in COP's application and Table 1 here).

(2) Ringed Seals

Ringed seal average and maximum summer densities were also calculated from the 1999–2000 spring aerial survey data in the offshore pack ice zone (zone 12P) of the northern Chukchi Sea (Bengtson *et al.*, 2005). Ringed seal availability bias, g(0), based on haul out and diving patterns was used in the reported densities. Average density of ringed seals on the offshore pack ice in zone 12P was 0.052 seals/km^2 and the maximum density 0.81 seals/km^2 (Bengston *et al.*, 2005). During the 2008–2010 CSESP marine mammal survey, ringed seal density in the Devils Paw prospect from July-October was 0.126 seals/km^2 in 2008, 0.018 seals/km^2 in 2009, and 0.012 seals/km^2 in 2010 (Aerts *et al.*, 2011). The average density over these 3 years was 0.052 seals/km^2 and the maximum density 0.126 seals/km^2. The average density of the CSESP surveys is very similar to that reported by Bengston *et al.* (2005), but the maximum CSESP density was about 6 times lower. As with the bearded seal density, it was decided to use the CSESP average and maximum densities data as these were gathered in the area of operation during the same season as the proposed operations (Table 4 in COP's application and Table 1 here). The maximum density was obtained in a year when ice was present in the area.

(3) Spotted Seals

Little information is available on spotted seal densities in offshore areas of the Chukchi Sea. Spotted seal densities were calculated based on the data collected during the CSESP marine mammal survey (Aerts *et al.*, 2011). Spotted seal density in the Devils Paw prospect from July–October was 0.036 seals/km^2 in 2008, 0.019 seals/km^2 in 2009, and 0.018 seals/km^2 in 2010 (Aerts *et al.*, 2011). The average density over these three years was 0.024 seals/km^2 and the maximum density 0.036 seals/km^2 (Table 4 in COP's application and Table 1 here).

(4) Ribbon Seals

Four ribbon seal sightings of four individuals were recorded in the Devils Paw prospect during the CSESP survey from July-October 2008 (Brueggeman *et al.*, 2009). No ribbon seals were sighted in 2009 and 2010 (Brueggeman *et al.*, 2010; Aerts *et al.*, 2011). Density calculated from this limited number of sightings in 2008 was 0.006 seals/km^2. The average and maximum densities were 0.002 seals/km^2 and 0.006 seals/km^2, respectively. Note that the 2008 density calculated for this IHA had, as expected, an extremely large coefficient of variation due to the limited number of sightings.

Estimated Area Exposed to Sounds >120 dB or >160 dB re 1 μPa rms

An acoustic propagation model (i.e. JASCO's Marine Operations Noise Model) was used to estimate distances to received rms SPLs of 190, 180, 160, and 120 dB re 1μPa from the drill rig, support vessel on DP alongside the drill rig, and from the VSP airguns. The distances to reach received sound levels of 120 dB re 1 μPa (for continuous sound sources, such as drilling activities, support vessels, and ice management) and 160 dB re 1 μPa (for pulsed sound sources, such as the VSP airguns) are used to calculate the potential numbers of marine mammals potentially harassed by the proposed activities. The distances to received levels of 180 dB and 190 dB re 1 μPa (rms) will be used to establish exclusion zones for mitigation purposes (see the "Proposed Mitigation" section earlier in this document). Three scenarios were considered for modeling:

1. Jack-up rig performing drilling operations (without support vessels);
2. Jack-up rig performing drilling operations with the support vessel alongside in DP mode, i.e., maintaining position using thrusters; and
3. 760 in^3 ITAGA airgun array operating at the drill site as representative for VSP data acquisition runs.

The results of these model runs are shown in the report "Acoustic Modeling of Underwater Noise from Drilling Operations at the Devils Paw prospect in the Chukchi Sea" (Attachment A of COP's application) and are summarized in Table 5 of COP's application and Table 2 here.

The ice management vessel is part of an ice alerts system and available to assist operations by conducting ice reconnaissance trips and protecting the rig from potential ice hazards if necessary. COP does not expect physical management of ice to be necessary during the open-water season and does not intend to engage in icebreaking. If ice floes are determined to require a managed response to protect the drill rig, the use of fire monitors (water cannons) or the vessel itself to modify ice floe trajectory is the most likely response. As summarized earlier in this document, an SPL of about 193 dB re 1μPa at 1 m was estimated to be a reasonable peak value for ice management vessels during different sea ice conditions and modes of propulsion level (Roth and Schmidt, 2010). Sound levels generated during physical management of ice are not expected to be as intense as during icebreaking activities described in most literature. Instead of actually breaking ice, the vessel will redirect and reposition the ice with slow movements, pushing it away from the direction of the drill rig at slow speeds so that the ice floe does not form any hazard to the drilling operations. At these slow speeds the vessel uses low power, with slow propeller rotation speed, thereby reducing noise generation from propeller rotation effects in the water. For the purpose of estimating the number of marine mammals potentially eliciting behavioral responses, COP assumed that the distance to received sound pressure levels of 120 dB re 1μPa from physical ice management is similar to that modeled for the support vessel on DP, i.e. 4.9 mi (7.9 km). This is considered to be an overestimation, since source levels from the proposed physical management of ice are expected to be much lower than the 204 dB re 1μPa used for the support vessel and also lower than the 193 dB re 1μPa reported for icebreaking activities.

Potential Number of Takes by Harassment

Although a marine mammal may be exposed to drilling, DP, or ice management sounds ≥120 dB (rms) or airgun sounds ≥160 dB (rms), not all animals react to sounds at this low level, and many will not show strong reactions (and in some cases any reaction) until sounds are much stronger. There are several variables that determine whether or not an individual animal will exhibit a response to the sound, such as the age of the animal, previous exposure to this type of anthropogenic sound, habituation, etc.

The 160 dB criterion is applied to pulsed sounds generated by airguns during the two or three VSP data acquisition runs that will be of short duration (with a total of about 2 hrs of airgun activity for two to three runs per well, not including time required for ramp up). The 120 dB criterion is applied to sounds from the drill rig for situations where the support vessel is located alongside the drill rig in DP mode, i.e., the scenario with highest sound production. This situation will occur about four times a week for a

maximum of 6 hrs per occurrence, i.e., about 318 hrs of DP based on 53 trips over the entire drilling season for the ware vessel and 4.5 times a week, i.e., about 378 hrs for the OSV. The 120 dB criterion is also applied to any physical management of ice that might occur. For analytical purposes, physical ice management was conservatively estimated at up to 72 hrs, only in July and August. The area ensonified with continuous sound levels of 120 dB re1 µPa (rms) during drilling activity only is so small (<0.2 km²) that it does not appreciably add to the total estimated number of marine mammal exposures and is therefore not included in the calculations.

The area around the drill rig ensonified with pulsed sound levels ≥160 dB re1 µPa (rms) during VSP runs is estimated at 30 mi² (78.5 km²; radius of 3.1 mi or 5 km), and 78 mi² (201 km²; radius of 5 mi or 8 km) for continuous sound levels of ≥120 dB re1 µPa (rms) during times when the support vessel is attending the rig and during physical management of ice (Table 5 in COP's application and Table 2 here).

The potential number of each species that might be exposed to received continuous SPLs of ≥120 dB re 1 µPa (rms) and pulsed SPLs of ≥160 dB re 1 µPa (rms) was calculated by multiplying:

- The expected (seasonal) species density as provided in Table 4 of COP's application and Table 1 here;
- the anticipated area to be ensonified by the 120 dB re 1 µPa (rms) SPL (support vessel in DP mode and ice management activity) and 160 dB re 1 µPa (rms) SPL (VSP airgun operations); and
- the estimated total duration of each of the three activities within each season expressed in days (24 hrs).

To derive at an estimated total duration for each of the three activities for each season (summer and fall) the following assumptions were made:

- The total duration during which the support vessel will be in DP mode is 318 + 378 = 696 hrs. This is the equivalent of 29 days over the entire season, with 14.5 days in July/August and 14.5 days in September/October.
- Physical management of ice was assumed to take place only in the early season, and, for analytical purpose, estimated at a total of 72 hrs. No physical management of ice is assumed in September or October. If sea ice becomes an issue in October, drilling activities will likely be halted and the drill rig prepared for demobilization.
- The ensonified area of 120 dB re 1µPa for continuous sounds of the support vessel in DP mode and active ice management are assumed to be similar. To be conservative, COP assumed that the ensonified areas of these two activities will not overlap. The duration of both of these activities combined, used to calculate marine mammal exposures to 120 dB re 1 µPa (rms), is therefore17.5 days (=14.5 + 3) for July/August and 14.5 days for September/October.
- The total duration of the two or three VSP data acquisition runs per well is estimated to be 24 hrs, during which the airguns will be operating a total of about 2 hrs. Assuming COP will do additional VSP data acquisition runs for a second well, the total time of operating airgun activity is estimated about 4 hrs. To be conservative, COP included airgun time for ramp ups. Therefore, COP used 12 hrs (0.5 day) in July/August and 12 hrs (0.5 day) in September/October for the calculations of potential exposures.

Table 6 in COP's application summarizes the number of marine mammals potentially exposed to continuous SPLs of 120 dB re 1 µPa from support vessels on DP and physical ice management. Table 7 in COP's application summarizes the estimated number of marine mammals potentially exposed to pulsed SPLs of 160 dB re 1 µPa during the VSP runs. The total number of potential marine mammal exposures from all three activities combined is provided in Table 8 of COP's application. Additional information is contained in Section 6 of COP's IHA application.

NMFS is proposing to authorize the maximum take estimates provided in Table 8 of COP's application, except for the species noted earlier in this section to account for typical group size of those species. Table 3 in this document outlines the abundance, proposed take, and percentage of each stock or population for the 12 species that may be exposed to sounds ≥120 dB from the drill rig with support vessels in DP mode and ice management activities and to sounds ≥160 dB from VSP activities in COP's proposed Chukchi Sea drilling area. Less than 1.3% of each species or stock would potentially be exposed to sounds above the Level B harassment thresholds. The take estimates presented here do not take any of the mitigation measures presented earlier in this document into consideration. These take numbers also do not consider how many of the exposed animals may actually respond or react to the proposed exploration drilling program. Instead, the take estimates are based on the presence of animals, regardless of whether or not they react or respond to the activities.

TABLE 3—POPULATION ABUNDANCE ESTIMATES, TOTAL PROPOSED LEVEL B TAKE ESTIMATES (WHEN COMBINING TAKES FROM DRILL RIG OPERATIONS, ICE MANAGEMENT, DP, AND VSP SURVEYS), AND PERCENTAGE OF STOCK OR POPULATION THAT MAY BE TAKEN FOR THE POTENTIALLY AFFECTED SPECIES THAT MAY OCCUR IN COP'S PROPOSED CHUKCHI SEA DRILLING AREA

Species	Abundance [1]	Total proposed take	Percentage of stock or population
Beluga Whale	3,710	16	0.4
Killer Whale	656	20	3
Harbor Porpoise	48,215	10	0.02
Bowhead Whale	[2] 15,750	200	1.3
Fin Whale	5,700	5	0.09
Gray Whale	18,017	72	0.4
Humpback Whale	2,845	5	0.2
Minke Whale	810–1,233	5	0.4–0.6
Bearded Seal	[3] 155,000	161	0.1
Ribbon Seal	49,000	15	0.03
Ringed Seal	208,000–252,000	818	0.3–0.4
Spotted Seal	141,479	231	0.2

[1] Unless stated otherwise, abundance estimates are taken from Allen and Angliss (2012).

[2] Estimate from George *et al.* (2004) with an annual growth rate of 3.4%.
[3] Beringia Distinct Population Segment (NMFS, 2010).

Negligible Impact and Small Numbers Analysis and Preliminary 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." In making a negligible impact determination, NMFS considers a variety of factors, including but not limited to: (1) The number of anticipated mortalities; (2) the number and nature of anticipated injuries; (3) the number, nature, intensity, and duration of Level B harassment; and (4) the context in which the takes occur.

No injuries or mortalities are anticipated to occur as a result of COP's proposed Chukchi Sea exploratory drilling program, and none are proposed to be authorized. Injury, serious injury, or mortality could occur if there were a large or very large oil spill. However, as discussed previously in this document, the likelihood of a spill is extremely remote. COP has implemented many design and operational standards to mitigate the potential for an oil spill of any size. NMFS does not propose to authorize take from an oil spill, as it is not part of the specified activity. Additionally, animals in the area are not expected to incur hearing impairment (i.e., TTS or PTS) or non-auditory physiological effects. Instead, any impact that could result from COP's activities is most likely to be behavioral harassment and is expected to be of limited duration. Although it is possible that some individuals may be exposed to sounds from drilling operations more than once, during the migratory periods it is less likely that this will occur since animals will continue to move across the Chukchi Sea towards their wintering grounds.

Bowhead and beluga whales are less likely to occur in the proposed project area in July and August, as they are found mostly in the Canadian Beaufort Sea at this time. The animals are more likely to occur later in the season (mid-September through October), as they head west towards Russia or south towards the Bering Sea. Additionally, while bowhead whale tagging studies revealed that animals occurred in the Lease Sale 193 area, a higher percentage of animals were found outside of the Lease Sale 193 area in the fall (Quakenbush *et al.*, 2010). Bowhead whales are not known to feed in areas near COP's leases in the Chukchi Sea. The closest primary feeding ground is near Point Barrow, which is more than 200 mi (322 km) east of COP's Devils Paw prospect. Therefore, if bowhead whales stop to feed near Point Barrow during COP's proposed operations, the animals would not be exposed to continuous sounds from the drill rig or support operations above 120 dB or to impulsive sounds from the airguns above 160 dB, as those sound levels only propagate 689 ft (210 m), 4.9 mi (7.9 km), and 3 mi (4.9 km), respectively. Additionally, the 120-dB radius for the airgun array has been modeled to propagate 44 mi (71 km) from the source. Therefore, sounds from the operations would not reach the feeding grounds near Point Barrow. Gray whales occur in the northeastern Chukchi Sea during the summer and early fall to feed. However, the primary feeding grounds lies outside of the 120-dB and 160-dB ensonified areas from COP's activities. While some individuals may swim through the area of active drilling, it is not anticipated to interfere with their feeding in the Chukchi Sea. Other cetacean species are much rarer in the proposed project area. The exposure of cetaceans to sounds produced by exploratory drilling operations (i.e., drill rig, DP, ice management, and airgun operations) is not expected to result in more than Level B harassment.

Few seals are expected to occur in the proposed project area, as several of the species prefer more nearshore waters. Additionally, as stated previously in this document, pinnipeds appear to be more tolerant of anthropogenic sound, especially at lower received levels, than other marine mammals, such as mysticetes. COP's proposed activities would occur at a time of year when the ice seal species found in the region are not molting, breeding, or pupping. Therefore, these important life functions would not be impacted by COP's proposed activities. The exposure of pinnipeds to sounds produced by COP's proposed exploratory drilling operations in the Chukchi Sea is not expected to result in more than Level B harassment of the affected species or stock.

Of the 12 marine mammal species likely to occur in the proposed drilling area, three are listed as endangered under the ESA—the bowhead, humpback, and fin whales—and two are listed as threatened—ringed and bearded seals. All five species are also designated as "depleted" under the MMPA. Despite these designations, the Bering-Chukchi-Beaufort stock of bowheads has been increasing at a rate of 3.4% annually for nearly a decade (Allen and Angliss, 2012), even in the face of ongoing industrial activity. Additionally, during the 2001 census, 121 calves were counted, which was the highest yet recorded. The calf count provides corroborating evidence for a healthy and increasing population (Allen and Angliss, 2011). An annual increase of 4.8% was estimated for the period 1987–2003 for North Pacific fin whales. While this estimate is consistent with growth estimates for other large whale populations, it should be used with caution due to uncertainties in the initial population estimate and about population stock structure in the area (Allen and Angliss, 2012). Zeribini *et al.* (2006, cited in Allen and Angliss, 2012) noted an increase of 6.6% for the Central North Pacific stock of humpback whales in Alaska waters. There are currently no reliable data on trends of the ringed and bearded seal stocks in Alaska. Certain stocks or populations of gray and beluga whales and spotted seals are listed as endangered or are proposed for listing under the ESA; however, none of those stocks or populations occur in the proposed activity area. The ribbon seal is a "species of concern." None of the other species that may occur in the project area are listed as threatened or endangered under the ESA or designated as depleted under the MMPA. There is currently no established critical habitat in the proposed project area for any of these 12 species.

Potential impacts to marine mammal habitat were discussed previously in this document (see the "Anticipated Effects on Habitat" section). Although some disturbance is possible to food sources of marine mammals, the impacts are anticipated to be minor. Based on the vast size of the Arctic Ocean where feeding by marine mammals occurs versus the localized area of the drilling program, any missed feeding opportunities in the direct project area would be of little consequence, as marine mammals would have access to other feeding grounds.

The estimated takes proposed to be authorized represent less than 1.3% of the affected population or stock for all species. These estimates represent the percentage of each species or stock that could be taken by Level B behavioral

harassment if each animal is taken only once. The estimated take numbers are likely somewhat of an overestimate. First, COP did not account for potential overlap of some of the sound sources if they are operating simultaneously. This leads to an overestimation of ensonified area. Additionally, the mitigation and monitoring measures (described previously in this document) proposed for inclusion in the IHA (if issued) are expected to reduce even further any potential disturbance to marine mammals. Last, some marine mammal individuals, including mysticetes, have been shown to avoid the ensonified area around airguns at certain distances (Richardson *et al.*, 1999), and, therefore, some individuals would not likely enter into the Level B harassment zones for the various types of activities.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the proposed mitigation and monitoring measures, NMFS preliminarily finds that the proposed exploration drilling program will result in the incidental take of small numbers of marine mammals, by Level B harassment only, and that the total taking from the drilling program will have a negligible impact on the affected species or stocks.

Impact on Availability of Affected Species or Stock for Taking for Subsistence Uses

Relevant Subsistence Uses

The disturbance and potential displacement of marine mammals by sounds from drilling activities are the principal concerns related to subsistence use of the area. Subsistence remains the basis for Alaska Native culture and community. Marine mammals are legally hunted in Alaskan waters by coastal Alaska Natives. In rural Alaska, subsistence activities are often central to many aspects of human existence, including patterns of family life, artistic expression, and community religious and celebratory activities. Additionally, the animals taken for subsistence provide a significant portion of the food that will last the community throughout the year. The main species that are hunted include bowhead and beluga whales, ringed, spotted, and bearded seals, walruses, and polar bears. (As mentioned previously in this document, both the walrus and the polar bear are under the USFWS' jurisdiction.) The importance of each of these species varies among the communities and is largely based on availability.

The subsistence communities in the Chukchi Sea that have the potential to be impacted by COP's offshore drilling program include Point Hope, Point Lay, Wainwright, Barrow, and possibly Kotzebue and Kivalina (however, these two communities are much farther to the south of the proposed project area). Point Lay, Wainwright, Point Hope, Barrow, and Kivalina are approximately 90 mi (145 km), 120 mi (193 km), 175 mi (282 km), 200 mi (322 km), and 225 mi (362 km) from the Devils Paw prospect, respectively. The communities of Gambell and Savoonga on St. Lawrence Island also have the potential to be impacted if vessels pass close by the island during times of active hunting.

(1) Bowhead Whales

Bowhead whale hunting is a key activity in the subsistence economies of northwest Arctic communities. The whale harvests have a great influence on social relations by strengthening the sense of Inupiat culture and heritage in addition to reinforcing family and community ties.

An overall quota system for the hunting of bowhead whales was established by the International Whaling Commission (IWC) in 1977. The quota is now regulated through an agreement between NMFS and the Alaska Eskimo Whaling Commission (AEWC). The AEWC allots the number of bowhead whales that each whaling community may harvest annually (USDOI/BLM, 2005). The annual take of bowhead whales has varied due to (a) changes in the allowable quota level and (b) year-to-year variability in ice and weather conditions, which strongly influence the success of the hunt.

Bowhead whales migrate around northern Alaska twice each year, during the spring and autumn, and are hunted in both seasons. Bowhead whales are hunted from Barrow during the spring and the fall migration. The spring hunt along Chukchi villages and at Barrow occurs after leads open due to the deterioration of pack ice; the spring hunt typically occurs from early April until the first week of June. From 1984–2009, bowhead harvests by the villages of Wainwright, Point Hope, and Point Lay occurred only between April 14 and June 24 and only between April 23 and June 15 in Barrow (George and Tarpley, 1986; George *et al.*, 1987, 1988, 1990, 1992, 1995, 1998, 1999, 2000; Philo *et al.*, 1994; Suydam *et al.*, 1995b, 1996, 1997, 2001b, 2002, 2003, 2004, 2005b, 2006, 2007, 2008, 2009, 2010). Point Lay landed its first whale in more than 70 years during the spring hunt in 2009 and another whale during the 2011 spring hunt. COP will not mobilize and move into the Chukchi Sea prior to July 1.

The fall migration of bowhead whales that summer in the eastern Beaufort Sea typically begins in late August or September. Fall migration into Alaskan waters is primarily during September and October. In the fall, subsistence hunters use aluminum or fiberglass boats with outboards. Hunters prefer to take bowheads close to shore to avoid a long tow during which the meat can spoil, but Braund and Moorehead (1995) report that crews may (rarely) pursue whales as far as 50 mi (80 km). The autumn bowhead hunt usually begins in Barrow in mid-September and mainly occurs in the waters east and northeast of Point Barrow. Fall bowhead whaling has not typically occurred in the villages of Wainwright, Point Hope, and Point Lay in recent years. However, a Wainwright whaling crew harvested the first fall bowhead whale in 90 years or more on October 8, 2010, and again landed a whale in October 2011. Because of changing ice conditions, there is the potential for these villages to resume a fall bowhead harvest.

Barrow participates in a fall hunt each year. From 1984–2009, Barrow whalers harvested bowhead whales between August 31 and October 29. While this time period overlaps with that of COP's proposed operations, the drill sites are located more than 200 mi (322 km) west of Barrow, so the whales would reach the Barrow hunting grounds before entering the sound field of COP's operations. COP will be flying helicopters out to the drillship for resupply missions. In the past 35 years, however, Barrow whaling crews have harvested almost all whales in the Beaufort Sea to the east of Point Barrow (Suydam *et al.*, 2008), indicating that relatively little fall hunting occurs to the west where the flight corridor is located. COP intends to base its flights out of Wainwright.

(2) Beluga Whales

Beluga whales are available to subsistence hunters along the coast of Alaska in the spring when pack-ice conditions deteriorate and leads open up. Belugas may remain in coastal areas or lagoons through June and sometimes into July and August. The community of Point Lay is heavily dependent on the hunting of belugas in Kasegaluk Lagoon for subsistence meat. From 1983–1992 the average annual harvest was approximately 40 whales (Fuller and George, 1997). Point Hope residents hunt beluga primarily in the lead system during the spring (late March to early June) bowhead hunt but also in open-

water along the coastline in July and August. Belugas are harvested in coastal waters near these villages, generally within a few miles from shore.

In Wainwright and Barrow, hunters usually wait until after the spring bowhead whale hunt is finished before turning their attention to hunting belugas. The average annual harvest of beluga whales taken by Barrow for 1962–1982 was five (MMS, 1996). The Alaska Beluga Whale Committee (ABWC) recorded that 23 beluga whales had been harvested by Barrow hunters from 1987 to 2002, ranging from 0 in 1987, 1988 and 1995 to the high of 8 in 1997 (Fuller and George, 1997; ABWC, 2002 cited in USDOI/BLM, 2005). Barrow residents typically hunt for belugas between Point Barrow and Skull Cliffs in the Chukchi Sea (primarily April-June) and later in the summer (July-August) on both sides of the barrier island in Elson Lagoon/Beaufort Sea (MMS, 2008). Harvest rates indicate that the hunts are not frequent. Wainwright residents hunt beluga in April-June in the spring lead system, but this hunt typically occurs only if there are no bowheads in the area. Communal hunts for beluga are conducted along the coastal lagoon system later in July-August.

COP's proposed exploration drilling activities take place well offshore, far away from areas that are used for beluga hunting by the Chukchi Sea communities. For vessel movements in nearshore areas, such as the alternate drill rig staging area or presence of oil spill response vessels, COP will consult with the communities on measures to mitigate potential impacts on subsistence hunts.

(3) Ringed Seals

Ringed seals are hunted mainly in the Chukchi Sea from late March through July; however, they can be hunted year-round. In winter, leads and cracks in the ice off points of land and along the barrier islands are used for hunting ringed seals. The average annual ringed seal harvest was 49 seals in Point Lay, 86 in Wainwright, and 394 in Barrow (Braund *et al.*, 1993; USDOI/BLM, 2003, 2005). Although ringed seals are available year-round, the planned activities will not occur during the primary period when these seals are typically harvested (March-July). Also, the activities will be largely in offshore waters where they will not influence ringed seals in the nearshore areas where they are hunted.

(4) Spotted Seals

Most subsistence harvest of the spotted seal is conducted by the communities of Wainwright and Point Lay during the fall (September and October), when spotted seals migrate back to their wintering habitats in the Bering Sea (USDOI/BLM, 2003). Available maps of recent and past subsistence use areas for spotted seals indicate harvest of this species within 30–40 mi (48–64 km) of the coastline. Spotted seals are also occasionally hunted in the area off Point Barrow and along the barrier islands of Elson Lagoon to the east (USDOI/BLM, 2005). The planned activities will remain offshore of the coastal harvest area of these seals and should not conflict with harvest activities.

(5) Bearded Seals

Bearded seals, although generally not favored for their meat, are important to subsistence activities in Barrow and Wainwright because of their skins. Six to nine bearded seal hides are used by whalers to cover each of the skin-covered boats traditionally used for spring whaling. Because of their valuable hides and large size, bearded seals are specifically sought. While bearded seals can be hunted year-round in the Chukchi Sea, they are primarily harvested in spring during breakup of the ice (Bacon *et al.*, 2009). The animals inhabit the environment around the ice floes in the drifting nearshore ice pack, so hunting usually occurs from boats in the drift ice. Most bearded seals are harvested in coastal areas inshore of the proposed exploration drilling area, so no conflicts with the harvest of bearded seals are expected.

Potential Impacts to Subsistence Uses

NMFS has defined "unmitigable adverse impact" in 50 CFR 216.103 as an impact resulting from the specified activity that is likely to reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by causing the marine mammals to abandon or avoid hunting areas; directly displacing subsistence users; or placing physical barriers between the marine mammals and the subsistence hunters; and that cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met.

Noise and general activity during COP's proposed drilling program have the potential to impact marine mammals hunted by Native Alaskans. In the case of cetaceans, the most common reaction to anthropogenic sounds (as noted previously in this document) is avoidance of the ensonified area. In the case of bowhead whales, this often means that the animals divert from their normal migratory path by several kilometers. Helicopter activity also has the potential to disturb cetaceans and pinnipeds by causing them to vacate the area. Additionally, general vessel presence in the vicinity of traditional hunting areas could negatively impact a hunt. Native knowledge indicates that bowhead whales become increasingly "skittish" in the presence of seismic noise. Whales are more wary around the hunters and tend to expose a much smaller portion of their back when surfacing (which makes harvesting more difficult). Additionally, natives report that bowheads exhibit angry behaviors in the presence of seismic activity, such as tail-slapping, which translate to danger for nearby subsistence harvesters.

Plan of Cooperation (POC)

Regulations at 50 CFR 216.104(a)(12) require IHA applicants for activities that take place in Arctic waters to provide a POC or information that identifies what measures have been taken and/or will be taken to minimize adverse effects on the availability of marine mammals for subsistence purposes. COP has developed a Draft POC for its 2014 Chukchi Sea, Alaska, exploration drilling program to minimize any adverse impacts on the availability of marine mammals for subsistence uses. A copy of the POC was provided to NMFS with the IHA application (see **ADDRESSES** for availability). COP began conducting meetings with potentially affected communities in 2008. Exhibit 1 of COP's POC contains a list of all meetings that have taken place through November 2012. Communities contacted include: Barrow, Kivalina, Kotzebue, Point Hope, Point Lay, and Wainwright. COP also presented this program at the 2012 Open Water Meeting in Anchorage, Alaska, and plans to present at the 2013 Open Water Meeting, scheduled for March 5–7, 2013, in Anchorage, Alaska.

COP intends to meet with the North Slope Borough, Northwest Arctic Borough, and Alaska Native marine mammal commissions before and after operations. COP will also communicate throughout operations as needed.

In order to reduce impacts on subsistence hunts, COP intends to implement a Communication Plan. COP will establish a central communication station (Com-Station) located at Wainwright and communication outposts in Point Hope, Poing Lay, and Barrow. The Wainwright Com-Station will coordinate communication between the drilling rig, marine vessels, aircraft, and the communication outposts in each community as well as the

subsistence hunters in Wainwright. Personnel on the drilling rig or ice management vessel will provide information to the Com-Center about the timing and location of planned vessel activity. The communication outposts will provide information to the Com-Station about the timing and location of planned hunts. The Com-Station will relay information and facilitate communication so that vessel activities can be modified as necessary to prevent avoidable conflicts with subsistence hunting. Communication outposts may also be established and manned in other villages, such as Kivalina and Kotzebue, if subsistence activities associated with those villages are occurring near the exploration operations. A communication representative may also be present in Wales and Savoonga during mobilization and demobilization activities if subsistence activities are occurring.

The Com-Station and outposts will be staffed by Inupiat communicators, if available. The duty of the Com-Station operator will be to stay in communication with outposts and with hunters regarding their subsistence hunting activities, and to relay information about subsistence hunting locations and activities to the drilling rig and marine vessels. The Com-Station operator will also provide the location of the drilling rig and marine vessels to the subsistence hunters and outposts.

The drill rig, ice management vessel, and monitoring vessel will carry on-board an Inupiat Communicator, who will also serve as a PSO, during the operating season. If a vessel that is part of the drilling program is in the vicinity of a hunting area and the hunters have launched their boats, the Inupiat Communicator's primary duty will be to stay in communication with the hunters and relay information to the vessel captain about hunting location, activities, timing, and overall plans. At all other times, the Inupiat Communicator will be serving as a PSO and will be responsible for monitoring for bowhead whales and other marine mammals.

COP will plan vessel routes to minimize potential conflict with marine mammals and subsistence activities related to marine mammals. Vessels will avoid areas of active hunting through communication with the established Com-Station by the Inupiat Communicator stationed on the rig. Moreover, many of the mitigation measures described earlier in this document (see the "Proposed Mitigation" section) will also help reduce impacts to subsistence hunts and subsistence uses of marine mammals. These include vessel operating measures when in the vicinity of marine mammals and helicopter flight altitude restrictions. Additionally, COP will not enter the Chukchi Sea prior to July 1 and will begin demobilization by October 31 so as to transit out of the Bering Strait no later than November 15.

Unmitigable Adverse Impact Analysis and Preliminary Determination

COP's drill sites are located more than 70 mi (113 km) from shore, and some of the activities will not begin until after the close of spring hunts. Seal hunts typically do not co-occur with COP's proposed activities and those that do occur close to shore. COP will utilize Com-Stations to avoid conflicts with active hunts. After the close of the July beluga whale hunts in the Chukchi Sea villages, very little whaling occurs in Wainwright, Point Hope, and Point Lay. Although the fall bowhead whale hunt in Barrow will occur while COP is still operating (mid- to late September to October), Barrow is located 200 mi (322 km) east of the proposed drill sites. Based on these factors, COP's Chukchi Sea survey is not expected to interfere with the fall bowhead harvest in Barrow. In recent years, bowhead whales have occasionally been taken in the fall by coastal villages along the Chukchi coast, but the total number of these animals has been small. Wainwright landed its first fall whale in more than 90 years in October 2010 and again landed a whale in October 2011. Hunters from the northwest Arctic villages prefer to harvest whales within 50 mi (80 km) so as to avoid long tows back to shore.

COP will also support village Com-Stations in the Arctic communities and employ local advisors from the Chukchi Sea villages to provide consultation and guidance regarding the whale migration and subsistence hunt. They will provide advice to COP on ways to minimize and mitigate potential impacts to subsistence resources during the drilling season. Support activities, such as helicopter flights, could impact nearshore subsistence hunts. However, COP will use flight paths and agreed upon flight altitudes to avoid adverse impacts to hunts and will communicate regularly with the Com-Station.

In the unlikely event of a major oil spill in the Chukchi Sea, there could be major impacts on the availability of marine mammals for subsistence uses. As discussed earlier in this document, the probability of a major oil spill occurring over the life of the project is low. Additionally, COP developed an OSRP, which is currently under review by DOI and will also be reviewed by NOAA. COP has also incorporated several mitigation measures into its operational design to reduce further the risk of an oil spill. Based on the information available, the proposed mitigation measures that COP will implement, and the extremely low likelihood of a major oil spill occurring, NMFS has preliminarily determined that COP's activities will not have an unmitigable adverse impact on the availability of marine mammals for subsistence uses.

Proposed Incidental Harassment Authorization

This section contains a draft of the IHA itself. The wording contained in this section is proposed for inclusion in the IHA (if issued).

(1) This Authorization is valid from July 1, 2014, through October 31, 2014.

(2) This Authorization is valid only for activities associated with COP's 2014 Devils Paw, Chukchi Sea, exploration drilling program. The specific areas where COP's exploration drilling program will be conducted are within COP lease holdings in the Outer Continental Shelf Lease Sale 193 area in the Chukchi Sea.

(3)(a) The incidental taking of marine mammals, by Level B harassment only, is limited to the following species: bowhead whale; gray whale; beluga whale; minke whale; fin whale; humpback whale; killer whale; harbor porpoise; ringed seal; bearded seal; spotted seal; and ribbon seal.

(3)(b) The taking by injury (Level A harassment), serious injury, or death of any of the species listed in Condition 3(a) or the taking of any kind of any other species of marine mammal is prohibited and may result in the modification, suspension or revocation of this Authorization.

(4) The authorization for taking by harassment is limited to the following acoustic sources (or sources with comparable frequency and intensity) and from the following activities:

(a) airgun array with a total discharge volume of 760 in^3;

(b) continuous drill rig sounds during active drilling operations and from support vessels in dynamic positioning mode; and

(c) vessel sounds generated during active ice management.

(5) The taking of any marine mammal in a manner prohibited under this Authorization must be reported immediately to the Chief, Permits and Conservation Division, Office of Protected Resources, NMFS or his designee.

(6) The holder of this Authorization must notify the Chief of the Permits and

Conservation Division, Office of Protected Resources, at least 48 hours prior to the start of exploration drilling activities (unless constrained by the date of issuance of this Authorization in which case notification shall be made as soon as possible).

(7) General Mitigation and Monitoring Requirements: The Holder of this Authorization is required to implement the following mitigation and monitoring requirements when conducting the specified activities to achieve the least practicable impact on affected marine mammal species or stocks:

(a) All vessels shall reduce speed to at least 5 knots when within 300 yards (274 m) of whales. The reduction in speed will vary based on the situation but must be sufficient to avoid interfering with the whales. Those vessels capable of steering around such groups should do so. Vessels may not be operated in such a way as to separate members of a group of whales from other members of the group. For purposes of this Authorization, a group is defined as being three or more whales observed within a 547-yd (500-m) area and displaying behaviors of directed or coordinated activity (e.g., group feeding);

(b) Avoid multiple changes in direction and speed when within 300 yards (274 m) of whales and also operate the vessel(s) to avoid causing a whale to make multiple changes in direction;

(c) When weather conditions require, such as when visibility drops, support vessels must reduce speed and change direction, as necessary (and as operationally practicable), to avoid the likelihood of injury to whales;

(d) Check the waters immediately adjacent to the vessel(s) to ensure that no whales will be injured when the propellers are engaged;

(e) Vessels should remain as far offshore as weather and ice conditions allow and at least 5 mi (8 km) offshore during transit;

(f) Aircraft shall not fly within 1,000 ft (305 m) of marine mammals or below 1,500 ft (457 m) altitude (except during takeoffs, landings, or in emergency situations) while over land or sea;

(g) Utilize NMFS-qualified, vessel-based Protected Species Observers (PSOs) to visually watch for and monitor marine mammals near the drill rig or ice management vessels during active drilling, dynamic positioning, or airgun operations (from nautical twilight-dawn to nautical twilight-dusk) and before and during start-ups of airguns day or night. The vessels' crew shall also assist in detecting marine mammals, when practicable. PSOs shall have access to reticle binoculars (7x50 Fujinon) and big-eye binoculars (25x150). PSO shifts shall last no longer than 4 hours at a time and shall not be on watch more than 12 hours in a 24-hour period. PSOs shall also make observations during daytime periods when active operations are not being conducted for comparison of animal abundance and behavior, when feasible;

(h) When a mammal sighting is made, the following information about the sighting will be recorded:

(i) Species, group size, age/size/sex categories (if determinable), behavior when first sighted and after initial sighting, heading (if consistent), bearing and distance from the PSO, apparent reaction to activities (e.g., none, avoidance, approach, paralleling, etc.), closest point of approach, and behavioral pace;

(ii) Time, location, speed, activity of the vessel, sea state, ice cover, visibility, and sun glare; and

(iii) The positions of other vessel(s) in the vicinity of the PSO location.

(iv) The ship's position, speed of support vessels, and water depth, sea state, ice cover, visibility, and sun glare will also be recorded at the start and end of each observation watch, every 30 minutes during a watch, and whenever there is a change in any of those variables.

(v) Altitude and position of the aircraft if sightings are made during helicopter crew transfers.

(i) PSO teams shall consist of Inupiat observers and experienced field biologists. An experienced field crew leader will supervise the PSO team onboard the survey vessel. New observers shall be paired with experienced observers to avoid situations where lack of experience impairs the quality of observations;

(j) PSOs will complete a training session on marine mammal monitoring, to be conducted shortly before the anticipated start of the 2014 open-water season.

(k) If there are Alaska Native PSOs, the PSO training that is conducted prior to the start of the survey activities shall be conducted with both Alaska Native PSOs and biologist PSOs being trained at the same time in the same room. There shall not be separate training courses for the different PSOs;

(l) PSOs shall be trained using visual aids (e.g., videos, photos) to help them identify the species that they are likely to encounter in the conditions under which the animals will likely be seen;

(m) Within safe limits, the PSOs should be stationed where they have the best possible viewing. Viewing may not always be best from the ship bridge, and in some cases may be best from higher positions with less visual obstructions (e.g., flying bridge);

(n) PSOs should be instructed to identify animals as unknown where appropriate rather than strive to identify a species if there is significant uncertainty;

(o) PSOs should maximize their time with eyes on the water. This may require new means of recording data (e.g., audio recorder) or the presence of a data recorder so that the observers can simply relay information to them; and

(p) PSOs should plot marine mammal sightings in near real-time for their vessel into a GIS software program and relay information regarding the animal(s)' position between platforms and vessels with emphasis placed on relaying sightings with the greatest potential to involve mitigation or reconsideration of the vessel's course.

(8) *VSP Mitigation and Monitoring Measures:* The Holder of this Authorization is required to implement the following mitigation and monitoring requirements when conducting the specified activities to achieve the least practicable impact on affected marine mammal species or stocks:

(a) PSOs shall conduct monitoring while the airgun array is being deployed or recovered from the water;

(b) PSOs shall visually observe the entire extent of the exclusion zone (EZ) (180 dB re 1 µPa [rms] for cetaceans and 190 dB re 1 µPa [rms] for pinnipeds) using NMFS-qualified PSOs, for at least 30 minutes (min) prior to starting the airgun array (day or night). If the PSO finds a marine mammal within the EZ, COP must delay the seismic survey until the marine mammal(s) has left the area. If the PSO sees a marine mammal that surfaces then dives below the surface, the PSO shall continue the watch for 30 min. If the PSO sees no marine mammals during that time, they should assume that the animal has moved beyond the EZ. If for any reason the entire radius cannot be seen for the entire 30 min period (i.e., rough seas, fog, darkness), or if marine mammals are near, approaching, or in the EZ, the airguns may not be ramped-up. If one airgun is already running at a source level of at least 180 dB re 1 µPa (rms), the Holder of this Authorization may start the second airgun without observing the entire EZ for 30 min prior, provided no marine mammals are known to be near the EZ;

(c) Establish and monitor a 180 dB re 1 µPa (rms) and a 190 dB re 1 µPa (rms) EZ for marine mammals before the airgun array is in operation; and a 180 dB re 1 µPa (rms) and a 190 dB re 1 µPa (rms) EZ before a single airgun is in

operation. For purposes of the field verification tests, described in condition 10(b)(i) below, the 180 dB radius for the airgun array is predicted to be 0.6 mi (920 m) and the 190 dB radius for the airgun array is predicted to be 525 ft (160 m). New radii will be used upon completion of the field verification tests described in the Monitoring Measures section below (condition 10(b)(i));

(d) Implement a "ramp-up" procedure when starting up at the beginning of seismic operations, which means start the smallest gun first and double the number of operating airguns at one-minute intervals. During ramp-up, the PSOs shall monitor the EZ, and if marine mammals are sighted, a power-down, or shut-down shall be implemented as though the full array were operational. Therefore, initiation of ramp-up procedures from shutdown requires that the PSOs be able to view the full EZ;

(e) Power-down or shutdown the airgun(s) if a marine mammal is detected within, approaches, or enters the relevant EZ. A shutdown means all operating airguns are shutdown (i.e., turned off). A power-down means reducing the number of operating airguns to a single operating airgun, which reduces the EZ to the degree that the animal(s) is no longer in or about to enter it;

(f) Following a power-down, if the marine mammal approaches the smaller designated EZ, the airguns must then be completely shutdown. Airgun activity shall not resume until the PSO has visually observed the marine mammal(s) exiting the EZ and is not likely to return, or has not been seen within the EZ for 15 min for species with shorter dive durations (small odontocetes and pinnipeds) or 30 min for species with longer dive durations (mysticetes);

(g) Following a power-down or shutdown and subsequent animal departure, airgun operations may resume following ramp-up procedures described in Condition 8(d) above;

(h) VSP surveys may continue into night and low-light hours if such segment(s) of the survey is initiated when the entire relevant EZs are visible and can be effectively monitored;

(i) No initiation of airgun array operations is permitted from a shutdown position at night or during low-light hours (such as in dense fog or heavy rain) when the entire relevant EZ cannot be effectively monitored by the PSO(s) on duty; and

(j) When utilizing the mitigation airgun, use a reduced duty cycle (e.g., 1 shot/min).

(9) *Subsistence Mitigation Measures:* To ensure no unmitigable adverse impact on subsistence uses of marine mammals, the Holder of this Authorization shall:

(a) Not enter the Chukchi Sea prior to July 1 to minimize effects on spring and early summer whaling;

(b) Implement the Communication Plan before initiating exploration drilling operations to coordinate activities with local subsistence users and Village Whaling Associations in order to minimize the risk of interfering with subsistence hunting activities;

(c) Establish Com-Stations and Com-Station outposts. The Com Centers shall operate 24 hours/day during the 2012 bowhead whale hunt;

(d) Employ local Inupiat communicators from the Chukchi Sea villages to provide consultation and guidance regarding the whale migration and subsistence hunt;

(e) Not operate aircraft below 1,500 ft (457 m) unless engaged in marine mammal monitoring, approaching, landing or taking off, or unless engaged in providing assistance to a whaler or in poor weather (low ceilings) or any other emergency situations; and

(f) Helicopters may not hover or circle above areas with groups of whales or within 0.5 mi (800 m) of such areas.

(10) Monitoring Measures:

(a) Vessel-based Monitoring: The Holder of this Authorization shall designate biologically-trained PSOs to be aboard the drill rig and ice management vessels. The PSOs are required to monitor for marine mammals in order to implement the mitigation measures described in conditions 7 and 8 above;

(b) Acoustic Monitoring:

(i) Field Source Verification: the Holder of this Authorization is required to conduct sound source verification tests for the drill rig, support vessels in DP mode, and the airgun array. Sound source verification shall consist of distances where broadside and endfire directions at which broadband received levels reach 190, 180, 170, 160, and 120 dB re 1 μPa (rms) for all active acoustic sources that may be used during the activities. For the airgun array, the configurations shall include at least the full array and the operation of a single source that will be used during power downs. Initial results must be provided to NMFS within 120 hours of completing the analysis.

(ii) The Holder of this Authorization shall deploy acoustic recorders in the U.S. Chukchi Sea in order to gain information on the distribution of marine mammals in the region. To the extent practicable, this program must be implemented as detailed in the 4MP.

(11) Reporting Requirements: The Holder of this Authorization is required to:

(a) Submit a sound source verification report to NMFS with the results for the drill rig, support vessels (including in DP mode), and the airguns. The reports should report down to the 120-dB radius in 10-dB increments;

(b) Submit daily PSO logs to NMFS;

(c) Submit a draft report on all activities and monitoring results to the Office of Protected Resources, NMFS, within 90 days of the completion of the exploration drilling program. This report must contain and summarize the following information:

(i) summaries of monitoring effort (e.g., total hours, total distances, and marine mammal distribution through the study period, accounting for sea state and other factors affecting visibility and detectability of marine mammals);

(ii) analyses of the effects of various factors influencing detectability of marine mammals (e.g., sea state, number of observers, and fog/glare);

(iii) species composition, occurrence, and distribution of marine mammal sightings, including date, water depth, numbers, age/size/gender categories (if determinable), group sizes, and ice cover;

(iv) sighting rates of marine mammals during periods with and without exploration drilling activities (and other variables that could affect detectability), such as: (A) Initial sighting distances versus drilling state; (B) closest point of approach versus drilling state; (C) observed behaviors and types of movements versus drilling state; (D) numbers of sightings/individuals seen versus drilling state; (E) distribution around the survey vessel versus drilling state; and (F) estimates of take by harassment;

(v) Reported results from all hypothesis tests should include estimates of the associated statistical power when practicable;

(vi) Estimate and report uncertainty in all take estimates. Uncertainty could be expressed by the presentation of confidence limits, a minimum-maximum, posterior probability distribution, etc.; the exact approach would be selected based on the sampling method and data available;

(vii) The report should clearly compare authorized takes to the level of actual estimated takes;

(viii) Sampling of the relative near-field around operations should be corrected for effort to provide the best possible estimates of marine mammals in EZs and exposure zones; and

(ix) If, after the independent monitoring plan peer review changes are made to the monitoring program, those changes must be detailed in the report.

(d) The draft report will be subject to review and comment by NMFS. Any recommendations made by NMFS must be addressed in the final report prior to acceptance by NMFS. The draft report will be considered the final report for this activity under this Authorization if NMFS has not provided comments and recommendations within 90 days of receipt of the draft report.

(12)(a) In the unanticipated event that the drilling program operation clearly causes the take of a marine mammal in a manner prohibited by this Authorization, such as an injury (Level A harassment), serious injury or mortality (e.g., ship-strike, gear interaction, and/or entanglement), COP shall immediately take steps to cease operations and immediately report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, or his designee by phone or email, the Alaska Regional Office, and the Alaska Regional Stranding Coordinators. The report must include the following information: (i) Time, date, and location (latitude/longitude) of the incident; (ii) the name and type of vessel involved; (iii) the vessel's speed during and leading up to the incident; (iv) description of the incident; (v) status of all sound source use in the 24 hours preceding the incident; (vi) water depth; (vii) environmental conditions (e.g., wind speed and direction, Beaufort sea state, cloud cover, and visibility); (viii) description of marine mammal observations in the 24 hours preceding the incident; (ix) species identification or description of the animal(s) involved; (x) the fate of the animal(s); (xi) and photographs or video footage of the animal (if equipment is available).

Activities shall not resume until NMFS is able to review the circumstances of the prohibited take. NMFS shall work with COP to determine what is necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. COP may not resume their activities until notified by NMFS via letter, email, or telephone.

(b) In the event that COP discovers an injured or dead marine mammal, and the lead PSO determines that the cause of the injury or death is unknown and the death is relatively recent (i.e., in less than a moderate state of decomposition as described in the next paragraph), COP will immediately report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, by phone or email, the Alaska Regional Office, and the NMFS Alaska Stranding Hotline and/or by email to the Alaska Regional Stranding Coordinators. The report must include the same information identified in Condition 12(a) above. Activities may continue while NMFS reviews the circumstances of the incident. NMFS will work with COP to determine whether modifications in the activities are appropriate.

(c) In the event that COP discovers an injured or dead marine mammal, and the lead PSO determines that the injury or death is not associated with or related to the activities authorized in Condition 2 of this Authorization (e.g., previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), COP shall report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, by phone or email and the NMFS Alaska Stranding Hotline and/or by email to the Alaska Regional Stranding Coordinators, within 24 hours of the discovery. COP shall provide photographs or video footage (if available) or other documentation of the stranded animal sighting to NMFS and the Marine Mammal Stranding Network. Activities may continue while NMFS reviews the circumstances of the incident.

(13) Activities related to the monitoring described in this Authorization do not require a separate scientific research permit issued under section 104 of the Marine Mammal Protection Act.

(14) The Plan of Cooperation outlining the steps that will be taken to cooperate and communicate with the native communities to ensure the availability of marine mammals for subsistence uses must be implemented.

(15) COP is required to comply with the Terms and Conditions of the Incidental Take Statement (ITS) corresponding to NMFS's Biological Opinion issued to NMFS's Office of Protected Resources.

(16) A copy of this Authorization and the ITS must be in the possession of all contractors and PSOs operating under the authority of this Incidental Harassment Authorization.

(17) Penalties and Permit Sanctions: Any person who violates any provision of this Incidental Harassment Authorization is subject to civil and criminal penalties, permit sanctions, and forfeiture as authorized under the MMPA.

(18) This Authorization may be modified, suspended or withdrawn if the Holder fails to abide by the conditions prescribed herein or if the authorized taking is having more than a negligible impact on the species or stock of affected marine mammals, or if there is an unmitigable adverse impact on the availability of such species or stocks for subsistence uses.

Endangered Species Act (ESA)

There are three marine mammal species listed as endangered under the ESA with confirmed or possible occurrence in the proposed project area: the bowhead, humpback, and fin whales. There are two marine mammal species listed as threatened under the ESA with confirmed occurrence in the proposed project area: ringed and bearded seals. NMFS' Permits and Conservation Division will initiate consultation with NMFS' Endangered Species Division under section 7 of the ESA on the issuance of an IHA to COP under section 101(a)(5)(D) of the MMPA for this activity. Consultation will be concluded prior to a determination on the issuance of an IHA.

National Environmental Policy Act (NEPA)

NMFS is currently preparing an Environmental Assessment (EA), pursuant to NEPA, to determine whether the issuance of an IHA to COP for its 2014 drilling activities may have a significant impact on the human environment. NMFS expects to release a draft of the EA for public comment and will inform the public through the **Federal Register** and posting on our Web site once a draft is available (see **ADDRESSES**).

Proposed Authorization

As a result of these preliminary determinations, NMFS proposes to authorize the take of marine mammals incidental to COP for its 2014 open-water exploration drilling program, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated.

Dated: February 12, 2013.

Helen M. Golde,

Acting Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2013–03681 Filed 2–21–13; 8:45 am]

BILLING CODE 3510–22–P

FEDERAL REGISTER

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Part V

The President

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Presidential Documents

Title 3—

The President

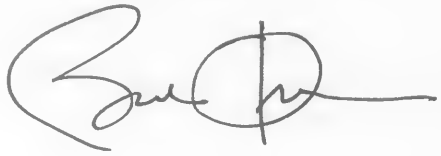
Presidential Determination No. 2013–05 of February 8, 2013

Waiver of Restriction on Providing Funds to the Palestinian Authority

Memorandum for the Secretary of State

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 7040(b) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2012 (Division I, Public Law 112–74) (the "Act") as carried forward by the Continuing Appropriations Act, 2013 (Public Law 112–175) (the "CR"), I hereby certify that it is important to the national security interests of the United States to waive the provisions of section 7040(a) of the Act as carried forward by the CR, in order to provide funds appropriated to carry out chapter 4 of part II of the Foreign Assistance Act, as amended, to the Palestinian Authority.

You are directed to transmit this determination to the Congress, with a report pursuant to section 7040(d) of the Act as carried forward by the CR, and to publish this determination in the *Federal Register*.



THE WHITE HOUSE,
Washington, February 8, 2013.

[FR Doc. 2013–04317
Filed 2–21–13; 11:15 am]
Billing code 4710–10

Presidential Documents

Presidential Determination No. 2013–06 of February 11, 2013

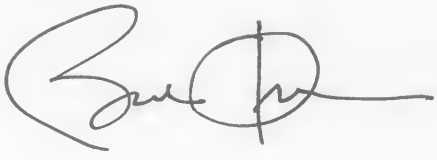
Drawdown Under Section 506(a)(1) of the Foreign Assistance Act of 1961, as Amended, for Chad and France To Support Their Efforts in Mali

Memorandum for the Secretary of State [and] the Secretary of Defense

Pursuant to the authority vested in me by section 506(a)(1) of the Foreign Assistance Act of 1961, as amended, 22 U.S.C. 2318(a)(1) (the "Act"), I hereby determine that an unforeseen emergency exists that requires immediate military assistance to Chad and France in their efforts to secure Mali from terrorists and violent extremists. I further determine that these requirements cannot be met under the authority of the Arms Export Control Act or any other provision of law.

I, therefore, direct the drawdown of up to $50 million in defense services of the Department of Defense for these purposes and under the authorities of section 506(a)(1) of the Act.

The Secretary of State is authorized and directed to report this determination to the Congress, arrange for its publication in the *Federal Register*, and coordinate the implementation of this drawdown.



THE WHITE HOUSE,
Washington, February 11, 2013.

[FR Doc. 2013–04327
Filed 2–21–13; 11:15 am]
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