FEDERAL REGISTER

Vol. 77 Wednesday

No. 234 December 5, 2012

OFFICE OF THE FEDERAL REGISTER

UNITED STATES GOVERNMENT PRINTING OFFICE

FEDERAL REGISTER

Vol. 77 Wednesday,
No. 234 December 5, 2012

Pages 72195–72680

OFFICE OF THE FEDERAL REGISTER

The **FEDERAL REGISTER** (ISSN 0097–6326) is published daily, Monday through Friday, except official holidays, by the Office of the Federal Register, National Archives and Records Administration, Washington, DC 20408, under the Federal Register Act (44 U.S.C. Ch. 15) and the regulations of the Administrative Committee of the Federal Register (1 CFR Ch. I). The Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 is the exclusive distributor of the official edition. Periodicals postage is paid at Washington, DC.

The **FEDERAL REGISTER** provides a uniform system for making available to the public regulations and legal notices issued by Federal agencies. These include Presidential proclamations and Executive Orders, Federal agency documents having general applicability and legal effect, documents required to be published by act of Congress, and other Federal agency documents of public interest.

Documents are on file for public inspection in the Office of the Federal Register the day before they are published, unless the issuing agency requests earlier filing. For a list of documents currently on file for public inspection, see *www.ofr.gov*.

The seal of the National Archives and Records Administration authenticates the Federal Register as the official serial publication established under the Federal Register Act. Under 44 U.S.C. 1507, the contents of the **Federal Register** shall be judicially noticed.

The **Federal Register** is published in paper and on 24x microfiche. It is also available online at no charge at *www.fdsys.gov*, a service of the U.S. Government Printing Office.

The online edition of the **Federal Register** is issued under the authority of the Administrative Committee of the Federal Register as the official legal equivalent of the paper and microfiche editions (44 U.S.C. 4101 and 1 CFR 5.10). It is updated by 6:00 a.m. each day the **Federal Register** is published and includes both text and graphics from Volume 59, 1 (January 2, 1994) forward. For more information, contact the GPO Customer Contact Center, U.S. Government Printing Office. Phone 202-512-1800 or 866-512-1800 (toll free). E-mail, *gpo@custhelp.com*.

The annual subscription price for the **Federal Register** paper edition is $749 plus postage, or $808, plus postage, for a combined **Federal Register, Federal Register** Index and List of CFR Sections Affected (LSA) subscription; the microfiche edition of the **Federal Register** including the **Federal Register** Index and LSA is $165, plus postage. Six month subscriptions are available for one-half the annual rate. The prevailing postal rates will be applied to orders according to the delivery method requested. The price of a single copy of the daily **Federal Register**, including postage, is based on the number of pages: $11 for an issue containing less than 200 pages; $22 for an issue containing 200 to 400 pages; and $33 for an issue containing more than 400 pages. Single issues of the microfiche edition may be purchased for $3 per copy, including postage. Remit check or money order, made payable to the Superintendent of Documents, or charge to your GPO Deposit Account, VISA, MasterCard, American Express, or Discover. Mail to: U.S. Government Printing Office—New Orders, P.O. Box 979050, St. Louis, MO 63197-9000; or call toll free 1-866-512-1800, DC area 202-512-1800; or go to the U.S. Government Online Bookstore site, see *bookstore.gpo.gov*.

There are no restrictions on the republication of material appearing in the **Federal Register.**

How To Cite This Publication: Use the volume number and the page number. Example: 77 FR 12345.

Postmaster: Send address changes to the Superintendent of Documents, Federal Register, U.S. Government Printing Office, Washington, DC 20402, along with the entire mailing label from the last issue received.

SUBSCRIPTIONS AND COPIES

PUBLIC

Subscriptions:

Paper or fiche	202–512–1800
Assistance with public subscriptions	202–512–1806
General online information	202–512–1530; 1–888–293–6498

Single copies/back copies:

Paper or fiche	202–512–1800
Assistance with public single copies	1–866–512–1800 (Toll-Free)

FEDERAL AGENCIES

Subscriptions:

Paper or fiche	202–741–6005
Assistance with Federal agency subscriptions	202–741–6005

FEDERAL REGISTER WORKSHOP

THE FEDERAL REGISTER: WHAT IT IS AND HOW TO USE IT

FOR: Any person who uses the Federal Register and Code of Federal Regulations.

WHO: Sponsored by the Office of the Federal Register.

WHAT: Free public briefings (approximately 3 hours) to present:

1. The regulatory process, with a focus on the Federal Register system and the public's role in the development of regulations.
2. The relationship between the Federal Register and Code of Federal Regulations.
3. The important elements of typical Federal Register documents.
4. An introduction to the finding aids of the FR/CFR system.

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

WHEN: Tuesday, December 11, 2012
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

Printed on recycled paper.

Contents

Federal Register
Vol. 77, No. 234
Wednesday, December 5, 2012

Separate Parts In This Issue

Reader Aids
Consult the Reader Aids section at the end of this page for phone numbers, online resources, finding aids, reminders, and notice of recently enacted public laws.

To subscribe to the Federal Register Table of Contents LISTSERV electronic mailing list, go to http://listserv.access.gpo.gov and select Online mailing list archives, FEDREGTOC-L, Join or leave the list (or change settings); then follow the instructions.

CFR PARTS AFFECTED IN THIS ISSUE

A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

Federal Register
Vol. 77, No. 234
Wednesday, December 5, 2012

Presidential Documents

Title 3—

The President

Proclamation 8909 of November 29, 2012

World AIDS Day, 2012

By the President of the United States of America

A Proclamation

On World AIDS Day, more than 30 years after the first cases of this tragic illness were reported, we join the global community once more in standing with the millions of people who live with HIV/AIDS worldwide. We also recommit to preventing the spread of this disease, fighting the stigma associated with infection, and ending this pandemic once and for all.

In 2010, my Administration released the National HIV/AIDS Strategy, our Nation's first comprehensive plan to fight the domestic epidemic. The Strategy aims to reduce new infections, increase access to care, reduce health disparities, and achieve a more coordinated national response to HIV/AIDS here in the United States. To meet these goals, we are advancing HIV/AIDS education; connecting stakeholders throughout the public, private, and non-profit sectors; and investing in promising research that can improve clinical outcomes and reduce the risk of transmission. Moving forward, we must continue to focus on populations with the highest HIV disparities—including gay men, and African American and Latino communities—and scale up effective, evidence-based interventions to prevent and treat HIV. We are also implementing the Affordable Care Act, which has expanded access to HIV testing and will ensure that all Americans, including those living with HIV/AIDS, have access to health insurance beginning in 2014.

These actions are bringing us closer to an AIDS-free generation at home and abroad—a goal that, while ambitious, is within sight. Through the President's Emergency Plan for AIDS Relief (PEPFAR), we are on track to meet the HIV prevention and treatment targets I set last year. We are working with partners at home and abroad to reduce new infections in adults, help people with HIV/AIDS live longer, prevent mother-to-child transmission, and support the global effort to eliminate new infections in children by 2015. And thanks to bipartisan action to lift the entry ban on persons living with HIV, we were proud to welcome leaders from around the world to the 19th International AIDS Conference in Washington, D.C.

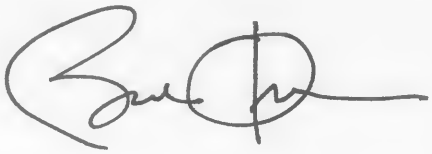
Creating an AIDS-free generation is a shared responsibility. It requires commitment from partner countries, coupled with support from donors, civil society, people living with HIV, faith-based organizations, the private sector, foundations, and multilateral institutions. We stand at a tipping point in the fight against HIV/AIDS, and working together, we can realize our historic opportunity to bring that fight to an end.

Today, we reflect on the strides we have taken toward overcoming HIV/AIDS, honor those who have made our progress possible, and keep in our thoughts all those who have known the devastating consequences of this illness. The road toward an AIDS-free generation is long—but as we mark this important observance, let us also remember that if we move forward every day with the same passion, persistence, and drive that has brought us this far, we can reach our goal. We can beat this disease. On World AIDS Day, in memory of those no longer with us and in solidarity with all who carry on the fight, let us pledge to make that vision a reality.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution

and the laws of the United States do hereby proclaim December 1, 2012, as World AIDS Day. I urge the Governors of the States and the Commonwealth of Puerto Rico, officials of the other territories subject to the jurisdiction of the United States, and the American people to join me in appropriate activities to remember those who have lost their lives to AIDS and to provide support and comfort to those living with this disease.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-ninth day of November, in the year of our Lord two thousand twelve, and of the Independence of the United States of America the two hundred and thirty-seventh.



[FR Doc. 2012–29466
Filed 12–4–12; 8:45 am]
Billing code 3295–F3

Rules and Regulations

Federal Register
Vol. 77, No. 234
Wednesday, December 5, 2012

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 927

[Doc. No. AMS–FV–12–0031; FV12–927–2 IR]

Pears Grown in Oregon and Washington; Assessment Rate Decrease for Processed Pears

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim rule with request for comments.

SUMMARY: This rule decreases the assessment rate established for the Processed Pear Committee (Committee) for the 2012–2013 and subsequent fiscal periods from $7.73 to $7.00 per ton of summer/fall processed pears. The Committee locally administers the marketing order which regulates the handling of processed pears grown in Oregon and Washington. Assessments upon handlers of Oregon-Washington processed pears are used by the Committee to fund reasonable and necessary expenses of the program. The fiscal period begins July 1 and ends June 30. The assessment rate will remain in effect indefinitely unless modified, suspended, or terminated.

DATES: Effective December 6, 2012. Comments received by February 4, 2013, will be considered prior to issuance of a final rule.

ADDRESSES: Interested persons are invited to submit written comments concerning this rule. Comments must be sent to the Docket Clerk, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250–0237; Fax: (202) 720–8938; or Internet: *http://www.regulations.gov*. Comments should reference the document number and the date and page number of this issue of the **Federal Register** and will be available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: *http://www.regulations.gov*. All comments submitted in response to this rule will be included in the record and will be made available to the public. Please be advised that the identity of the individuals or entities submitting the comments will be made public on the Internet at the address provided above.

FOR FURTHER INFORMATION CONTACT: Teresa Hutchinson or Gary Olson, Northwest Marketing Field Office, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA; Telephone: (503) 326–2724, Fax: (503) 326–7440, or Email: *Teresa.Hutchinson@ams.usda.gov* or *GaryD.Olson@ams.usda.gov*.

Small businesses may request information on complying with this regulation by contacting Laurel May, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, Fax: (202) 720–8938, or Email: *Laurel.May@ams.usda.gov*.

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Order No. 927, as amended (7 CFR part 927), regulating the handling of pears grown in Oregon and Washington, hereinafter referred to as the "order." The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the "Act."

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

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order now in effect, Oregon-Washington pear handlers are subject to assessments. Funds to administer the order are derived from such assessments. It is intended that the assessment rate as issued herein will be applicable to all assessable summer/fall processed pears beginning July 1, 2012, and continue until amended, suspended, or terminated.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This rule decreases the assessment rate established for the Committee for the 2012–2013 and subsequent fiscal periods from $7.73 to $7.00 per ton for summer/fall processed pears handled. The assessment rate for "winter" and "other" pears for processing would remain unchanged at a zero rate.

The order provides authority for the Committee, with USDA approval, to formulate an annual budget of expenses and to collect assessments from handlers to administer the processed pear program. The members of the Committee are producers, handlers, and processors of Oregon-Washington processed pears. They are familiar with the Committee's needs and with the costs for goods and services in their local area and are thus in a position to formulate an appropriate budget and assessment rate. The assessment rate is formulated and discussed at a public meeting. Thus, all directly affected persons have an opportunity to participate and provide input.

For the 2011–2012 and subsequent fiscal periods, the Committee unanimously recommended, and USDA approved, the following three base rates of assessment: (a) $7.73 per ton for any or all varieties or subvarieties of pears for canning classified as "summer/fall," excluding pears for other methods of processing; (b) $0.00 per ton for any or all varieties or subvarieties of pears for processing classified as "winter"; and (c) $0.00 per ton for any or all varieties or subvarieties of pears for processing classified as "other." The assessment rate for "summer/fall" pears applies only to pears for canning and excludes pears for other methods of processing as

defined in § 927.15, which includes pears for concentrate, freezing, dehydrating, pressing, or in any other way to convert pears into a processed product. This rate would continue in effect from fiscal period to fiscal period unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other information available to USDA.

The Committee met on May 30, 2012, and unanimously recommended 2012–2013 expenditures of $842,137 and an assessment rate of $7.00 per ton for summer/fall processed pears handled. In comparison, last year's budgeted expenditures were $926,933. The assessment rate of $7.00 is $0.73 lower than the 2011–2012 rate. The Committee recommended the assessment rate decrease because of the 2012–2013 summer/fall processed pear promotion budget reduction.

The major expenditures recommended by the Committee for the 2012–2013 fiscal period include $654.000 for promotion and paid advertising, $137,447 for research programs, $24,000 for contracted administration by Washington State Fruit Commission, and $12,500 for market access and trade policy. In comparison, major expenses for the 2011–2012 fiscal period included $759,000 for promotion and paid advertising, $117,243 for research programs, $24,000 for contracted administration by Washington State Fruit Commission, and $12,500 for market access and trade policy.

The Committee based its recommended assessment rate for processed pears on the 2012–2013 summer/fall processed pear crop estimate, the 2012–2013 program expenditure needs, and the current and projected size of its monetary reserve. Applying the $7.00 per ton rate to the Committee's 120,000 ton summer/fall processed pear crop estimate should provide $840,000 in assessment income. Thus, income derived from summer/fall processed pear handler assessments, and interest and other income ($500) plus $1,637 from the Committee's monetary reserve would be adequate to cover the recommended $842,137 budget for 2012–2013. The Committee estimates that it will have a monetary reserve of $618,804 on June 30, 2012. During 2012–2013, the Committee estimates that $1,637 will be deducted from the reserve for an estimated reserve of $617,167 on June 30, 2013, which would be within the maximum permitted by the order of approximately one fiscal period's operational expenses (§ 927.42).

The assessment rate established in this rule will continue in effect indefinitely unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other available information.

Although this assessment rate is effective for an indefinite period, the Committee will continue to meet prior to or during each fiscal period to recommend a budget of expenses and consider recommendations for modification of the assessment rate. The dates and times of Committee meetings are available from the Committee or USDA. Committee meetings are open to the public and interested persons may express their views at these meetings. USDA will evaluate Committee recommendations and other available information to determine whether modification of the assessment rate is needed. Further rulemaking will be undertaken as necessary. The Committee's 2012–2013 budget and those for subsequent fiscal periods will be reviewed and, as appropriate, approved by USDA.

Initial Regulatory Flexibility Analysis

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

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

There are approximately 1,500 producers of processed pears in the regulated production area and approximately 50 handlers of processed pears subject to regulation under the order. Small agricultural producers are defined by the Small Business Administration (SBA)(13 CFR 121.201) as those having annual receipts of less than $750,000, and small agricultural service firms are defined as those whose annual receipts are less than $7,000,000.

According to the Noncitrus Fruits and Nuts 2011 Preliminary Summary issued in March 2012 by the National Agricultural Statistics Service, the total farm-gate value of summer/fall processed pears grown in Oregon and Washington for 2011 was $35,315,000. Based on the number of processed pear producers in the Oregon and Washington, the average gross revenue for each producer can be estimated at approximately $23,543. Furthermore, based on Committee records, the Committee has estimated that all of the Oregon-Washington pear handlers currently ship less than $7,000,000 worth of processed pears each on an annual basis. From this information, it is concluded that the majority of producers and handlers of Oregon and Washington processed pears may be classified as small entities.

There are three pear processing plants in the production area, all located in Washington. All three pear processors would be considered large entities under the SBA's definition of small businesses.

This rule decreases the assessment rate established for the Committee and collected from handlers for the 2012–2013 and subsequent fiscal periods from $7.73 to $7.00 per ton of processed pears handled. The Committee unanimously recommended 2012–2013 expenditures of $842,137 and an assessment rate of $7.00 per ton of summer/fall processed pears handled. The assessment rate of $7.00 is $0.73 lower than the 2011–2012 rate. The Committee recommended the assessment rate decrease because of the 2012–2013 summer/fall processed pear promotion budget reduction.

The quantity of assessable summer/fall processed pears for the 2012–2013 fiscal period is estimated at 120,000 tons. Thus, the $7.00 rate should provide $840,000 in assessment income. Income derived from summer/fall processed pear handler assessments, monetary reserve, and interest and other income would be adequate to cover the budgeted expenses.

The major expenditures recommended by the Committee for the 2012–2013 fiscal period include $654,000 for promotion and paid advertising, $137,442 for research programs, $24,000 for contracted administration by Washington State Fruit Commission, and $12,500 for market access and trade policy. Budgeted expenses for these items in the 2011–2012 fiscal period were $759,000, $117,243, $24,000, and $12,500, respectively.

The Committee discussed alternate rates of assessment, but determined that the recommended assessment rate would be sufficient to fund the 2012–2013 summer/fall processed pear programs.

A review of historical information and preliminary information pertaining to the upcoming fiscal period indicates

that the Oregon-Washington producer price for the 2012–2013 fiscal period could average $246 per ton of summer/fall processed pears. Therefore, the estimated assessment revenue for the 2012–2013 fiscal period as a percentage of total producer revenue is 2.85 percent.

This action decreases the assessment obligation imposed on handlers. Assessments are applied uniformly on all handlers, and some of the costs may be passed on to producers. However, decreasing the assessment rate reduces the burden on handlers, and may reduce the burden on producers.

In addition, the Committee's meeting was widely publicized throughout the Oregon-Washington pear industry and all interested persons were invited to attend the meeting and participate in Committee deliberations on all issues. Like all Committee meetings, the May 30, 2012, meeting was a public meeting and all entities, both large and small, were able to express views on this issue. Finally, interested persons are invited to submit comments on this interim rule, including the regulatory and informational impacts of this action on small businesses.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the order's information collection requirements have been previously approved by the Office of Management and Budget (OMB) and assigned OMB No. 0581–0189, Generic Fruit Crops. No changes in those requirements as a result of this action are anticipated. Should any changes become necessary, they would be submitted to OMB for approval.

This action imposes no additional reporting or recordkeeping requirements on either small or large Oregon-Washington processed pear handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

AMS 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.

USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *www.ams.usda.gov/MarketingOrdersSmallBusinessGuide*. Any questions about the compliance guide should be sent to Laurel May at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant material presented, including the information and recommendation submitted by the Committee and other available information, it is hereby found that this rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it is also found and determined upon good cause that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior to putting this rule into effect, and that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because: (1) The 2012–2013 fiscal period begins on July 1, 2012, and the marketing order requires that the rate of assessment for each fiscal period apply to all assessable processed pears handled during such fiscal period; (2) this action decreases the assessment rate for assessable processed pears beginning with the 2012–2013 fiscal period; (3) handlers are aware of this action which was unanimously recommended by the Committee at a public meeting and is similar to other assessment rate actions issued in past years; and (4) this interim rule provides a 60-day comment period, and all comments timely received will be considered prior to finalization of this rule.

List of Subjects in 7 CFR Part 927

Marketing agreements, Pears, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 927 is amended as follows:

PART 927—PEARS GROWN IN OREGON AND WASHINGTON

■ 1. The authority citation for 7 CFR part 927 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. In § 927.237, the introductory text and paragraph (a) are revised to read as follows:

§ 927.237 Processed pear assessment rate.

On and after July 1, 2012, the following base rates of assessment for pears for processing are established for the Processed Pear Committee:

(a) $7.00 per ton for any or all varieties or subvarieties of pears for canning classified as "summer/fall" excluding pears for other methods of processing;

* * * * *

Dated: November 29, 2012.

David R. Shipman,

Administrator, Agricultural Marketing Service.

[FR Doc. 2012–29428 Filed 12–4–12; 8:45 am]

BILLING CODE 3410–02–P

NUCLEAR REGULATORY COMMISSION

10 CFR Part 171

[NRC–2012–0092]

RIN 3150–AJ16

Technical Corrections; Correction

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule; correcting amendment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is correcting a final rule that was published in the **Federal Register** on July 6, 2012 (77 FR 39899), and effective on August 6, 2012. That final rule amended the NRC regulations to make technical corrections, including updating the street address for the Region I office, correcting authority citations and typographical and spelling errors, and making other edits and conforming changes. This correcting amendment is necessary to correct the statutory authority that is cited in one of the authority citations in the final rule.

DATES: The correction is effective on December 5, 2012.

FOR FURTHER INFORMATION CONTACT: Cindy Bladey, Chief, Rules, Announcements, and Directives Branch, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–492–3667 or email: *Cindy.Bladey@nrc.gov*.

SUPPLEMENTARY INFORMATION: On July 6, 2012 (77 FR 39899), the NRC published a final rule in the **Federal Register** amending its regulations to make technical corrections. This document is necessary to correct the statutory authority that is cited in the authority citation for part 171 of Title 10 of the *Code of Federal Regulations* (10 CFR). The authority citation for 10 CFR part 171 referred to section 6101 of the Consolidated Omnibus Budget Reconciliation Act. The authority citation should refer to section 7601 of the Act.

Rulemaking Procedure

Because this amendment constitutes a minor technical correction to the NRC's regulations and the authority citation for the prior technical corrections rulemaking, the Commission finds that the notice and comment provisions of the Administrative Procedure Act are unnecessary and is exercising its authority under 5 U.S.C. 553(b)(3)(B) to publish these amendments as a final rule. These amendments do not require action by any person or entity regulated by the NRC. Also, the final rule does not change the substantive responsibilities of any person or entity regulated by the NRC.

List of Subjects in 10 CFR Part 171

Annual charges, Byproduct material, Holders of certificates, Registrations, Approvals, Intergovernmental relations, Non-payment penalties, Nuclear materials, Nuclear power plants and reactors, Source material, Special nuclear material.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; and 5 U.S.C. 552 and 553, 10 CFR part 171 is corrected by making the following correcting amendment.

PART 171—ANNUAL FEES FOR REACTOR LICENSES AND FUEL CYCLE LICENSES AND MATERIAL LICENSES, INCLUDING HOLDERS OF CERTIFICATES OF COMPLIANCE, REGISTRATIONS, AND QUALITY ASSURANCE PROGRAM APPROVALS AND GOVERNMENT AGENCIES LICENSED BY THE NRC

■ 1. Revise the authority citation for part 171 to read as follows:

Authority: Consolidated Omnibus Budget Reconciliation Act sec. 7601 Pub. L. 99–272, as amended by sec. 5601, Pub. L. 100–203 as amended by sec. 3201, Pub. L. 101–239, as amended by sec. 6101, Pub. L. 101–508, as amended by sec. 2903a, Pub. L. 102–486 (42 U.S.C. 2213, 2214), and as amended by Title IV, Pub. L. 109–103 (42 U.S.C. 2214); Atomic Energy Act sec. 161(w), 223, 234 (42 U.S.C. 2201(w), 2273, 2282); Energy Reorganization Act sec. 201 (42 U.S.C. 5841); Government Paperwork Elimination Act sec. 1704 (44 U.S.C. 3504 note); Energy Policy Act of 2005 sec. 651(e), Pub. L. 109–58 (42 U.S.C. 2014, 2021, 2021b, 2111).

For the Nuclear Regulatory Commission.

Dated at Rockville, Maryland, this 29th day of November, 2012.

Cindy Bladey,

Chief, Rules, Announcements, and Directives Branch, Division of Administrative Services, Office of Administration.

[FR Doc. 2012–29348 Filed 12–4–12; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–1220; Directorate Identifier 2012–NM–208–AD; Amendment 39–17277; AD 2012–24–07]

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 certain The Boeing Company Model 787–8 airplanes. This AD requires ensuring that lockwire is installed correctly on the engine fuel feed manifold couplings. This AD also requires inspecting the assembly of the engine fuel feed manifold rigid and full flexible couplings. This AD was prompted by reports of fuel leaks due to improperly assembled engine fuel feed manifold couplings. We are issuing this AD to detect and correct improperly assembled couplings, which could result in fuel leaks and consequent fuel exhaustion, engine power loss or shutdown, or leaks on hot engine parts that could lead to a fire.

DATES: This AD is effective December 5, 2012.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in the AD as of December 5, 2012.

We must receive comments on this AD by January 22, 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:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P. O. Box 3707, MC 2H–65, Seattle, WA 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; Internet *https://www.myboeingfleet.com*. You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Sherry Vevea, Aerospace Engineer, Propulsion Branch, ANM–140S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–917–6514; fax: 425–917–6590; email: *sherry.vevea@faa.gov*.

SUPPLEMENTARY INFORMATION:

Discussion

We have received reports of fuel leaks on two different in-service airplanes, and the subsequent discovery of several improperly assembled engine fuel feed manifold couplings on in-service and production airplanes. The improper coupling installations, which occurred during production, have included couplings with missing or improperly installed lockwire, parts within the couplings installed in the wrong locations, incorrect parts installed in the couplings, and couplings that have extra parts installed. These conditions, if not corrected, could result in fuel leaks, which could lead to fuel exhaustion, engine power loss or shutdown, or leaks on hot engine parts that could lead to a fire.

Relevant Service Information

We reviewed Boeing Multi Operator Message MOM–MOM–12–0838–01B(R2), including Attachment A, dated November 25, 2012. For information on the procedures and compliance times, see this service information at *http://www.regulations.gov* by searching for Docket No. FAA–2012–1220.

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 accomplishing the actions specified in the service information described previously, except as discussed under "Differences Between the AD and the Service Information."

The phrase "related investigative actions" might be used in this AD. "Related investigative actions" are follow-on actions that (1) are related to the primary actions, and (2) further investigate the nature of any condition found. Related investigative actions in an AD could include, for example, inspections.

In addition, the phrase "corrective actions" might be used in this AD. "Corrective actions" are actions that correct or address any condition found. Corrective actions in an AD could include, for example, repairs.

Differences Between the AD and the Service Information

For engine fuel feed manifold couplings that have not been previously inspected, Boeing Multi Operator Message MOM–MOM–12–0838–01B(R2), including Attachment A, dated November 25, 2012, recommends accomplishment of all actions specified in Action 1) within 7 days. This AD, however, requires only that operators ensure the correct lockwire installation within 7 days; the compliance time for the remaining actions is 21 days. We have determined that the additional time for the remaining actions is warranted, based on the assurance that the lockwire is installed correctly.

In addition, for engine fuel feed manifold full flexible couplings that have been previously inspected, Boeing Multi Operator Message MOM–MOM–12–0838–01B(R2), including Attachment A, dated November 25, 2012, specifies that operators do not need to re-inspect these couplings if review of the airplane maintenance records conclusively demonstrates that the corresponding actions are equivalent to steps 1 through 6 of Action 1) of Boeing Multi Operator Message MOM–MOM–12–0838–01B(R2), including Attachment A, dated November 25, 2012. We have determined that the potential for not identifying incorrect parts during prior inspection of the full flexible coupling warrants re-inspecting these couplings; this AD therefore requires inspection of these full flexible couplings.

These differences have been coordinated with Boeing.

FAA's Justification and 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 improperly assembled engine fuel feed manifold couplings could result in fuel leaks and consequent fuel exhaustion, engine power loss or shutdown, or leaks on hot engine parts that could lead to a fire. 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–2012–1220 and Directorate Identifier 2012–NM–208–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 3 airplanes of U.S. registry. We estimate the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Coupling inspection, o-ring replacement, retainer ring installation, blade seal inspection, and lockwire installation.	10 work-hours × $85 per hour = $850.	$54	$904	$2,712

We have received no definitive data that would enable us to provide cost estimates for the on-condition actions specified in this proposed 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):

2012–24–07 The Boeing Company: Amendment 39–17277; Docket No. FAA–2012–1220; Directorate Identifier 2012–NM–208–AD.

(a) Effective Date

This AD is effective December 5, 2012.

(b) Affected ADs

None.

(c) Applicability

This AD applies to The Boeing Company Model 787–8 airplanes, certificated in any category, serial numbers 34485, 34486, 34488, 34490, 34493, 34494, 34497, 34502, 34506 through 34508 inclusive, 34514, 34515, 34521, 34744 through 34747 inclusive, 34822, 34824, 34829, 34832, 34834 through 34838 inclusive, 35938, 36276 through 36278 inclusive, 38319, 38320, 38330, 38466, 38471, 40748, and 40899.

(d) Subject

Joint Aircraft System Component (JASC)/ Air Transport Association (ATA) of America Code 28, Fuel.

(e) Unsafe Condition

This AD was prompted by reports of fuel leaks due to improperly assembled engine fuel feed manifold couplings. We are issuing this AD to detect and correct improperly assembled couplings, which could result in fuel leaks and consequent fuel exhaustion, engine power loss or shutdown, or leaks on hot engine parts that could lead to a fire.

(f) Compliance

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

(g) Inspection

Except as provided by paragraph (h) of this AD: Do the actions specified in paragraphs (g)(1) and (g)(2) of this AD, in accordance with Action 1) of Boeing Multi Operator Message MOM–MOM–12–0838–01B(R2), including Attachment A, dated November 25, 2012.

(1) Within 7 days after the effective date of this AD, ensure that the lockwire installation on the rigid and full flexible couplings is correct.

(2) Within 21 days after the effective date of this AD, inspect the rigid and full flexible couplings for correct assembly, including replacement of the o-rings with new o-rings, confirmation that the proper retainer rings are installed in the full flexible coupling, a general visual inspection for damage of the blade seals, and all applicable corrective actions. Do all applicable corrective actions before further flight.

(h) Requirements Based on Previous Accomplishment

(1) For airplanes on which the fuel couplings have been inspected before the effective date of this AD as specified in "Method 1: AMM Method" of Boeing Multi Operator Message MOM–MOM–12–0838–01B, dated November 11, 2012, which is not incorporated by reference in this AD; or Boeing Multi Operator Message MOM–MOM–12–0838–01B(R1), dated November 14, 2012, which is not incorporated by reference in this AD: A review of the airplane maintenance records is acceptable for compliance with the requirements of paragraph (g)(1) of this AD, if the records conclusively demonstrate that lockwire was installed correctly using a method equivalent to step 6.a. of Action 1) of Boeing Multi Operator Message MOM–MOM–12–0838–01B(R2), including Attachment A, dated November 25, 2012.

(2) For airplanes on which the fuel couplings have been inspected before the effective date of this AD as specified in "Method 2: Non-Invasive Method" of Boeing Multi Operator Message MOM–MOM–12–0838–01B, dated November 11, 2012, which is not incorporated by reference in this AD; or Boeing Multi Operator Message MOM–MOM–12–0838–01B(R1), dated November 14, 2012, which is not incorporated by reference in this AD: The actions specified in paragraph (g)(1) of this AD are not required.

(3) For airplanes on which the rigid fuel couplings have been inspected before the effective date of this AD as specified in "Method 1: AMM Method" or "Method 2: Non-Invasive Method" of Boeing Multi Operator Message MOM–MOM–12–0838–01B, dated November 11, 2012, which is not incorporated by reference in this AD; or Boeing Multi Operator Message MOM–MOM–12–0838–01B(R1), dated November 14, 2012, which is not incorporated by reference in this AD: The actions specified in paragraph (g)(2) of this AD are not required for the rigid fuel couplings only. However, the actions specified in paragraph (g)(2) of this AD are required for the full flexible couplings, even if inspected prior to the effective date of this AD as specified in Boeing Multi Operator Message MOM–MOM–12–0838–01B, dated November 11, 2012, which is not incorporated by reference in this AD; or Boeing Multi Operator Message MOM–MOM–12–0838–01B(R1), dated November 14, 2012, which is not incorporated by reference in this AD.

(i) No Reporting Requirement

Boeing Multi Operator Message MOM–MOM–12–0838–01B(R2), including Attachment A, dated November 25, 2012, specifies reporting to Boeing any anomalies found during inspection of the assembly of the rigid and full flexible couplings, including anomalies of the lockwire installation. This AD does not require any report.

(j) Special Flight Permit

Special flight permits may be issued in accordance with sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the airplane can be modified, provided the lockwire is correctly installed on the engine fuel feed manifold rigid and full flexible couplings in accordance with paragraph (g)(1) of this AD.

(k) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Seattle Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in 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.

(3) An AMOC that provides an acceptable level of safety may be used for any repair required by this AD if it is approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) that has been authorized by the Manager, Seattle ACO, to make those findings. For a repair method to be approved, the repair must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(l) Related Information

(1) For more information about this AD, contact Sherry Vevea, Aerospace Engineer, Propulsion Branch, ANM–140S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–917–6514; fax: 425–917–6590; email: *sherry.vevea@faa.gov.*

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P. O. Box 3707, MC 2H–65, Seattle, WA 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; Internet *https://www.myboeingfleet.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

(m) **Material Incorporated by Reference**

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

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

(i) Boeing Multi Operator Message MOM–MOM–12–0838–01B(R2), including Attachment A, dated November 25, 2012. The document number and issue date are identified on page 1 of Boeing Multi Operator Message MOM–MOM–12–0838–01B(R2), including Attachment A, dated November 25, 2012, and on each page of Attachment A; no other page of this document contains this information.

(ii) Reserved.

(3) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P. O. Box 3707, MC 2H–65, Seattle, WA 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; Internet *https://www.myboeingfleet.com.*

(4) You may view this service information at FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

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

Issued in Renton, Washington, on November 28, 2012.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–29405 Filed 12–4–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–1245; Directorate Identifier 2012–NE–41–AD; Amendment 39–17279; AD 2012–24–09]

RIN 2120–AA64

Airworthiness Directives; Lycoming Engines and Continental Motors, Inc. Reciprocating Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: We are adopting a new airworthiness directive (AD) for Lycoming Engines TSIO–540–AK1A, and Continental Motors, Inc. TSIO–360–MB, TSIO–360–SB, and TSIO–360–RB reciprocating engines, with certain Hartzell Engine Technologies (HET) turbochargers, model TA0411, part number (P/N) 466642–0001; 466642–0002; 466642–0006; 466642–9001; 466642–9002; or 466642–9006, or with certain HET model TA0411 turbochargers overhauled or repaired since August 29, 2012. This AD requires removing the affected turbochargers from service before further flight. This AD was prompted by a report of a turbocharger turbine wheel that failed a static strength test at its manufacturing facility. We are issuing this AD to prevent turbocharger turbine wheel failure, reduction or complete loss of engine power, loss of engine oil, oil fire, and damage to the airplane.

DATES: This AD is effective December 20, 2012.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in the AD as of December 20, 2012.

We must receive comments on this AD by January 22, 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:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this AD, contact Hartzell Engine Technologies, LLC, 2900 Selma Highway, Montgomery, AL 36108, phone: 334–386–5400; fax: 334–386–5450; internet: *http://www.hartzellenginetech.com.* You may view this service information at the FAA, 12 New England Executive Park, Burlington, MA. 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 Management Facility 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 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: Christopher Richards, Aerospace Engineer, Chicago Aircraft Certification Office, FAA, 2300 E. Devon Ave., Des Plaines, IL 60018; phone: 847–294–7156; fax: 847–294–7834; email: *christopher.j.richards@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

We received a report of an HET turbocharger turbine wheel that failed a static strength test at its manufacturing facility. Subsequent tests showed that nearly all turbine wheels, P/N 410188–0019, had significant cracking under the surface of a critical weld joint between the turbine wheel head and shaft that occurred during manufacturing. HET has identified by serial number (S/N) the turbochargers shipped from the factory with this unsafe condition. HET has also identified the S/N range of affected turbine wheels. Some of the affected turbine wheels became available for overhaul or field repair since August 29, 2012, and may have been installed. This condition, if not corrected, could result in turbocharger turbine wheel failure, reduction or complete loss of engine power, loss of engine oil, oil fire, and damage to the airplane.

Relevant Service Information

We reviewed HET Alert Service Bulletin (ASB) No. 048, dated November 16, 2012. The ASB lists the known serial numbers of affected turbochargers.

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 removing the affected turbochargers from service before further flight.

FAA's Justification and 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 HET cannot confirm the affected turbochargers can safely be used. 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–2012–1245 and Directorate Identifier 2012–NE–41–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 56 airplanes of U.S. registry with affected turbochargers installed. We also estimate that it will take about 4 hours to remove a turbocharger from service. The average labor rate is $85 per hour. Based on these figures, we estimate the total cost of the AD to U.S. operators to be $19,040.

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):

2012–24–09 Lycoming Engines and Continental Motors, Inc. Reciprocating Engines: Amendment 39–17279; Docket No. FAA–2012–1245; Directorate Identifier 2012–NE–41–AD.

(a) Effective Date

This AD is effective December 20, 2012.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Lycoming Engines TSIO–540–AK1A, and Continental Motors, Inc. TSIO–360–MB, TSIO–360–SB, and TSIO–360–RB reciprocating engines with any of the following turbochargers installed:

(1) Hartzell Engine Technologies (HET) model TA0411 turbochargers, part numbers (P/Ns) 466642–0001; 466642–0002; 466642–0006; 466642–9001; 466642–9002; and 466642–9006, with serial numbers (S/Ns) listed in Table 2 of HET Alert Service Bulletin No. 048, dated November 16, 2012, installed.

(2) HET model TA0411 turbochargers having a turbine wheel, P/N 410188–0019, with any of the turbine wheel S/Ns H120716 through H121988, installed.

(3) HET model TA0411 turbochargers overhauled or repaired since August 29, 2012, using a turbine wheel, P/N 410188–0019, with any of the turbine wheel S/Ns H120716 through H121988, installed.

(d) Unsafe Condition

This AD was prompted by a report of a turbocharger turbine wheel that failed a static strength test at its manufacturing facility. We are issuing this AD to prevent turbocharger turbine wheel failure, reduction or complete loss of engine power, loss of engine oil, oil fire, and damage to the airplane.

(e) Compliance

Before further flight, remove from service the turbochargers identified in paragraph (c) of this AD, unless already done.

(f) Special Flight Permits

Special flight permits are permitted provided that:

(1) The flight is limited to three hours.

(2) The turbocharger boost is set to "Off" in the cockpit (if applicable).

(3) The wastegate for the turbocharger is safety wired in the locked open position.

(g) Alternative Methods of Compliance (AMOCs)

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

(h) Related Information

For more information about this AD, contact Christopher Richards, Aerospace Engineer, Chicago Aircraft Certification Office, FAA, 2300 E. Devon Ave., Des Plaines, IL 60018; phone: 847–294–7156; fax:

847–294–7834; email: *christopher.j.richards@faa.gov.*

(i) Material Incorporated by Reference

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

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

(i) Hartzell Engine Technologies Alert Service Bulletin No. 048, dated November 16, 2012.

(ii) Reserved.

(3) For service information identified in this AD, contact Hartzell Engine Technologies, LLC, 2900 Selma Highway, Montgomery, AL 36108, phone: 334–386–5400; fax: 334–386–5450; internet: *http://www.hartzellenginetech.com.*

(4) You may view this service information at the FAA, 12 New England Executive Park, Burlington, MA. For information on the availability of this material at the FAA, call 781–238–7125.

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

Issued in Burlington, Massachusetts, on November 29, 2012.

Colleen M. D'Alessandro,

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

[FR Doc. 2012–29472 Filed 12–4–12; 8:45 am]

BILLING CODE 4910–13–P

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1107

[CPSC Docket No. CPSC–2011–0082]

Testing and Labeling Pertaining to Product Certification Regarding Representative Samples for Periodic Testing of Children's Products

AGENCY: Consumer Product Safety Commission.

ACTION: Final rule.

SUMMARY: The Consumer Product Safety Commission (CPSC, Commission, or we) is issuing a final rule to amend its regulations on testing and labeling pertaining to product certification. Pursuant to section 14(i)(2)(B)(ii) of the Consumer Product Safety Act (CPSA), the final rule requires the testing of representative samples to ensure continued compliance of children's products with all applicable children's product safety rules. The final rule also establishes a recordkeeping requirement associated with the testing of representative samples.

DATES: To coincide with the effective date of 16 CFR part 1107, the final rule is effective on February 8, 2013, and it applies to products manufactured after that date.[1]

FOR FURTHER INFORMATION CONTACT: Randy Butturini, Project Manager, Office of Hazard Identification and Reduction, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814; telephone (301) 504–7562; email *rbutturini@cpsc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

A. What is the purpose of the final rule?

The final rule amends 16 CFR 1107.21 and 1107.26 of the Commission's regulation on testing and labeling pertaining to product certification in order to implement the statutory requirement in section 14(i)(2)(B) of the CPSA for the periodic testing of representative samples of children's products, as well as associated recordkeeping.

B. What does the law require?

Section 14(a)(2) of the CPSA, 15 U.S.C. 2063(a)(2), requires manufacturers, including importers, and private labelers of any children's product that is subject to a children's product safety rule, to submit sufficient samples of the product, or samples that are identical in all material respects to the product, to a third party conformity assessment body whose accreditation has been accepted by the CPSC, to be tested for compliance with such children's product safety rule. Based on that testing, the manufacturer or private labeler must issue a certificate, which certifies that such children's product complies with the children's product safety rule. 15 U.S.C. 2063(a)(2)(B). A children's product certifier must issue a separate certificate for each applicable children's product safety rule, or a combined certificate that certifies compliance with all applicable children's product safety rules, and specifies each rule. This certificate is called a Children's Product Certificate (CPC).

Section 14(i)(2)(B) of the CPSA, 15 U.S.C. 2063(i)(2)(B), as originally provided in section 102 of the Consumer Product Safety Improvement Act of 2008 (CPSIA) prior to amendment, requires, in relevant part, that we establish protocols and standards for "ensuring that a children's product tested for compliance with a children's product safety rule is subject to testing periodically and when there has been a material change in the product's design or manufacturing process, including the sourcing of component parts," and the "testing of random samples to ensure continued compliance."

In the **Federal Register** of May 20, 2010 (75 FR 28336), we published a proposed rule on "Testing and Labeling Pertaining to Product Certification." The proposed rule was intended to implement parts of what was then known as section 14(d)(2)(B) of the CPSA (now renumbered section 14(i)(2)(B)) and to implement parts of section 14(a) of the CPSA. Proposed § 1107.22, "Random Samples," would have implemented the testing of random samples' requirement in the CPSA, by requiring each manufacturer of a children's product to select samples for periodic testing by using a process that assigns each sample in the production population an equal probability of being selected (75 FR at 28349 through 28350, 28365).

On August 12, 2011, the President signed into law Public Law 112–28. Among other things, Public Law 112–28 changed the obligation for the testing of "random samples" to the testing of "representative samples." Additionally, Public Law 112–28 corrected an editorial error in section 14 of the CPSA, by renumbering section 14(d) of the CPSA, "Additional Regulations for Third Party Testing," as section 14(i) of the CPSA.

On November 8, 2011, we published a final rule in the **Federal Register** (76 FR 69482) for the testing and labeling rule, 16 CFR part 1107, on those aspects of the rule left unchanged by Public Law 112–28. However, because Public Law 112–28 amended section 14(i)(2)(B)(ii) of the CPSA to require the testing of "representative samples," the Commission deleted § 1107.22 from the final rule on testing and labeling, and it issued a proposed rule (76 FR 69586), also on November 8, to implement the new statutory requirement for the testing of representative samples.

The Commission is now issuing a final rule amending 16 CFR 1107.21(f) and 1107.26(a)(4) to implement the requirement to test "representative samples," pursuant to section 14(i)(2)(B)(ii) of the CPSA, as well as our implementing authority under section 3 of the CPSIA.

[1] The Commission voted 2–1 to publish this final rule in the **Federal Register**. Chairman Inez M. Tenenbaum and Commissioner Robert S. Adler voted to publish the final rule. Commissioner Nancy A. Nord voted against publication of the final rule.

C. How does the final rule implement the law?

The final rule amends § 1107.21(f) to require a manufacturer to select representative product samples to be submitted to a third party conformity assessment body for periodic testing. The procedure used to select representative product samples for periodic testing must provide a basis for inferring compliance about the population of untested products produced during the applicable periodic testing interval. The number of samples selected for the sampling procedure must be sufficient to ensure continuing compliance with all applicable children's product safety rules. Moreover, a manufacturer must document the procedure used to select representative product samples for periodic testing and the basis for inferring the compliance of the product manufactured during the periodic testing interval from the results of the tested samples.

The final rule also amends § 1107.26(a)(4) to require a manufacturer of a children's product subject to an applicable children's product safety rule to maintain records documenting the testing of representative samples, including the number of representative samples selected and the procedure used to select representative samples. Records also must include the basis for inferring compliance of the product manufactured during the periodic testing interval from the results of the tested samples. Existing § 1107.26(b) requires that records be maintained for five years.

D. How do I comply with the requirement to periodically test representative samples?

1. Selecting Representative Samples

Under the final rule, various methods can be used to determine that the selected samples are representative, depending upon on the rule, ban, standard, or regulation being evaluated. For example, for the chemical tests, a sample selected from a homogeneous material, such as a well-mixed container of paint, could be considered representative of the entire container. For discretely produced products, information indicating uniform materials and dimensional control could be used to indicate that a sample is representative of the product for mechanical tests. For example, if a bicycle handlebar sample is manufactured from the same grade of steel and with the same dimensions (*e.g.*, wall thickness, length, shape, placement of holes for attaching brake levers) as other handlebars produced, then that handlebar sample can be considered representative of the population of handlebars for the purpose of complying with the handlebar stem test in 16 CFR 1512.18(g).

Other methods may be used to establish that samples selected for periodic testing are representative—with respect to compliance—of the population of products manufactured since the last periodic test. Examples of such methods include: Inspecting incoming raw materials or component parts; generating process control data during product manufacture; and using manufacturing techniques with intrinsic manufacturing uniformity, such as die casting.

Random sampling is another way of selecting representative samples that provides a basis for inferring the compliance of untested product units from the tested product units. The conditions that allow for the inference of compliance concerning untested units versus tested units may be met by a range of probability-based sampling designs, including, but not limited to, simple random sampling, cluster sampling, systematic sampling, stratified sampling, and multistage sampling. These methods allow the manufacturer the flexibility to select a random sampling procedure that is most appropriate for the manufacturer's product production setting but still allow for the inference about the compliance of the population of product units. For example, alternative sampling procedures—like systematic sampling (where a starting unit is randomly selected and then every k^{th} unit after that is selected) or multistage sampling (where units are grouped in clusters, such as pallets, the clusters are randomly selected, and then units within the selected clusters are randomly drawn)—can be employed for products for which such sampling procedures would be beneficial. Even though every unit produced does not have the same probability of selection for testing in these examples, these techniques can be used to infer the compliance of the untested units. It should be noted, however, that just because random sampling can be used as one method of conducting representative testing, it is by no means the only method to meet the new broader "representative" sampling requirement in Public Law 112–28.

With evidence that the samples submitted to a third party conformity assessment body are representative of the children's product produced since the last periodic test (or since product certification for the first periodic test interval), the manufacturer can infer the compliance of the untested units.

2. Determining Continued Compliance

For the purposes of periodic testing, passing test results means the samples tested are in compliance with the applicable children's product safety rule. Most children's product safety rules require each product sample submitted to pass the prescribed tests. For example, each pacifier subjected to the guard and shield testing specified in 16 CFR 1511.3 must pass the test. In a similar manner, each infant walker submitted for testing must pass the tests prescribed in 16 CFR part 1216.

However, for some children's product standards, compliance with the standard can include individual test results that exceed a specified maximum. For example, for children's products tested for compliance to 16 CFR part 1611, *Standard for the flammability of vinyl plastic film,* the burn rate of 10 samples is averaged to determine if the average exceeds the maximum burn rate of 1.2 inches per second, as specified in 16 CFR 1611.3. Because the maximum burn rate requirement in part 1611 applies to the average burn rate of the 10 samples tested, it is possible for one or more of the tested samples to exceed the maxiumum burn rate when tested. In this example, if the average burn rate does not exceed 1.2 inches per second, the samples are considered to be in conformance with the standard and have passed the test.

As another example, small carpets and rugs that are children's products are subject to the requirements for periodic testing. For small carpets and rugs, at least seven of the eight samples tested for compliance to 16 CFR part 1631, *Standard for the surface flammability of small carpets and rugs (FF 2–70),* must meet the test criterion specified in § 1631.3(b). Alternatively, a small carpet or rug that does not meet the test criterion must be permanently labeled prior to its introduction into commerce. Small carpets and rugs that meet either condition would be considered to be in compliance with 16 CFR part 1631 and deemed to have passed the periodic tests.

3. Creating and Maintaining Required Records

Manufacturers must document periodic testing of representative samples. Documentation must include the number of representative samples selected, how the samples were selected, and the manufacturer's basis for inferring compliance of the untested

units during the testing interval, based on testing of the sampled units. Such documentation must be maintained for five years.

II. Comments on the Proposed Rule and CPSC's Responses

A. How many comments were received about the proposed rule?

The comment period for the proposed rule closed on January 23, 2012. Eight commenters responded. A summary of these comments and the Commission's responses are set forth below in section II.B of this preamble. Additionally, on November 8, 2011, a request for comments titled, *Application of Third Party Testing Requirements; Reducing Third Party Testing Burdens,* Docket CPSC–2011–0081, was published in the **Federal Register** (76 FR 69596). Some of the comments received in that docket also address the testing of representative samples. We summarize and respond to those comments in section II.B, as well, to ensure that all comments on representative samples were considered as part of this rulemaking, in addition to any suggestions for amending the final rule. After consideration of all the comments, however, no changes were made to the final rule.

B. What comments did the Commission receive?

A summary of the commenters' topics is presented below, followed by staff's responses. For ease of reading, each comment will be prefaced with a numbered "Comment"; and each response will be prefaced by a numbered "Response." The numbering is for identification purposes only and does not imply the importance of the comment or the order in which it was received.

1. General Comments and Comments on Definitions

(Comment 1)—A commenter welcomes the change from random sampling (in the 16 CFR part 1107 NPR) to representative sampling in the proposed rule because the proposed rule includes a variety of methods to assure compliance.

(Response 1)—As long as the test results from the representative samples can infer compliance of the untested units of the children's product, a variety of means can be employed, at the manufacturer's discretion, to select samples for testing under the final rule.

(Comment 2)—A commenter asserts that:

> There is no definition of "representative'" in 16 CFR Part 1107.26 (sic) of the notified draft Regulation, so it would likely lead to a misunderstanding in the implementation of the regulation. It is suggested that a clear definition of "representative samples" should be given so that the representative samples can be selected in a convenient and applicable way. Only in this way can the implementation of the regulation be more effective.

(Response 2)—We agree with the commenter that a clear understanding of "representative samples" will help to implement the required periodic testing of such samples effectively. For this reason, we define a "representative sample" in proposed § 1107.21(f) as one that provides the manufacturer with a basis for inferring the compliance of the untested units of the product population from the tested units. In other words, the manufacturer must have a basis for thinking that the units making up the sample to be tested (or the representative sample) are like the untested units of the children's product with respect to compliance to the applicable children's product safety rule. The final rule maintains this definition, which places responsibility on the manufacturer to choose representative samples in a manner that provides a basis for inferring the compliance of the untested product units.

(Comment 3)—A commenter opines that the proposed rule defines "representative" in a rigid way, and thereby re-creates the effect of "random" as in the original wording of the CPSIA. The commenter asserts that the word "representative" does not require any clarification. The commenter suggests that the common meaning of the word "representative" is that the sample stands for the body of product being tested, and further suggests the following as an alternate definition of "representative":

> a sample is "representative" when it is
> (a) produced in a manufacturing lot not known to be produced in a materially different manner than other production lots of the same item,
> (b) produced according to the usual, typical manufacturing procedures,
> (c) selected without attempting to "game" the testing protocol, and
> (d) is not otherwise known by the manufacturer to be unrepresentative in any material way which might result in misleading testing results.

(Response 3)—No change to the final rule was made based on this comment. The commenter's proposed definition characterizes "representative" samples as those units that are "not known to be different" from the untested units, as opposed to the Commission's characterization, which is that "representative" samples are those units that are "known to be like" the untested samples on the basis provided by the manufacturer. The Commission considered the commenter's alternative definition but regards this definition of "representative sampling" as an attempt to prove a negative, which cannot be done. A "not known to be different" form of representative sampling does not provide a basis for knowing that the samples tested are similar to the untested units of the product. Without that basis, the testing results can indicate only the compliance of the samples actually tested and not the compliance of the untested product units. Without a means to infer compliance of the untested product units, the testing of "not known to be different" representative samples cannot ensure continued compliance, as required by section 14(i)(2)(B)(ii) of the CPSA.

To ensure continued compliance, the Commission's approach is to require a manufacturer to have knowledge of the similarity of the tested samples to the untested units because the absence of knowledge of their differences is not sufficient to ensure continued compliance. Knowledge of the similarity of tested samples may come from prior testing, the manufacturer's knowledge of its product, production processes, quality control procedures, a production testing program, the materials used in the product, and/or the design of the product. So long as the manufacturer has a rational basis for inferring the similarity of the untested product to the tested samples, and documents this rationale, the manufacturer has met the requirements in the final rule.

(Comment 4)—A commenter suggests that the CPSC define "representative samples" based on what they are not. The commenter states that as long as a sample is not a "golden sample," meaning that it was not manufactured to be different in any way from the rest of the produced samples, then it should be considered to be representative.

The commenter reasons that noncompliant outliers may exist even in the most homogenous of manufacturing practices, and manufacturers may not be able to prove why a single test result was an outlier. However, the commenter adds that it is much easier to prove that the manufacturer performed the due diligence necessary to ensure they did everything possible to prevent the outlier from being created.

The commenter opines that this clarification would in no way change the CPSC's definition of a "representative sample." According to the commenter, all manufacturers would still have to be able to prove that a test result is representative of their

entire product line. Moreover, adds the commenter, such a clarification will give manufacturers the assurance needed to rely on their individual remedial action plans if a failure occurs due to an outlier that does not represent the entire product line. The commenter predicts that this interpretation will protect manufacturers from having to destroy many more products that may still be compliant, should testing reveal a noncompliance.

(Response 4)—The Commission considered this alternative definition but regards this definition of "representative sampling" as an attempt to prove a negative, which cannot be done. A "not a golden sample" form of representative sampling does not provide a basis for knowing that the samples tested are similar to the untested units of the product. Without that basis, the testing results can indicate the compliance only of the samples actually tested and not the compliance of the untested product units. Without a means to infer compliance of the untested product units, the testing of "not a golden sample" representative samples cannot ensure continued compliance, as required by section 14(i)(2)(B)(ii) of the CPSA.

The term "golden sample" would seem to suggest a sample that is: (1) Not known to be similar to the population of units produced, and (2) would have a greater likelihood of passing the required tests. However, the absence of those two traits does not make a sample representative based on the definition in the final rule. For example, if a sample was taken of the first 400 items from a production run of 100,000, the sample selector may have no greater confidence before the test that these items would pass the test than items selected from later in the run or throughout the run. The first 400 items may be representative samples, however, if the manufacturer has a basis for inferring that the units are representative of the remaining 99,600 units. Absent some independent basis for knowing that the remaining 99,600 units are similar to the first 400 units of product from the run, this could be a sampling approach that could fail to be representative.

A single test failure in a number of samples tested does not automatically mean that the production lot from which the samples were selected is not compliant, and therefore, must be reworked or destroyed. A failing test result means that the manufacturer does not have a high degree of assurance that all of the units from the production lot from which the sample was taken are compliant with the applicable children's product safety rule. Further investigation is needed for the manufacturer to determine whether the manufacturer can still have a high degree of assurance that the untested units are compliant. This investigation might include examining the testing procedures, calibrating the test instrumentation, testing additional samples, or other actions.

(Comment 5)—A commenter states that the CPSC interprets the need to "ensure" compliance to mean that no exercise of judgment or good faith is allowed and that regulated companies must always be able to prove compliance. The commenter adds that the proposed rule rules out reliance on "process," or even the absence of contrary indicators, to support a conclusion that samples are "representative."

(Response 5)—No changes to the final rule were made based on this comment because the final rule does indeed allow and require manufacturers to exercise judgment and good faith in selecting representative samples. In fact, the entire third party testing regime set forth in 16 CFR parts 1107 and 1109 depends upon the exercise of "due care" by all certifiers. "Due care" is a flexible concept, defined as "the degree of care that a prudent and competent person engaged in the same line of business or endeavor would exercise under similar circumstances. Due care does not permit willful ignorance." 16 CFR 1107.2 & 1109.4(g).

Because of the multitude of different industries and children's products, the Commission adopted a flexible performance standard in implementing third party testing requirements. Determining what constitutes "a high degree of assurance," and "the exercise of due care," requires the exercise of business judgment in all aspects of testing. The Commission stated numerous times throughout the final testing rule that manufacturers are required to know about their products and they must implement a testing program accordingly. Sections 1107.20(b) and (d), 1107.21(b)(2), 1107.21(c)(1), and 1107.23(a) of 16 CFR part 1107, all refer to the manufacturer's knowledge of the product and its fabrication in implementing sampling and testing plans, as well as other manufacturer actions intended to provide a high degree of assurance of compliance to the applicable children's product safety rules.

The final rule requires regulated companies to be able to provide a basis for inferring the compliance of the untested production units from the tested samples. Without such a basis, the testing would serve no purpose other than to demonstrate the compliance of the tested units. However, the final rule does not rule out the use of "process." In fact, "process" can show that the samples selected for testing are like the untested units. For example, a process that manages the lots or batches of constituent materials of a children's product can be used as a basis for inferring homogeneity of the products with respect to the chemical tests for lead and phthalates. As another example, a process that creates uniformly spaced holes in the crib rails for the uniformly constructed crib slats can be used as a basis for inferring the homogeneity of that portion of the product when conducting the component spacing test of ASTM F1169–10.

Standing alone, the absence of contrary indicators is not sufficient to infer compliance of the untested production units from the tested samples because this could include willful ignorance of the potential differences between the untested units and the tested samples. Such an approach would not likely meet minimum due care requirements.

2. Selecting Representative Samples

(Comment 6)—A commenter desires that the CPSC continue to consider random sampling to be a subset of representative sampling. The commenter asserts that including random sampling methods allows the manufacturer the flexibility to select a random sampling procedure that is most appropriate for the manufacturer's product production setting but still allows for the inference about the compliance of the population of product units. The commenter further states that many companies proactively implemented random testing programs when the CPSC first proposed and supported such programs in December 2008, and the commenter wants the CPSC to continue to recognize this as an acceptable means of representative sampling.

(Response 6)—No change to the final rule-arises out of this comment because the final rule allows random sampling as a means to ensure representative sampling. The Commission agrees that random samples are a form of representative sampling because the test results of the tested units can be used to infer the compliance of the untested units of the children's product. The preamble to the proposed rule specifically states:

> Random sampling is another means of selecting representative samples that provide a basis for inferring the compliance of

untested product units from the tested product units. The conditions that allow for the inference of compliance concerning untested units versus tested units may be met by a range of probability-based sampling designs, including, but not limited to, simple random sampling, cluster sampling, systematic sampling, stratified sampling, and multistage sampling. These methods allow the manufacturer the flexibility to select a random sampling procedure that is most appropriate for the manufacturer's product production setting but still allow for the inference about the compliance of the population of product units.

76 FR 69586, 69587 (Nov. 8, 2011).

(Comment 7)—One commenter is having difficulty understanding how to select a representative sample for periodic testing. The commenter's products consist of sets of component parts, each produced on a different date. Some of the finished products contain component parts that were manufactured more than a year ago. The commenter adds that their finished products consist of multiple variations of component parts from many production lots, resulting in no more than a few with the same set of component parts.

(Response 7)—The purpose of periodic testing is to ensure compliance with all the applicable children's product safety rules for continued production of a children's product. Previously tested lots or batches of component parts do not require periodic testing. If a lot or batch of component parts was sampled and tested for certification purposes, those test reports remain valid for the remainder of the particular lot or batch. Continued production or importation of newly produced component parts (assuming no material changes) are subject to periodic testing. If a manufacturer or importer conducted certification testing on each new lot or batch of component parts, that testing would constitute, in essence, recertification of the finished product, based on tests of each batch or lot of the components, and therefore, periodic testing requirements might not apply.

Continuing production of the component parts can have representative samples selected for periodic testing purposes. For example, if a component part continues to be produced or imported, and it is included in a children's product, representative samples of the component part could be tested to comply with the periodic testing requirements. Alternatively, representative samples of continued production of the finished product could be selected for periodic testing purposes.

If the source of component parts changes (either a new supplier of a currently used component part or a component part that had not been used before), that would be a material change, necessitating certification testing to the children's product safety rules that could be affected by the material change.

Another method of conducting periodic testing could involve random sampling and testing of the continued production of component parts or of the finished product. Random sampling is an acceptable means of selecting a representative sample.

If varying combinations of component parts can affect the compliance of the finished product, then those combinations of component parts represent a material change that requires certification testing for each combination that is materially different.

(Comment 8)—This comment was received in Docket CPSC–2011–0081. A commenter believes that knowledge from first party testing and/or second party testing can be used to develop sampling plans for third party testing that reduce the overall test burden, while still allowing the compliance of untested products to be inferred from the products tested by the third party conformity assessment body.

(Response 8)—We interpret "first party testing" as testing conducted by the manufacturer and "second party testing" as testing conducted by a retailer to whom a manufacturer sells children's products. We agree with the commenter that the manufacturer's knowledge of a product, the applicable children's product safety rules, and the manufacturing process, combined with first or second party testing, can be used to determine the procedure for selecting representative samples. The combination of the factors listed above can be used to infer the compliance of the untested production units from the samples tested by a third party conformity assessment body.

3. Imported Products

(Comment 9)—A commenter states that if the manufacturing process of a children's product is "managed properly," then the first customs clearance article should be regarded as a representative sample.

(Response 9)—We are not sure what the commenter means by "first customs clearance article," but we will assume, for the purposes of this answer, that it means the first article manufactured outside of the United States that is cleared for entry and consumption by U.S. Customs and Border Patrol. If the article is a finished children's product subject to a children's product safety rule, it must be accompanied by a Children's Product Certificate based on testing by a CPSC-accepted third party conformity assessment body.

If, by "managed properly," the commenter means that the imported products are homogeneous with respect to compliance, then the first customs clearance article, assuming that it was tested by a CPSC-accepted third party conformity assessment body, can be regarded as a representative sample. Under the final rule, the manufacturer or importer must be able to provide a basis for why it believes its products are homogeneous. A demonstration of homogeneity with respect to compliance would serve as a basis to show that the representative samples chosen for testing are like the untested production units.

For example, if a manufacturer injection molded an item using plastic pellets from the same lot or batch, the manufacturer would be assured that, with respect to the chemical tests, the plastic items were homogeneous. As another example, if a manufacturer produced small balls, and the production process included an automatic test to reject balls small enough to pose a small parts hazard (perhaps by falling through a hole into a reject bin), then the manufacturer would have demonstrated homogeneity with respect to the small balls requirement. Because an imported children's product must comply with all of the applicable children's product safety rules, an importer, wishing to use the first customs clearance article as a representative sample, must also show how that sample is representative for all of the applicable tests, including those for which the finished product is required to assess compliance.

(Comment 10)—This comment was received in Docket CPSC–2011–0081. Two commenters state that the CPSC should clarify that importers are not required to determine "representative sampling" procedures. One commenter recommends that the CPSC look at the definition of "manufacturer" used in the *Testing and Labeling Pertaining to Product Certification* rulemaking. The commenter notes that 16 CFR 1107.2 defines "manufacturer" as "the parties responsible for certification of a consumer product pursuant to 16 CFR 1110." According to § 1110.7(a), when products are manufactured outside of the United States, the importer must issue a certificate of conformity. The commenters believe that some could read this to mean that a "representative sampling" procedure must be determined by the importer, even if

component part testing is conducted by suppliers. These commenters explain that many testing decisions are made upstream in the supply chain. Now that the CPSC accepts component part testing, these commenters contend that decisions related to testing intervals and sample size are appropriately made by the manufacturer ultimately responsible for production samples to be tested, regardless of the importation method. The commenters argue that while it is important that the finished product certifier exercises due care in their reliance on supplier certifications, this should not mean that the finished product certifier should necessarily dictate its suppliers' sampling procedures or that the importer of record should require duplicative testing.

(Response 10)—If the importer is the party that issues the Children's Product Certificate for a product, it is that importer's responsibility to ensure that periodic testing is performed on the children's products they import that are subject to an applicable children's product safety rule. Under the component part testing rule, 16 CFR part 1109, an importer can rely on test reports or certificates from another party as long as they (the importer) exercise due care.

If an importer relies on certificates for component parts or finished products that are supplied by another party, such as a foreign manufacturer or a supplier, then it is the voluntary certifier of the component part or finished product who is responsible for periodic testing of representative samples for the component parts or finished products they certify, and not the importer. The importer must exercise due care to ensure that applicable testing is completed in an appropriate manner. However, if the importer arranges for periodic testing itself, the importer retains the responsibility for selecting and testing representative samples periodically to ensure continued compliance. Periodic testing, including representative sample selection, may be contracted to another party. If so contracted, the other party, called the "testing party" in the component part testing rule, 16 CFR part 1109 (*e.g.*, a foreign manufacturer or distributor) must provide the basis that the samples selected for testing are representative.

A manufacturer or importer issuing the Children's Product Certificate must still exercise due care in relying on another party's test reports or certifications.

The Commission reminds the commenter that representative samples are selected for periodic testing, which is testing conducted on continuing production of a previously certified children's product. If each imported lot or batch of a children's product is third party tested and certified, then the periodic testing requirements might not apply. Lots or batches that are tested and certified would not represent continued production, even if the name or model number of the children's product did not change.

4. Periodic Testing of Component Parts

(Comment 11)—A commenter suggests that the frequency of testing component parts needs to be considered with respect to the level of control exerted over product safety from other regulations with stricter limits on lead and heavy metals, and with respect to the business relationships they have with their suppliers. For example, the commenter considers it sufficient to test for conformity to ASTM F963, "Standard Consumer Safety Specification for Toy Safety," and total lead once every 2 years as a consequence of the strict specification on the raw materials used in their component parts.

(Response 11)—If the commenter's phrase "strict specification on the raw materials used in their component parts" means a production testing plan as described in 16 CFR 1107.21(c)(2), then submitting representative samples to a third party conformity assessment body for periodic testing every 2 years is allowable, as long as it provides a high degree of assurance of compliance with all applicable children's product safety rules. Unless the manufacturer implements and documents a production testing plan (or uses an ISO/IEC 17025:2005-accredited first party testing laboratory for testing to ensure continued compliance), the maximum testing interval for periodic tests is one year. These periods are the maximum allowed interval. Periodic testing should be conducted at a frequency which, when combined with the manufacturer's other efforts at assuring continued compliance, gives the manufacturer a high degree of assurance of continued compliance.

(Comment 12)—This comment was received in Docket CPSC–2011–0081. A commenter states that the manufacturer, working together with the factory, should determine representative sampling of products with a substantial number of different components, based on knowledge of the products, the applicable product safety standard, and the manufacturing processes that go into making the products.

(Response 12)—We agree that the above-mentioned factors should be taken into account when selecting a representative sample for periodic testing purposes. The method used for selecting representative samples must be one that provides a basis for inferring the compliance of the untested production units from the test results of the tested samples. The manufacturer or importer of a children's product subject to a children's product safety rule retains the responsibility to ensure that periodic tests are conducted on representative samples. Representative sample selection and testing may be contracted to another party. If so contracted, the other party (*e.g.*, a foreign manufacturer or distributor) must provide the basis for inferring the compliance of the untested production units based on testing of the selected representative samples. The manufacturer or importer issuing the Children's Product Certificate must still exercise due care in relying on another party's test reports or certifications.

(Comment 13)—A commenter who manufactures multiple products from a set of common component parts states that the proposal for testing representative samples has an advantage for this product type. The representative sample can be assembled from common components across the product lines and each component tested according to the relevant safety concerns under the CPSIA.

(Response 13)—This practice is acceptable under the final rule for tests that do not require the finished product for testing. For example, determining compliance to the use and abuse testing of toys described in §§ 1500.50, 1500.51, 1500.52, and 1500.53 on representative samples of common component parts is likely to be unacceptable to determine compliance of a finished product to that standard. For the use and abuse tests, a finished product is necessary to conduct the tests.

However, component part testing of representative samples for compliance to all children's product safety rules that do not require the finished product to assess compliance (such as the chemical tests) can be conducted. The passing test results for those component parts may be used to support children's product certification for finished products employing those component parts.

(Comment 14)—A commenter recommends that 16 CFR 1107.21(c)(1) be amended to include explicit language allowing the use of component part testing for periodic testing purposes. The commenter states that specific regulatory language needs to be inserted into the text, or the commenter's customers may not include component

part testing in their contractual relationships with the commenter.

(Response 14)—Section 16 CFR 1107.21(a) states: "Component part testing pursuant to 16 CFR part 1109 may be used to support the periodic testing requirements of this section." Because the use of component part testing is allowed explicitly in § 1107.21(a), repetition of this in § 1107.21(c)(1) is unnecessary.

(Comment 15)—The following comments on using component parts as representative samples were received in Docket CPSC–2011–0081. One commenter suggests that if a product can be proven to be composed of the same material throughout the end product, then a component could be submitted as a representative sample. The commenter adds that traceability would be important as there are ways that raw materials could be contaminated in the assembly.

A second commenter provides an example of a representative sample with sampling from a construction set of 50 different physical component configurations injection molded with four different colors of polyvinyl chloride resin. The commenter states that a sample could be considered representative as long as all four colors of material were sampled and compliance with the lead substrate or phthalate limits could be established.

A third commenter opines that as long as representative materials or components used in finished production can be sampled, such a process should be maintained as suitable for determining compliance with the lead-in-paint, lead substrate, and phthalate limits for toys and other child care articles. The commenter asserts that Congress clearly recognized the advantage of permissive use of "representative sampling" for the purpose of certifying compliance for like materials and components to these requirements.

(Response 15)—The commenters are describing forms of component part testing used to meet the requirements of periodic testing. These practices are allowed by 16 CFR part 1109. For the chemical content tests, component part testing can be used for periodic test purposes. If the raw materials are tested for lead (and phthalates, if appropriate), then any products made from those raw materials can use the raw material test reports to support the products' Children's Product Certificates. Component part testing is not allowed for tests that require a finished product, such as use and abuse testing of toys described in §§ 1500.50, 1500.51, 1500.52, and 1500.53.

5. Testing Costs

(Comment 16)—This comment was received in Docket CPSC–2011–0081. One commenter states that changing the "random" sampling requirement to "representative" sampling will reduce the testing burden because, for some manufacturers, particularly suppliers of raw materials or components, or manufacturers of simple products, substantially similar products may be representative of the whole body of product to be certified.

(Response 16)—The Commission agrees that changing "random" sampling to "representative" sampling has the potential to reduce the testing burden for manufacturers because more techniques for sample selection are available that can leverage the manufacturer's knowledge of the product and its production processes. Component part testing of raw materials for periodic testing purposes is one means by which a representative sample can be selected. For example, if the same lots or batches of raw materials were used to create several children's products, the results of the chemical tests for one of the products could be used to support the certification requirements of the other products.

(Comment 17)—A commenter states that implementation of the new rules will impose a significant compliance cost on his company. The commenter asserts that the additional costs will not result in increased safety of his company's products and states that "they were already safe." The commenter's additional compliance cost concerns pertain to rules promulgated since the CPSIA, in particular, 16 CFR part 1107, on testing and labeling pertaining to children's product certification, and not specifically to the proposed rule regarding the use of representative samples for periodic testing.

(Response 17)—No change to the final rule was made based on this comment. Congress provided the CPSC with a third party testing regime to improve the safety of children's products. The final rule implements part of this testing regime. The Commission acknowledges that the cost of the testing required by 16 CFR part 1107 can be significant for some companies. The Commission also is considering other means to reduce third party testing burdens pursuant to section 14(i)(3) of the CPSA, which requires the Commission to seek and consider comments on opportunities to reduce third party testing burdens consistent with assuring compliance.

(Comment 18)—A commenter states that the CPSC's rules for testing children's products are too complicated and costly, and that compliance with the rules is practically impossible. The commenter fears that "[t]he power of the agency to use violations of its rules to levy excessive fines and even attack via injunction ensures that it can dictate any outcome it wants."

(Response 18)—This rulemaking is limited to the use of representative samples for periodic testing of children's products covered by an applicable children's product safety rule. The final rule is intended to aid industry and the regulated community in understanding what is expected for the periodic testing of children's products.

6. Recordkeeping Requirements

(Comment 19)—A commenter opines that the recordkeeping requirements of the proposed rule are excessive, uneconomical, and unreasonable. The commenter asserts: "There is absolutely no safety benefit to this recordkeeping, nor will the records maintain (sic) help the agency figure out if there is a safety issue with the affected product."

(Response 19)—The Commission disagrees with the assertion that no safety benefit comes from recordkeeping. Because failure in the certification system of children's products could occur in many ways, recordkeeping can provide data to help identify the source of the failure. A safety benefit of the recordkeeping requirement is that, if noncompliant products are found in the marketplace, information is readily available that might help the manufacturer and the CPSC determine how such noncompliance occurred and its extent. Requiring manufacturers to provide a rationale for why their samples were chosen for periodic testing may help determine whether that rationale could have been a contributing factor in the incidence of noncompliant children's products being introduced into commerce.

(Comment 20)—A commenter suggests that the Commission prove that:

(a) Congress wanted all manufacturers to ESTABLISH that each and every sample was 'representative,'

(b) the required recordkeeping for proof that each testing sample is "representative" bears a rational relationship to the agency's mandate to keep the citizenry safe,

(c) the devotion of resources to the activities described in the rule actually makes anyone safer, and

(d) the benefits of the new rule outweigh its costs.

(Response 20)—Section 2(a)(1) of Public Law 112–28 amended section

14(i)(2)(B)(ii) of the CPSA to state that the Commission shall, by regulation, establish protocols and standards "for the testing of representative samples to ensure continued compliance." Because the text of the CPSA in this section explicitly calls for regulations to establish standards, we interpret that phrase to include establishing standards for representative samples.

With regard to the commenter's suggestion regarding the relationship between recordkeeping and "keeping the citizenry safe," the safety benefits of the recordkeeping requirement are described in the response to Comment 19 above. The recordkeeping requirements are intended to help prevent children's products from creating an unreasonable risk of death or injury for consumers.

By enacting section 14(i)(2)(B)(ii) of the CPSA, Congress determined that establishing protocols and standards for periodic testing of representative samples of children's products are worthy of resources and they strengthen the safety of children's products.

The Commission has provided an assessment of the impact of the rule on small businesses under the Regulatory Flexibility Act, but it is not required to conduct a cost-benefit analysis.

7. Comments Considered Outside the Scope of the Rulemaking

(Comment 21)—A commenter proposes that they provide a Certificate of Conformity to the CPSC for each finished product distributed to the U.S. market that requires certification under the CPSIA. The commenter wants the CPSC to determine whether the commenter acted with due diligence with respect to product safety. The certificate would include references to component part tests.

(Response 21)—The final rule is limited to the testing of representative samples for periodic testing of children's products. A request for the CPSC to evaluate certificates of conformity regarding due diligence is beyond the scope of this proposal.

(Comment 22)—A commenter recommends that the Commission have a series of public meetings to review the concept of representative samples because of the enormous range of children's products subject to the rule. The commenter predicts that Commission guidance on an industry basis, over the range of products, would materially assist its member companies to comply.

(Response 22)—This rulemaking is limited to the use of representative samples for periodic testing of children's products covered by an applicable children's product safety rule. However, the Commission will consider the request for public meetings or other guidance regarding the implementation of 16 CFR part 1107, as necessary, beyond the efforts taken, to date.

III. Environmental Considerations

Generally, the Commission's regulations are considered to have little or no potential for affecting the human environment, and environmental assessments and impact statements are not usually required. *See* 16 CFR 1021.5(a). The final rule sets forth the Commission's regulation for meeting the requirement in section 14(i)(2)(B)(ii) of the CPSA to test "representative samples." As such, the final rule is not expected to have an adverse impact on the environment. The rule falls within the categorical exclusion in 16 CFR 1021.5(c)(2). Accordingly, no environmental assessment or environmental impact statement is required.

IV. Regulatory Flexibility Analysis

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612, generally requires that agencies review proposed rules for their potential economic impact on small entities, including small businesses. The RFA calls for agencies to prepare and make available for public comment, an initial regulatory flexibility analysis describing the impact of the proposed rule on small entities and identifying impact-reducing alternatives. 5 U.S.C. 603. The RFA further requires agencies to consider comments they receive on the initial regulatory flexibility analysis and prepare a final regulatory flexibility analysis describing the impact of the final rule on small entities and identifying alternatives that could reduce that impact. *Id.* 604. This section summarizes the Commission's final regulatory flexibility analysis for the final rule on representative samples for periodic testing of children's products.

A. Objective of the Final Rule

The objective of the final rule is to reduce the risk of injury from consumer products, especially from products intended for children age 12 years and younger. The final rule will accomplish this objective by requiring manufacturers (including private labelers and importers of products manufactured by foreign manufacturers) to select the samples of children's products for periodic testing (which is be required by 16 CFR 1107.21), using a procedure that provides a basis for inferring that if the selected samples comply with the applicable children's product safety rules, then the units not selected will also comply. In order to ensure compliance of all units produced, one must be able to infer the compliance of the untested units of a product from tests performed on the sampled units.

B. Comments on the Initial Regulatory Flexibility Act

We received several comments regarding the initial regulatory flexibility analysis (IRFA), which we respond to below.

(Comment 23)—One commenter states that the initial regulatory flexibility analysis was a "[s]ham." The commenter argues that the "regulatory cost analysis is a whitewash, not a true arm's length analysis" and that "no company will be able to keep up with these rules, big or small." The commenter further states: "[t]he new rules cannot be afforded by any but the biggest companies—and yet, it's the big companies that have caused the most notorious and dangerous recalls of Children's Products." The commenter opines that it is the small companies that will be impacted most adversely by the new rule. The commenter finally argues: "[h]aving devoted pages to toting up how many companies would be affected by the rule and meaningless and inaccurate data on revenues of those companies, the authors then punt on the impact of the law."

(Response 23)—The Commission disagrees with the assertion that the IRFA for the proposed rule, which would establish requirements for the selection of representative samples, is a sham. As the commenter noted, the IRFA described the number and types of small entities that could be impacted by the proposed rule, the requirements that the rule would impose on small entities, and the types of costs small businesses might incur in meeting the requirements. However, the proposed rule did not specify the procedure that firms must use for selecting representative samples: It only required firms to use a procedure that would provide a basis for inferring compliance about the population of products manufactured during that period. Because the Commission did not know what procedures firms would use to meet the requirements of the proposed rule, or know to what extent the procedures used would differ from the procedures that firms would have used to select samples for periodic testing in the absence of the proposed rule, we were not able to quantify further the costs that the rule would have on small

businesses. The IRFA specifically requested comments on this issue.

The only revenue data that was included in the IRFA was the average revenue reported by the U.S. Bureau of the Census for the very small, nonemployer businesses that could be impacted by the proposed rule. It is not known to what the commenter is referring when the commenter states that the IRFA contained meaningless and inaccurate data on the revenues of the affected companies. We agree that the proposed rule could have a disproportionate impact on small businesses. However, the commenter seems to be discussing the impacts of the general rule on testing and labeling pertaining to product certification, which was published in the **Federal Register** on November 8, 2011. The current rulemaking pertains only to the selection of samples for periodic testing and not to the requirements for testing and certification, in general.

(Comment 24)—One commenter notes that two industries were omitted from the list of industries that could be impacted by the proposed rule in the IRFA. The two omitted industries were "screen printing" (NAICS code 323113) and "digital printing" (NAICS code 323115).

(Response 24)—We agree that some manufacturers in the two industries referred to by the commenter could be impacted by the final rule. These industries have been added to the relevant table in the final regulatory flexibility analysis. Additionally, the tables have been updated to reflect the most current available data.

(Comment 25)—One commenter states that the rule will have a tremendous negative economic impact on a substantial number of small entities, and that generally, when agencies request information regarding economic impact on small entities, cost and time estimates are provided. The commenter "believe[s] that these costs will outweigh the paperwork and necessity of testing products that are well within the limits based on component part testing." The commenter further provides: "The Commission needs to consider alternative testing strategies that allow the small business to incorporate and use current testing protocols that meet the same end goal: Ensuring that all products meet both the lead and phthalate content limits, as applicable."

(Response 25)—We agree that the final rule could have a negative economic impact on some small entities. The IRFA described the requirements of the proposed rule and the types of costs that firms subject to the rule might incur. However, because the proposed rule did not specify the procedure that firms must use for selecting representative samples, and because we did not know what procedures firms would use to meet the requirements of the proposed rule or to what extent the procedures used would differ from the procedures that firms would have used to select samples for periodic testing in the absence of the proposed rule, we were not able to quantify further the costs that the rule would have on small businesses. The notice of proposed rulemaking also contained an additional discussion of the potential costs associated with the recordkeeping requirements of the proposed rule.

Although alternatives for reducing the costs associated with third party testing are not being addressed in this rulemaking, the Commission is examining alternatives for further reducing the costs associated with third party testing. Any alternatives that are identified may be addressed in future rulemakings, as needed.

C. Description of the Number of Small Entities to Which the Final Rule Will Apply

By regulation (16 CFR part 1110), the Commission has determined that the domestic manufacturer or importer is responsible for ensuring that a consumer product is properly tested, and, based on the testing results, certifying that it conforms to all applicable consumer product safety rules. Therefore, it is the domestic manufacturer or importer who will be responsible for ensuring that representative samples of children's products that are subject to one or more children's product safety rules are tested to ensure continued compliance. The definition of a children's product is broad and includes bicycles, furniture, apparel, jewelry, televisions, electronic games, toys, and so on, if designed or intended primarily for a child 12 years of age or younger. Virtually all children's products are subject to one or more children's product safety rules. A full list of the children's product safety rules for which third party testing and certification will be required is provided in Table 1.

TABLE 1—PRODUCT SAFETY RULES APPLICABLE TO CHILDREN'S PRODUCTS

16 CFR Part No. (or test method or standard)	Description
1420	All-Terrain Vehicles.
1203	Bicycle Helmets.
1512	Bicycles.
1513	Bunk Beds.
1500.86(a)(5)	Clacker Balls.
1500.86(a)(7) and (8)	Dive Sticks and Other Similar Articles.
1505	Electrically Operated Toys or Articles.
1615	Flammability of Children's Sleepwear, Sizes 0 through 6X.
1616	Flammability of Children's Sleepwear, Sizes 7 through 14.
1610	Flammability of Clothing Textiles.
1632	Flammability of Mattresses and Mattress Pads.
1633	Flammability (Open-Flame) of Mattress Sets.
1611	Flammability of Vinyl Plastic Film.
1219	Full-Size Cribs.
1215	Infant Bath Seats.
1216	Infant Walkers.
Sec. 101 of CPSIA (Test Method CPSC–CH–E1001–08, CPSC–CH–E1001–08.1 or 2005 CPSC Laboratory SOP).	Lead Content in Children's Metal Jewelry.
Sec. 101 of CPSIA (Test Method CPSC–CH–E1001–08 or CPSC–CH–E1001–08.1).	Lead Content in Children's Metal Products.
Sec. 101 of CPSIA (Test Method CPSC–CH–E1002–08 and/or CPSC–CH–E1002–08.1).	Lead Content in Children's Non-Metal Products.
1303	Lead Paint.

TABLE 1—PRODUCT SAFETY RULES APPLICABLE TO CHILDREN'S PRODUCTS—Continued

16 CFR Part No. (or test method or standard)	Description
1220	Non-Full-Size Cribs.
1511	Pacifiers.
Sec. 108 of CPSIA (Test Method CPSC–CH–C1001–09.3)	Phthalate Content of Children's Toys and Child Care Articles.
1510	Rattles.
1224	Portable Bed Rails.
1501	Small Parts Rule.
1630	Surface Flammability of Carpets and Rugs.
1631	Surface Flammability of Small Carpets and Rugs.
1217	Toddler Beds.
(ASTM F963)	Toys.

The number of firms that could be impacted was estimated by reviewing every industry in the North American Industrial Classification System (NAICS) and selecting industries with firms that could manufacture or sell any children's product that could be covered by a consumer product safety rule. Firms are classified in the NAICS category that describes their primary activity. Therefore, firms that might manufacture or import consumer products covered by a safety rule as a secondary or tertiary activity may not have been counted. There is no separate NAICS category for importers. Firms that import products might be classified as manufacturers, wholesalers, or retailers.

1. Manufacturers

According to the criteria established by the U.S. Small Business Administration (SBA), manufacturers are generally considered to be small entities if they have fewer than 500 employees. Table 2 shows the number of manufacturing firms by the NAICS categories that cover most children's products subject to a children's product safety rule. Although there are more than 26,000 manufacturers that would be considered small in these categories, not all of these firms are engaged in manufacturing children's products subject to a children's product safety rule. It would be expected that most of the firms engaged in Doll, Toy, and Game manufacturing produce some products that are intended for children age 12 and younger. On the other hand, the category Surgical Appliance and Supplies Manufacturing includes crash helmets, but most of the other products in this category are not under the CPSC's jurisdiction.

TABLE 2—NUMBER OF MANUFACTURING FIRMS IN SELECTED PRODUCT CATEGORIES

NAICS Code	Description	Small firms	Total firms
31411	Carpet and Rug Mills	241	258
315	Apparel Manufacturing	7,508	7,565
316211	Rubber and Plastic Footwear Manufacturing	38	40
316212	House Slipper Manufacturing	2	2
316219	Other Footwear Manufacturing	45	46
323113	Commercial Screen Printing	4,464	4,488
323115	Digital Printing	2,326	2,357
326299	All Other Rubber Product Manufacturing	583	626
336991	Motorcycle, Bicycle, and Parts Manufacturing	417	422
33712	Household and Institutional Furniture Manufacturing	5,145	5,227
33791	Mattress Manufacturing	398	410
339113	Surgical Appliance and Supplies Manufacturing	1,772	1,866
33991	Jewelry and Silverware Manufacturing	2,369	2,382
33992	Sporting and Athletic Goods Manufacturing	1,619	1,652
33993	Doll, Toy and Game Manufacturing	649	660
339942	Lead Pencil and Art Good Manufacturing	123	129
339999	All Other Miscellaneous Manufacturing	3,798	3,841
	Total Manufacturers	31,497	31,971

Source: U.S. Department of Commerce, Bureau of the Census, 2009 County Business Patterns, Number of Firms, Number of Establishments, Employment, and Annual Payroll by Enterprise Employment Size for the United States, All Industries: 2009. (available at *http://www2.census.gov/econ/susb/data/2009/us_6digitnaics_2009.xls*. Last accessed on 28 February 2012.)

In addition to the manufacturers in Table 2, there were 25,184 nonemployer businesses classified in NAICS 315 (Apparel Manufacturing), 27,645 classified in NAICS 3231 (Printing and Related Support Activities), and 61,180 classified in NAICS 3399 (Other Miscellaneous Manufacturers) in 2008. Nonemployer businesses are generally very small businesses with no employees. They are generally sole proprietorships and may or may not be the owner's principal source of income. The average receipts for the nonemployer businesses classified in apparel manufacturing were about $31,000; for those classified in printing and related support activities, the average revenue was $49,424; and the average receipts for the nonemployer businesses classified other miscellaneous manufacturers were about $41,000.[2] There is no information regarding the number of nonemployer

[2] U.S. Department of Commerce, Bureau of the Census, "Revised 2008 Nonemployer Statistics Table." Available at *http://www.census.gov/econ/nonemployer/Revised%202008%20Data%20With%202009%20Methodology%20Applied.xls* (last accessed 16 August 2011).

businesses that actually manufacture children's products.

2. Wholesalers

Wholesalers would be impacted by the final rule if they import any children's product that is subject to a children's product safety rule. Wholesalers who obtain their products strictly from domestic manufacturers or from other wholesalers would not be impacted by the final rule because the manufacturer or importer would be responsible for certifying the products. Table 3 shows the number of wholesalers by NAICS code that would cover most children's products that are subject to a children's product safety rule. According to the SBA criteria, wholesalers are generally considered to be small entities if they have fewer than 100 employees. Although there are more than 78,000 wholesalers that would be considered small in these categories, not all of these firms are engaged in importing children's products that are subject to a children's product safety rule. A significant proportion of the firms classified as Toy and Hobby Goods and Supplies Merchant Wholesalers probably import at least some children's products. However, the only firms classified as Motor Vehicle and Motor Vehicle Parts and Suppliers that would be impacted by the final rule are those that import all-terrain vehicles that are intended for children 12 year old or younger.

TABLE 3—NUMBER OF WHOLESALERS IN SELECTED PRODUCT CATEGORIES

NAICS Code	Description	Small firms	Total firms
4231	Motor Vehicle and Motor Vehicle Parts and Suppliers	16,815	17,776
4232	Furniture and Home Furnishing Merchant Wholesalers	10,574	10,974
42362	Electrical and Electronic Appliance, Television, and Radio Set Merchant Wholesalers	2,368	2,512
42391	Sporting and Recreational Goods and Supplies Merchant Wholesalers	4,693	4,845
42392	Toy and Hobby Goods and Supplies Merchant Wholesalers	2,068	2,138
42394	Jewelry, Watch, Precious Stone, and Precious Metal Merchant Wholesalers	7,162	7,234
42399	Other Miscellaneous Durable Goods Merchant Wholesalers	8,816	9,054
42432	Men's and Boy's Clothing and Furnishings Merchant Wholesalers	3,375	3,515
42433	Women's, Children's, and Infant's Clothing, and Accessories Merchant Wholesalers	6,655	6,859
42434	Footwear Merchant Wholesalers	1,435	1,498
42499	Other Miscellaneous Nondurable Goods Merchant Wholesalers	10,812	11,058
	Total Wholesalers	74,773	77,463

Source: U.S. Department of Commerce, Bureau of the Census, 2009 County Business Patterns, Number of Firms, Number of Establishments, Employment, and Annual Payroll by Enterprise Employment Size for the United States, All Industries: 2009. (available at *http://www2.census.gov/econ/susb/data/2009/us_6digitnaics_2009.xls*. Last accessed on 28 February 2012.)

In addition to the wholesalers tabulated in Table 3, the U.S. Census Bureau estimated that there were 206,072 nonemployer businesses classified in NAICS categories that could include wholesalers of children's products. As noted above, nonemployer businesses are generally very small sole proprietorships. The average receipts for the nonemployer business wholesalers were about $86,000.[3] An unknown number of nonemployer wholesalers could import children's products.

3. Retailers

Retailers who obtain all of their products from domestic manufacturers or wholesalers will not be directly impacted by the final rule because the manufacturers or wholesalers would be responsible for the testing and certification of the children's products. However, there are some retailers who manufacture or directly import some products, and therefore, will be responsible for ensuring that these products are properly tested and certified. The number of such retailers is not known. Table 4 shows the number of retailers by NAICS code that would cover most children's products. According to SBA size standards, retailers are generally considered to be small entities if their annual sales are less than $7 million to $30 million, depending on the specific NAICS category. Because of the way in which the data were reported by the Bureau of the Census, the estimates of the number of small firms in each category in Table 4 are based on similar, but different criteria. Although there are more than 100,000 firms that would be considered to be small businesses in these categories, it is not known how many of these firms are engaged in importing or manufacturing children's products. Many of these firms probably obtain all of their products from domestic wholesalers or manufacturers and would not be directly impacted by the final rule.

TABLE 4—NUMBER OF RETAILERS FOR SELECTED PRODUCT CATEGORIES

NAICS Code	Description	SBA size standard (millions of dollars of annual sales)	Criteria used for estimate of small firms (millions of dollars of annual sales)	Small firms	Total firms
441221	Motorcycle, ATV, and Personal Watercraft Dealers	<30	<25	4,794	4,879
4421	Furniture Stores	<19	<10	16,033	16,611
44813	Children's and Infant's Clothing Stores	<30	<25	2,057	2,074
44814	Family Clothing Stores	<25.5	<25	6,588	6,684
44815	Clothing Accessories Stores	<14	<10	2,757	2,774
44819	Other Clothing Stores	<19	<10	6,331	6,393

[3] U.S. Department of Commerce, Bureau of the Census, "Revised 2008 Nonemployer Statistics Table." Available at *http://www.census.gov/econ/nonemployer/Revised%202008%20Data%20With%202009%20Methodology%20Applied.xls* (last accessed 16 August 2011).

TABLE 4—NUMBER OF RETAILERS FOR SELECTED PRODUCT CATEGORIES—Continued

NAICS Code	Description	SBA size standard (millions of dollars of annual sales)	Criteria used for estimate of small firms (millions of dollars of annual sales)	Small firms	Total firms
4482103	Children's & Juveniles' Shoe Stores	<25.5	<25	227	230
4482104	Family Shoe Stores	<25.5	<25	2,905	2,941
45111	Sporting Goods Stores	<14	<10	14,388	14,545
45112	Hobby, Toy, & Game Stores	<25.5	<25	4,612	4,629
452	General Merchandise Stores	<30	<25	6,873	6,971
45322	Gift, Novelty, and Souvenir Stores	<30	<25	19,297	19,339
454111	Electronic Shopping	<30	<25	11,374	11,646
454113	Mail Order Houses	<35.5	<25	5,281	5,645
4542	Vending Machine Operators	<10	<10	3,796	3,887
	Total Retailers			107.313	124,700

Source: U.S. Census Bureau, 2007 Economic Census, Retail Trade, Summary Statistics by Sales Size of Firms for the United States, Release date 11/02/2010.

In addition to the retailers tabulated in Table 4, the U.S. Census Bureau estimated that there were 324,918 nonemployer businesses classified in NAICS categories that could include retailers of children's products. As noted above, nonemployer businesses are generally very small sole proprietorships. The average receipts for the nonemployer business retailers were about $40,000.[4] An unknown number of nonemployer retailers could import children's products.

D. Compliance, Reporting, and Recordkeeping Requirements

The final rule requires that children's product manufacturers select samples required for third party periodic testing (required by 16 CFR 1107.21) using a procedure that provides a basis for inferring compliance about the population of untested products produced during the applicable periodic testing interval. The final rule requires further that the number of samples selected must be sufficient to ensure continuing compliance with all of the applicable children's product safety rules.

In order to be able to infer the compliance of the untested products, the samples selected must be representative of the untested or unselected units in the population of products produced during the periodic testing interval. In other words, children's product manufacturers must have a basis for believing that if the samples selected for periodic testing show compliance with the applicable children's product safety rules, then one can infer the compliance of the untested units in the population. In many cases, a manufacturer's knowledge of the manufacturing processes or materials used may provide such information. For example, if the manufacturer knows that a product or component is manufactured using the same grade of material as all of the other units, and the production processes are controlled such that all of the dimensions are the same as all other units, then that product or component could be considered representative of all other units produced during the interval. Information that can be used to establish that a sample is representative can come from a variety of sources, including inspection of, or tests on, incoming materials or components and inspection, tests, and process-control data generated during production.

Other methods of selecting representative samples include various probability-based sampling methods. These methods include simple random sampling, cluster sampling, systematic sampling, stratified sampling, and multistage sampling. Probability-based sampling methods allow statistical inferences to be made about the population of the products, based upon results of tests on the selected samples.

The final rule requires that manufacturers document the procedures used to select the product samples for periodic testing and note the basis for their belief that the samples are representative of the untested product produced during the periodic testing interval. The records must be maintained for five years. The records can be maintained electronically or in hardcopy. The manufacturer must make the records available for inspection by the CPSC, upon request. The records may be maintained in languages other than English, if they can be provided immediately to the CPSC, upon request, and as long as the manufacturer can translate the records into English accurately within 48 hours of a request to do so by the CPSC, or any longer period negotiated with CPSC staff.

There will be some costs associated with developing and implementing sampling procedures that will result in the selection of representative samples. Some knowledge of subjects, such as statistics and quality control techniques, may be necessary to develop the procedure. Some manufacturers may have these skills in-house; others may need to hire consultants with these skills. There also may be some ongoing costs associated with selecting the representative samples once the procedures have been developed. There will also be some costs associated with documenting the procedure and maintaining the records that are required by the final rule. However, because there are potentially a wide range of methods for selecting representative samples, and we do not know which methods will be used by firms, the magnitude of the costs cannot be estimated.

E. Federal Rules That May Duplicate, Overlap, or Conflict With the Final Rule

The final rule establishes requirements that must be met in selecting the samples of children's products for the periodic testing required by 16 CFR 1107.21. It does not duplicate, overlap, or conflict with other federal rules.

F. Steps Taken To Minimize the Adverse Economic Impact on Small Businesses

The final rule establishes a performance standard rather than

[4] U.S. Department of Commerce, Bureau of the Census, "Revised 2008 Nonemployer Statistics Table." Available at *http://www.census.gov/econ/nonemployer/Revised%202008%20Data%20With%202009%20Methodology%20Applied.xls* (last accessed 16 August 2011).

mandates a specific procedure for selecting samples for periodic testing that all manufacturers must use. Manufacturers may use any procedure they choose for selecting samples for periodic testing as long as the procedure provides a basis for inferring compliance about the entire population of products manufactured during the applicable interval. Manufacturers are also free to change the procedures that they use to select samples, if they determine that a procedure different from the one they are using would be less costly, provided that the new procedure provides a basis for inferring compliance about the population of untested products produced during the applicable period.

As discussed in the initial regulatory flexibility analysis, we considered less stringent alternatives for selecting representative samples, such as allowing manufacturers to select the samples using any procedure, provided that the procedure used would not purposively lead to the selection of samples that the manufacturer knows are more likely to comply with a standard or requirement than other samples (often referred to as "golden samples"). We reexamined these alternatives during review of the public comments submitted in response to the notice of proposed rulemaking. Such alternatives were not adopted because we generally believe that it is necessary for manufacturers to have a positive basis for believing that the samples selected for periodic testing are, in fact, representative of the entire population of units produced during the applicable periodic testing interval. Using a "not a golden sample" form of representative sampling would require manufacturers to prove a negative, which cannot be implemented or enforced. The approach does not provide a basis for knowing that the samples tested are similar to the untested units of the product. Without that basis, the testing results can indicate the compliance only of the samples actually tested and not the compliance of the untested product units. Without a means to infer compliance of the untested product units, the testing of "not a golden sample" representative samples cannot ensure continued compliance, as required by section 14(i)(2)(B)(ii) of the CPSA.

V. Paperwork Reduction Act

The final rule contains information collection requirements that are subject to public comment and review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). In a November 8, 2011, **Federal Register** notice regarding the proposed rule (76 FR 69586, 69592–93), we described the information collection and the annual reporting burden. Our estimate includes the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing each collection of information.

We invited comment on: (1) Whether the collection of information is necessary for the proper performance of the CPSC's functions, including whether the information will have practical utility; (2) the accuracy of the CPSC's estimate of the burden of the proposed collection of information, including the validity of the method and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

We received one comment on the burden estimates contained in the proposed rule.

(Comment 26)—One commenter agrees with our estimate that it might take 4 hours per product or group of products to prepare the records required by the rule to document the procedures used to select representative samples and the basis for inferring the compliance of the untested products manufactured during the period. However, the commenter states that the estimated hourly cost of $50.08 was probably low and that a more accurate estimate was $75 per hour, given the likely involvement of lawyers and other professionals. The commenter also questions the assumption that manufacturers would use the same sampling plan for similar or closely related products or product lines. The commenter states that they thought it would be much more likely that a plan would be developed and documented for each item. The commenter also states that another 4 hours would be required for each test sample selected.

(Response 26)—The hourly cost estimate of $50.08 in the proposed rule was based upon the average hourly cost for total employee compensation for all management, professional, and related workers in private industry, as reported by the Bureau of Labor Statistics as part of the "Employer Costs for Employee Compensation data series. Therefore, the cost estimate we used assumed appropriately that the work would be done by management and professional employees. Of course, the costs for any particular businesses may be higher or lower than the average. We do not believe that the commenter provided sufficient information to change our approach for estimating the hourly cost of producing the records for documenting the selection of representative samples. However, the hourly cost estimate is being updated to reflect the most recent estimate reported by the Bureau of Labor Statistics, which is $50.41, as of September 2011.

We agree with the commenter that some manufacturers may determine that they need to develop a separate sampling procedure for each children's product that they manufacture. The discussion in the notice of proposed rulemaking allowed for this possibility when it stated that in some cases, "a manufacturer might have only one product in a particular product line." 76 FR 69592. However, we believe that other manufacturers may have multiple products in their product lines and determine that the same sampling procedure may be used for groups of similar or closely related products or product lines. As stated in the notice of proposed rulemaking, we do "not have information on the number of closely related products or product lines that manufacturers offer or the average number of individual models within each set of closely related products or product lines." *Id.* Therefore, a range of possible values was used in estimating the recordkeeping burden, and the notice of proposed rulemaking invited comments from manufacturers and others to gain better insight on the potential recordkeeping burden of the proposed rule. This comment was the only one that addressed this issue. However, it did not provide sufficient information to change the assumptions we used in the notice of proposed rulemaking for estimating the recordkeeping burden.

The commenter's statement that an additional 4 hours would be required for each test sample selected appears to be a reference to the amount of time associated with the other recordkeeping requirements of the final rule on testing and labeling pertaining to product certification (16 CFR part 1107), which was published in the **Federal Register** on November 8, 2011. Those recordkeeping costs were discussed in the **Federal Register** notice associated with that rulemaking (76 FR 69537–40) and are not related to the current final rule on selecting representative samples.

The information collection requirement associated with the final rule is summarized below.

Title: Amendment to Regulation on Testing and Labeling Pertaining to Product Certification Regarding

Representative Samples for Periodic Testing of Children's Products

Description of Respondents: Manufacturers of children's products.

Description: The final rule would require records that describe how the samples for periodic testing are selected, the number of samples that will be selected, and an explanation of why the procedure described will result in the selection of representative samples, such that one can infer that the untested units produced during the periodic testing interval comply with the applicable children's product safety rules if the samples selected comply.

We estimate the burden of this collection of information as follows: Although it might take a manufacturer several hours, perhaps several days to analyze its products and manufacturing processes to determine its options for selecting representative samples (and some might need to hire consultants for this purpose), the actual documentation of the procedure and basis for inferring compliance will probably take less time.

On the assumption that because this document is required by regulation, manufacturers will make sure that the document is reviewed and edited properly, it could take an average of 4 hours to prepare this document, once the procedure that will be used is decided and the number of samples has been determined. Developing the sampling procedure and documenting it are managerial or professional functions. According to the Bureau of Labor Statistics, as of September 2011, total compensation for management, professional, and related occupations for all workers in private industry was $50.41 an hour. Therefore, the cost of creating the record documenting a procedure for selecting representative samples could be estimated to be about $202 ($50.41 × 4 hours).[5]

In developing the estimates of the recordkeeping burden associated with the testing and labeling pertaining to the certification of a children's products rule, we estimated that there were about 1.6 million children's products. However, manufacturers probably will not need to develop and document a separate sampling procedure for each product. It might be more reasonable to believe that manufacturers will be able to use the same sampling plan for similar or closely related products or product lines. Therefore, manufacturers may need to develop and document separate sampling procedures for each set of closely related children's products or children's product lines rather than each individual product. For example, a manufacturer of die-cast toy cars might offer 50 different models, but if each one is manufactured using the same manufacturing processes and the same materials, one sampling plan for all die-cast cars by this manufacturer might be sufficient. We do not have information on the number of closely related products or product lines that manufacturers offer or the average number of individual models within each set of closely related products or product lines. In some cases, a manufacturer might have only one product in a particular product line. Some large manufacturers may offer several hundred models or styles within some product lines.

A starting point to estimate the recordkeeping burden of the final rule is to assume that each product line averages 10 to 50 individual product models or styles. If each product line averages 50 individual models or styles, then a total of 32,000 individual sampling plans (1.6 million children's products ÷ 50 models or styles) would need to be developed and documented. This would require 128,000 hours (32,000 plans × 4 hours per plan) at a total cost of approximately $6.5 million (128,000 hours × $50.41 per hour). If each product line averages 10 individual models or styles, then a total of 160,000 different sampling plans (1.6 million children's products ÷ 10 models or styles) would need to be documented. This would require 640,000 hours (160,000 plans × 4 hours per plan), at a total cost of approximately $32.3 million (640,000 hours × $50.41 per hour).

Once a sampling plan is developed and documented, manufacturers will probably not incur the full cost of documenting their sampling plans in subsequent years because the same plan and documentation should be valid. However, each year, it is expected that manufacturers will retire some product lines and introduce new ones. Moreover, some manufacturers will leave the market, and other manufacturers will enter the market. Therefore, there will be some ongoing costs associated with documenting sampling plans.

We do not have data on the number of new product lines introduced annually, whether from existing manufacturers or from new manufacturers entering a market. For purposes of this analysis, we will assume that about 20 percent of the children's product lines are new each year, either because an existing manufacturer has changed an existing product line to the extent that a new sampling plan is required, introduced a new product line, or because a new manufacturer has entered the market. If this is the case, then the ongoing recordkeeping costs associated with the final rule would be 25,600 hours (128,000 hours × 0.2) to 128,000 hours (640,000 hours × 0.2) annually or approximately $1.3 million (25,600 hours × $50.41 per hour) to approximately $6.5 million (128,000 hours × $50.41 per hour) annually.

Another potential ongoing recordkeeping cost might result if manufacturers make adjustments or revisions to their sampling plans or procedures for their existing product lines. This might occur if manufacturers find that their initial procedures are difficult to implement or if they come up with more efficient methods of selecting representative samples. We do not have any information that could be used to estimate how often manufacturers will revise these plans. For purposes of this analysis, we will assume that this, too, would amount to about 20 percent of the burden estimated for the initial year, or approximately $1.3 million to $6.5 million annually.

VI. Executive Order 12988 (Preemption)

Executive Order 12988 (February 5, 1996), requires agencies to state in clear language the preemptive effect, if any, of new regulations. The final rule would be issued under the authority of the CPSA and the CPSIA. The CPSA provision on preemption appears at section 26 of the CPSA. The CPSIA provision on preemption appears at section 231 of the CPSIA. The preemptive effect of this rule would be determined in an appropriate proceeding by a court of competent jurisdiction.

VII. Effective Date

The Administrative Procedure Act (APA) generally requires that the effective date of a rule be at least 30 days after publication of a final rule. 5 U.S.C. 553(d). The Commission stated in the proposed rule, at 76 FR 69593, that a final rule would become effective on the same date as the rule on "Testing and Labeling Pertaining to Certification" because §§ 1107.21(f) and 1107.26(a)(4) on representative sampling are an amendment to that rule. Accordingly, the effective date of the final rule is February 8, 2013, and it applies to products manufactured after this date, to coincide with the effective date of 16 CFR part 1107.

[5] Bureau of Labor Statistics, Employer Costs for Employee Compensation, Table 9 (September 2011). Available at: *http://www.bls.gov/news.release/archives/ecec_12072011.htm.*

List of Subjects in 16 CFR Part 1107

Business and industry, Children, Consumer protection, Imports, Product testing and certification, Records, Record retention, Toys.

Accordingly, the Commission amends 16 CFR part 1107 as follows:

PART 1107—TESTING AND LABELING PERTAINING TO PRODUCT CERTIFICATION

■ 1. The authority citation for part 1107 continues to read as follows:

Authority: 15 U.S.C. 2063, Sec. 3, 102 Pub. L. 110–314, 122 Stat. 3016, 3017, 3022.

Subpart C—Certification of Children's Products

■ 2. Add paragraph (f) to § 1107.21 to read as follows:

§ 1107.21 Periodic testing.

* * * * *

(f) A manufacturer must select representative product samples to be submitted to the third party conformity assessment body for periodic testing. The procedure used to select representative product samples for periodic testing must provide a basis for inferring compliance about the population of untested products produced during the applicable periodic testing interval. The number of samples selected for the sampling procedure must be sufficient to ensure continuing compliance with all applicable children's product safety rules. The manufacturer must document the procedure used to select the product samples for periodic testing and the basis for inferring the compliance of the product manufactured during the periodic testing interval from the results of the tested samples.

* * * * *

■ 3. Add paragraph (a)(4) to § 1107.26 to read as follows:

§ 1107.26 Recordkeeping.

(a) * * *

(4) Records documenting the testing of representative samples, as set forth in § 1107.21(f), including the number of representative samples selected and the procedure used to select representative samples. Records also must include the basis for inferring compliance of the product manufactured during the periodic testing interval from the results of the tested samples;

* * * * *

Dated November 29, 2012.

Todd A. Stevenson,

Secretary, Consumer Product Safety Commission.

[FR Doc. 2012–29204 Filed 12–4–12; 8:45 am]

BILLING CODE 6355–01–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 203

[Docket No. FR–5679–N–01]

Federal Housing Administration: Prohibited Sources of Minimum Cash Investment Under the National Housing Act—Interpretive Rule

AGENCY: Office of the General Counsel, HUD.

ACTION: Interpretive rule.

SUMMARY: HUD is issuing this interpretive rule to clarify the scope of the provision in the National Housing Act that prohibits certain sources of a homebuyer's funds for the required minimum cash investment for single family mortgages to be insured by the Federal Housing Administration (FHA). Uncertainty has arisen as to the effect of this provision on State and local governments and their agencies' and instrumentalities' homeownership programs that provide funds for the minimum cash investment. This rule provides HUD's interpretation that this statutory provision does not remove the availability of FHA insurance for use in conjunction with State and local government programs that provide funds toward the required minimum cash investment. Although interpretive rules are exempt from public comment under the Administrative Procedure Act, HUD nevertheless invites public comment on the interpretation provided in this rule.

DATES: *Effective Date:* November 29, 2012. *Comment Due Date:* January 4, 2013.

ADDRESSES: Interested persons are invited to submit comments regarding this rule to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW., Room 10276, Washington, DC 20410–0500. Communications must refer to the above docket number and title. There are two methods for submitting public comments. All submissions must refer to the above docket number and title.

1. *Submission of Comments by Mail.* Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW., Room 10276, Washington, DC 20410–0500.

2. *Electronic Submission of Comments.* Interested persons may submit comments electronically through the Federal eRulemaking Portal at *www.regulations.gov*. HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the *www.regulations.gov* Web site can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

Note: To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the rule.

No Facsimile Comments. Facsimile (FAX) comments are not acceptable.

Public Inspection of Public Comments. All properly submitted comments and communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an appointment to review the public comments must be scheduled in advance by calling the Regulations Division at 202–708–3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Relay Service at 800–877–8339. Copies of all comments submitted are available for inspection and downloading at *www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Millicent Potts, Associate General Counsel for Insured Housing, Office of General Counsel, U.S. Department of Housing and Urban Development Room 9226, 202–708–2212. Hearing or speech impaired individuals may access these numbers via TTY by calling the toll free Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

A. The National Housing Act Prohibition on Certain Sources of Cash Investment

To qualify a mortgage for FHA mortgage insurance, section 203(b)(9)(A) of the National Housing Act (12 U.S.C. 1709(b)(9)) requires the homebuyer to

pay "in cash or equivalent on account of the property an amount equal to not less than 3.5 percent of the appraised value of the property." Some homebuyers obtain this minimum amount from sources other than their own earnings or savings; for example, a relative may give or loan them this money or some part of it. However, section 203(b)(9)(C) of the National Housing Act provides that no part of this required minimum investment may consist of funds provided by the seller of the property or any other person or entity who benefits financially from the sale of the property, or any person who is reimbursed by any such person or entity.

B. Federally Funded Homeownership Programs

Governments—Federal, State, and local—and their agencies and instrumentalities have provided assistance toward the minimum cash investment as part of homeownership programs from various public funds, including appropriated funds, operating tax revenues, taxable and tax-exempt general obligation bonds, and surplus revenues (for example, excess reserves). Federal homeownership assistance programs that have a cash investment component include HUD's Neighborhood Stabilization Program, Community Development Block Grant (CDBG) program, and HOME Investment Partnerships program, as well as the Department of Veterans Affairs Home Loan Guaranty Service and U.S. Department of Agriculture's Rural Development Housing and Community Facilities program. These Federal homeownership assistance programs have specified public purposes, such as revitalizing communities affected by foreclosures and vacancy, increasing the homeownership rate in particular geographies, making homeownership affordable to underserved populations and in high-cost markets.

For these Federal assistance programs, Congress has authorized funds to be distributed from the Treasury, often through State and local governments or their instrumentalities, for purposes of supporting homeownership programs. At the same time, section 203(b)(9)(C) of the National Housing Act raises the question whether the distribution of these same Federal funds would cause the mortgages originated on the basis of support from such funds not to qualify for FHA insurance. Reading the prohibition in section 203(b)(9)(C) to include other Federal agencies, State and local governments, or their instrumentalities disbursing government funds in accordance with the requirements of government assistance programs would place these governments and instrumentalities in an untenable position of having governmental authority to provide assistance toward the minimum cash investment on the one hand, but being unable to use FHA-insured mortgage financing on the other. To do so would also frustrate the statutory purpose of these programs and of the FHA to encourage and support homeownership.[1]

C. Other Government Funded Homeownership Assistance Programs

Another key source of homeownership assistance programs, such as assistance with closing costs, or rehabilitation, is provided by State and local governments, primarily through housing finance agencies (HFAs). According to the National Council of State Housing Finance Agencies, HFAs are generally State-chartered authorities established by State governments to help meet the affordable housing needs of State residents.[2] Although HFAs vary widely in characteristics such as their relationship to State government, most are independent entities that operate under the direction of a board of directors appointed by their respective State governors. They administer a wide range of affordable housing and community development programs.[3] Using housing bonds, low-income housing tax credits, HOME program funds, and other Federal and State resources, HFAs have crafted hundreds of housing programs, including homeownership, rental, and all types of special-needs housing. HFAs have provided affordable mortgages to 2.6 million families to buy their first homes through mortgage revenue bond programs.[4]

A recent study of HFAs found that 100 percent of the 51 HFAs surveyed said that part of their mission is "to assist low- and moderate-income residents to purchase homes and be successful homeowners."[5] A majority of those programs—in 2011, 88 percent (45 of 51) of State HFAs—include minimum cash investment as a part of advancing their mission.[6] Federally backed mortgage insurance is also a critical part of the HFAs' strategy. Of HFA loan production in 2011, 86 percent involved FHA, Veterans Administration (VA), or Rural Housing Service loan or loan insurance programs.

Many HFAs administer other State and Federal housing assistance programs such as homeless assistance, CDBG, and State housing trust funds. Local housing finance agencies operate similarly but at the county, city, or other municipal-entity level. In many cases, a local agency may be the local government itself. HFAs provide various services to assist citizens within their jurisdictions in attaining affordable housing options. These services include providing access to affordable mortgage loans for purchasing a home, counseling, money and other resources for closing costs, and assistance for any required investment in the mortgaged property. Such funds come from numerous sources. Program beneficiaries are usually low- and moderate-income individuals and families who have gone through homeownership counseling through which they receive training on money management, use of credit, and home maintenance.

D. FHA and Minimum Cash Investment Requirements

Since its enactment, the National Housing Act (NHA) has required the mortgagor to have a minimum investment in the property being purchased. For many years, the required minimum investment was 3 percent of the cost of acquisition, and is currently 3.5 percent of the home's appraised value. Prior to 2008, the statute and regulations regarding the required investment were silent, with minor exceptions, as to permissible sources of the mortgagor's required investment. However, FHA's single family mortgage credit handbook, Handbook 4155.1,[7] provided administrative guidance to approved mortgagees as to permissible sources of the funds that a homebuyer could use for the required minimum investment. HUD's policy under the handbook provisions was to permit the minimum cash investment to be financed by sources including a family

[1] In providing an overview of the Housing and Economic Recovery Act if 2008 (HERA), the Congressional Research Service in an August 19, 2008 report for Congress on HERA [RL34623] notes that HERA authorizes $4 billion for state and local governements to purchase and rehabilitate abandoned and foreclosed houisng and that this housing would be sold or rented to low- and moderate-income individuals and families. *See http://assets.opencrs.com/rpts/RL34623_20080819.pdf.*

[2] See *http://answers.usa.gov/system/self service.controller?CONFIGURATION=1000&PARTITION_ID=1&CMD=VIEW_ARTICLE&USERTYPE=1&LANGUAGE=en&COUNTRY=US&ARTICLE_ID=10182.*

[3] See *http://www.ncsha.org/about-hfas/hfa-programs.*

[4] See *http://www.ncsha.org/about-hfas.*

[5] See *http://www.chfainfo.com/documents/HFA_HEC_Report_March2012.pdf* at 1.

[6] *Id.* at 1.

[7] See *http://www.hud.gov/offices/adm/hudclips/handbooks/hsgh/4155.1/41551HSGH.pdf.*

member, the borrower's employer or labor union, a governmental entity, a charitable organization, or a close friend with a clearly defined and documented interest in the borrower. HUD's policies have always expressly prohibited the seller from financing or providing a gift of the required investment.

In the 1990s, several nonprofit entities developed an approach to funding homebuyers' cash investments that circumvented the handbook prohibition. These entities obtained charitable status from the Internal Revenue Service, and then encouraged home sellers to use their services and provided homebuyers with all or part of the required cash investment amount. After the funds were provided by the nonprofit entity to the homebuyer, the seller made a donation to the nonprofit entity of the amount of the assistance plus a fee. The donated funds were directed to subsequent homebuyers for the cash investment on their homes. The nonprofit does not conduct broad-based fundraising but instead relies on sellers and other businesses in real estate for financial support. In effect, sellers and other donors were indirectly funding the homebuyer's required minimum investment by reimbursing the nonprofit entity for each transaction.[8]

As the prevalence of channeling funds from sellers through nonprofit entities increased, FHA became concerned that this practice as applied to homebuyers with FHA-insured mortgages could result in FHA insuring riskier loans. In response, FHA published a proposed rule in 1999 to prohibit this source of the minimum cash investment.[9] Under the proposed rule, a gift of the buyer's required minimum cash investment would disqualify the loan from FHA insurance if the entity providing the gift received funds directly or indirectly from the seller of the property. However, the proposed rule expressly included funds provided by a "State or local government agency or instrumentality" in the category of permissible sources of funds that the homebuyer can apply toward the minimum investment requirement.[10] HUD withdrew the rule in January 2001 in light of widespread opposition to the rule as proposed.[11]

The direct and indirect financing of homebuyers' minimum cash investment by sellers continued to be a source of concern following the withdrawal of the proposed rule. In 2005, the Government Accountability Office (GAO) published a report on the risks raised by the reimbursement of nonprofit entities by sellers.[12] The GAO findings noted that sales prices were increased commensurately to cover the cost incurred by the seller, and thus resulted in homeowners having less actual equity in the newly acquired home.[13] The GAO report also found that the default and claim rate for homes purchased with charitable gifts where the nonprofit entity was reimbursed by the seller was much higher than in those cases where the homebuyer provided his or her own money for the required investment.[14]

Moreover, the IRS found that organizations claiming to be charities were being used to funnel money from sellers to buyers through self-serving, circular-financing arrangements, and that in a typical scheme, there is a direct correlation between the amount of the funds provided to the buyer and the payment received from the seller.[15] On May 4, 2006, the IRS issued Revenue Ruling 2006–27, which determined that organizations that indirectly provide cash investments funded by sellers to homebuyers do not qualify as tax-exempt charities.[16] In the press announcement accompanying the ruling, the IRS stated that the ruling makes clear that organizations operating seller-funded programs are not charities because they do not meet the requirements of section 501(c)(3) of the Internal Revenue Code.[17] The IRS also found that the seller pays the organization only if the sale closes, and the organization usually charges an additional fee for its services.[18]

On May 11, 2007, HUD again published a proposed rule that prohibited funds provided by the seller as a source for the minimum cash investment.[19] This provision, entitled "Restrictions on Seller Funding," proposed to prohibit cash investment amounts that consists, in whole or in part, of funds provided by any of the following parties before, during or after closing of the property sale: "(1) The seller, or any other person or entity that financially benefits from the transaction; or (2) any third party or entity * * * that is reimbursed directly or indirectly by any of the parties listed in clause (1)."[20] Once again, the May 2007 proposed rule expressly exempted funds from "a federal, state, or local government agency or instrumentality" from the category of prohibited sources for funds toward the required minimum investment.[21] HUD published its final rule on October 1, 2007.[22] On the effective date of the rule, a lawsuit challenging the rule was filed against HUD in the U.S. district court for the Eastern District of California, and in February 2008 the court set aside the final rule.[23]

The 2005 GAO report, the 2006 IRS Ruling, and the judicial invalidation of HUD's final rule eventually led to congressional action on the issue in 2008. Section 2113 of the Housing and Economic Recovery Act of 2008 (HERA), signed into law on July 30, 2008, amended the NHA with language that is identical in relevant part to the language in HUD's 2007 final rule. Section 2113 of HERA amended section 203(b)(9) of the NHA to provide that mortgages eligible for FHA insurance must "[b]e executed by a mortgagor who shall have paid in cash or its equivalent, on account of the property an amount equal to not less than 3.5 percent of the appraised value of the property or such larger amount as the Secretary may determine." Section 203(b)(9) was also amended to include a new subparagraph (9)(C), which specifies prohibited sources for a mortgagor's minimum investment. Section 203(b)(9)(C) of the NHA states:

> PROHIBITED SOURCES.—In no case shall the funds required by subparagraph (A) consist, in whole or in part, of funds provided by any of the following parties before, during, or after closing of the property sale:
>
> (i) The seller or any other person or entity that financially benefits from the transaction.
>
> (ii) Any third party or entity that is reimbursed, directly or indirectly, by any of the parties described in clause (i).

Since HERA's enactment, FHA has not replaced the regulation that was

[8] *See* IRS Ruling 2006–27, *available at http://www.irs.gov/pub/irs-drop/rr-06–27.pdf.*

[9] *See* Sources of Homeowner Downpayment, 64 FR 49956 (proposed Sept. 14, 1999).

[10] *See id.* at 49958.

[11] *See* Withdrawal of Proposed Rule on Sources of Homeowner Downpayment Pursuant to Section 203 of the National Housing Act, 66 FR 2851 (January 12, 2001).

[12] *See* United States Government Accountability Office, "Mortgage Finance—Additional Action Needed to Manage Risk of FHA-Insured Loans with Down Payment Assistance," (Nov. 2005) available at *http://www.goo.gov/new.items/d0624.pdf.*

[13] *See id.* at 25.

[14] *See id.* at 3–4.

[15] *See http://www.irs.gov/Charities-&-Non-Profits/Seller-Funded-Down-Poyment-Assistonce-Programs-Are-Not-Tox-Exempt.*

[16] *See http://www.irs.gov/pub/irs-drop/rr-06-27.pdf.*

[17] *See http://www.irs.gov/uoc/IRS-Torgets-Down-Poyment-Assistonce-Scoms;-Seller-Funded-Programs-Do-Not-Quolify-As-Tox-Exempt.*

[18] *Id.*

[19] *See* Standards for Mortgagor's Investment in Mortgaged Property, 72 FR. 27048 (proposed May 11, 2007).

[20] *See id.* at 27049.

[21] *See id.* at 27051.

[22] *See* Standards for Mortgagor's Investment in Mortgaged Property, 72 FR 56002 (final Oct. 1, 2007).

[23] *See Nehemiah Corp. of Americo v. Jockson,* 546 F. Supp. 2d 830, 848 (E.D. Cal. 2008).

vacated by the district court in February 2008. However, Mortgagee Letter 2008–23 provides notification of the statutory revisions to the cash investment requirements imposed by HERA.[24] Instead of 3 percent of the cost of acquisition, the required investment was changed by HERA to 3.5 percent of the appraised value of the property. Aside from the statement that closing costs (*i.e.*, the present allowed seller incentive of 6 percent) could not be used to meet the 3.5 percent appraised value minimum investment requirement, the Mortgagee Letter is silent regarding the source of the required cash investment by the mortgagor.

II. This Interpretive Issue

A. Conjunction of Government Housing Assistance Programs and FHA-Insured Mortgages

It is HUD's interpretation that section 203(b)(9)(C) of the NHA does not prohibit FHA from insuring mortgages originated as part of the homeownership programs of Federal, State, or local governments or their agencies or instrumentalities when such agencies or instrumentalities also directly provide funds toward the required minimum cash investment.[25] The addition of a statutory provision on prohibited sources of cash investment funds, as part of the amendments to section 203(b)(9) of the NHA enacted in HERA, was intended to preclude the abuse of the program where a seller (or other interested or related party) funded the homebuyer's cash investment after the closing by reimbursing third-party entities and added the cost of this reimbursement to the sales price of the home, thus inflating the price of the home beyond its market value. It is HUD's interpretation that the amended section 203(b)(9) does not exclude as a permissible source of cash investment, funds provided directly by Federal, State, or local governments, or their agencies or instrumentalities as part of their respective homeownership programs.

HUD finds support for this interpretation in the surrounding provisions in HERA and in the legislative history of the amendment to section 203(b)(9). First, HERA itself authorized governmental homeownership programs that include a cash investment component, and interpreting section 203(b)(9)(C) to deny FHA insurance to mortgages resulting from such programs would frustrate their statutory purpose. In section 2301 of HERA, Congress authorized the first increment of funding for the Neighborhood Stabilization Program (NSP). NSP provides funds to low- and moderate-income homebuyers for the cash investment on purchasing lender-foreclosed single family properties when the property will be the buyer's primary residence and is located in an eligible target area. NSP funds are distributed through State and local government agencies and instrumentalities. NSP funds are also used to purchase vacant or distressed properties, which may then be resold by the purchasing agency or instrumentality to low- or moderate-income buyers with funds toward the minimum cash investment. Access to FHA mortgage insurance is often essential to making such programs work.[26] Thus, an interpretation of section 203(b)(9)(C) that precludes governments and their agencies and instrumentalities government agencies from providing funding toward the minimum cash investment for an FHA-insured mortgage would undercut a central purpose of NSP and similar Federal, State, and local government programs.[27]

Second, the legislative history of the amendment to section 203(b)(9)(C) also supports HUD's interpretation that it does not exclude State and local government home ownership programs from FHA insurance eligibility. In a statement supporting the amendment to section 203(b)(9)(C), Senator Dodd explained that "this bill eliminates the seller-funded downpayment assistance program."[28] There is no indication that State and local governments or their agencies or instrumentalities were to be within the scope of the amendment. The Senate Committee Report accompanying a 2007 bill containing statutory language[29] identical to what was eventually enacted in HERA further support this interpretation. The report explained that the "section also prohibits seller-funded downpayment entities from providing any of this required cash investment."[30] It noted that "[s]ince this legislation was passed by the Committee, HUD has promulgated a regulation that also prohibits *these entities* from providing downpayment assistance funds."[31] As discussed above, the 2007 HUD rule to which the Senate Report refers expressly excluded State and local government agencies and instrumentalities from the category prohibited sources for the minimum cash investment. The report's identification of "seller-funded downpayment entities" as the targets of both HUD's proposed rule *and* of the bill indicates that the provision, which is identical to what was enacted in HERA, does not include State and local governments or their agencies or instrumentalities.

B. Scope of Interpretive Rule

Under section 203(b)(9)(A) of the NHA, the homebuyer's investment in the property must be at least 3.5 percent of its appraised value. So long as the homebuyer makes this minimum required investment from his or her own (or other approved) funds, any person, even one associated with the transaction, may contribute additional funds towards the borrower's costs without violating section 203(b)(9)(C). This interpretive rule only applies to funds that constitute all or part of the

[24] *See* Mortgagee Letter 2008–23, *available at http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_19737.pdf.*

[25] In Mortgagee Letter 94–2, FHA defined a government agency or instrumentality for purposes of section 528 of the NHA. *See http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_16755.txt.* This definition applies here. That definition provides that the entity must have been established by a governmental body or with governmental approval or under special law to serve a particular public purpose or designated as an instrumentality by law (statute or court opinion) and the majority of governing board and/or principal officers named or approved by governmental body/officials, or the government body approves all major decisions and/or expenditures, or the government body provides funds through direct appropriations/grants/loans, with related controls applicable to all activities of entity.

[26] HERA was enacted in 2008. FHA data shows that in that year, there was a dramatic increase in FHA's market share. From 2005 through 2007, FHA's market share ranged from 2.6 to 3.9% of the national mortgage market. In 2008, it rose to almost 20% of the market share. *See* "FHA-Insured Single Family Mortgage Originations and Market Share Report, 2009–Q4, *http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_16681.pdf* (last visited 7–3–2012). See also FHA's Annual Report to Congress on the Fiscal Year 2012 Financial Status of the FHA Mutual Mortgage Insurance Fund, issued November 16, 2012, which has updated information on FHA's market share, at *http://portal.hud.gov/hudportol/HUD?src=/press/press_releoses_medio_odvisories/2012/HUDNo.12-171.*

[27] *See United Savings Ass'n* v. *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (statutory provisions should be interpreted to avoid interpreting inconsistencies between provisions); *see also Babitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); *Gade* v. *Nat'l Solid Waste Monogement Ass'n*, 505 U.S. 88, 100–01 (1992).

[28] *See* 154 Cong. Rec. S6354–S6356 (July 7, 2008) *ovoilable ot http://www.gpo.gov/fdsys/pkg/CREC-2008-07-07/html/CREC-2008-07-07-pt1-PgS6354-2.htm.*

[29] *See* FHA Modernization Act of 2007, S. 2338, (2007) § 103.

[30] S. Rep. No. 110–227, at 6 (Nov.13, 2007), *ovoiloble ot http://www.gpo.gov/fdsys/pkg/CRPT-110srpt227/pdf/CRPT-110srpt227.pdf.*

[31] *Id.* (emphasis added).

3.5 percent minimum investment requirement.

C. Conclusion

Accordingly, HUD interprets NHA section 203(b)(9)'s "prohibited sources" provision in subsection (C) as not including funds provided directly by Federal, State, or local governments, or their agencies and instrumentalities in connection with their respective homeownership programs.

D. Solicitation of Comment

This interpretive rule represents HUD's interpretation of section 203(b)(9)(C) and is exempt from the notice and comment requirements of the Administrative Procedure Act. *See* 5 U.S.C. 553(b)(3)(A). Nevertheless, HUD is interested in receiving feedback from the public on this interpretation, specifically with respect to clarity and scope.

Dated: November 29, 2012.

Helen R. Kanovsky,

General Counsel.

[FR Doc. 2012–29361 Filed 12–4–12; 8:45 am]

BILLING CODE 4210–67–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2012–0202; FRL–9371–6]

Clodinafop-Propargyl; Pesticide Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation reduces the established tolerance for residues of clodinafop-propargyl in or on wheat, grain. Syngenta Crop Protection, LLC requested this tolerance change under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective December 5, 2012. Objections and requests for hearings must be received on or before February 4, 2013 and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2012–0202, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), EPA West Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Mindy Ondish, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (703) 605–0723; email address: *ondish.mindy@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

B. How can I get electronic access to other related information?

You may access a frequently updated electronic version of EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's e-CFR site at *http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?&c=ecfr&tpl=/ecfrbrowse/Title40/40tab_02.tpl.* To access the OCSPP test guidelines referenced in this document electronically, please go to *http://www.epa.gov/ocspp* and select "Test Methods and Guidelines."

C. How can I file an objection or hearing request?

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2012–0202 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before February 4, 2013. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2012–0202, 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.*

II. Summary of Petitioned-for Tolerance

In the **Federal Register** of October 17, 2012 (77 FR 63782) (FRL–9366–2), EPA issued a document pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 1F7955) by Syngenta Crop Protection, LLC, P.O. Box 18300, Greensboro, NC 27419–8300. The petition requested that 40 CFR 180.559 be amended by lowering the established tolerance for residues of the herbicide clodinafop-propargyl in or on wheat, grain from 0.1 to 0.02 parts per million (ppm). That document referenced a summary of the petition prepared by Syngenta Crop Protection, LLC, the registrant, which is available in the docket, *http://www.regulations.gov.* Comments were received on the notice of filing. EPA's response to these comments is discussed in Unit IV.C. Finally, EPA is revising the tolerance

expression for the reasons explained in Unit IV.D.

III. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is "safe." Section 408(b)(2)(A)(ii) of FFDCA defines "safe" to mean that "there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information." This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to "ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue * * *."

Consistent with FFDCA section 408(b)(2)(D), and the factors specified in FFDCA section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for clodinafop-propargyl including exposure resulting from the tolerance established by this action. EPA's assessment of exposures and risks associated with clodinafop-propargyl follows.

In the **Federal Register** of June 22, 2000 (65 FR 38765) (FRL–6590–7), EPA published a final rule establishing tolerances for combined residues of the herbicide clodinafop-propargyl and its acid metabolite in or on wheat (forage, grain, hay, and straw) based upon EPA's conclusion that aggregate exposure to clodinafop-propargyl is safe for the general population, including infants and children. Since 2000, there have been no additional tolerance actions for clodinafop-propargyl.

This action decreases the established tolerance for residues of clodinafop-propargyl in or on the commodity wheat, grain from 0.1 to 0.02 ppm, based upon a change to an enforcement method (Method MS 247) with a lower limit of quantitation (LOQ) on wheat grain than the current methods. Since an established tolerance is being reduced, which is expected to have no significant exposure effect, no new dietary exposure assessment, drinking water exposure assessment, or non-dietary exposure assessment was conducted.

Except as supplemented by the information described in this unit, EPA is relying on the safety finding in the 2000 rulemaking and the risk assessment underlying that action in amending the tolerance for wheat grain. Further information regarding the safety finding for the last rulemaking can be found in the **Federal Register** of June 22, 2000, at *http://www.epa.gov/fedrgstr/EPA-PEST/2000/June/Day-22/p15715.htm*. Although significant new data have been received since the 2000 rulemaking, as discussed in this unit, these data do not indicate that risk from exposure to clodinafop-propargyl were understated. To the contrary, these new data suggest that EPA's prior risk assessment overstated clodinafop-propargyl risks. Further information about EPA's risk assessment and determination of safety for this action can be found at *http://www.regulations.gov* in document "Clodinafop-propargyl. Human Health Risk Assessment for Clodinafop-propargyl to Reduce the Established Tolerance on Wheat Grain" in docket ID number EPA–HQ–OPP–2012–0202.

For the 2000 rulemaking, the toxicity database for clodinafop-propargyl was considered incomplete. Acute neurotoxicity, subchronic neurotoxicity, developmental neurotoxicity, and *in vitro* cytogenetic studies were required. The absence of these studies, along with quantitative and qualitative evidence of increased susceptibility, and evidence of potential endocrine disruption, led EPA to retain an additional safety factor for the protection of infants and children as provided by FFDCA section 408(b)(2)(C) (i.e., 10X for acute risk for females 13+ and chronic risk; 3X for acute risk for infants and children). With the exception of the cytogenetic studies, the required studies have since been submitted and found acceptable. Studies were submitted which removed mutagenicity concerns and thus the cytogenetic studies were no longer required.

In all likelihood, the submission of these data will lead EPA to remove the additional safety factor for the protection of infants and children when it formally revises the clodinafop-propargyl risk assessment. The absence of these data was the primary reason for retaining that additional factor. Currently, there is a data gap for an immunotoxicity study. In 2007 changes to 40 CFR part 158 imposed new data requirements for immunotoxicity testing (OPPTS Guideline 870.7800) for pesticide registration. This study has not been submitted for clodinafop-propargyl. The absence of this study is unlikely to result in retention of an additional safety factor. EPA has only retained an additional safety factor when there is a data gap for immunotoxicity where the database shows clear evidence of immunotoxicity and immunotoxic effects were seen at the LOAEL that defined the point of departure (POD). For clodinafop-propargyl, there is evidence in the current toxicological database that clodinafop-propargyl may perturb immune function but this evidence is not strong and it did not affect the choice of the POD. In the subchronic oral toxicity study in rats, treatment-related effects were observed (37% decrease in thymus weight and increased thymic atrophy). Thymus effects were observed only in males at the highest treatment-dose (71 mg/kg/day), and were fully reversed after a 4-week recovery period. No thymus effects were observed in the chronic toxicity/carcinogenicity study in rats. No other indicators of structural immunotoxicity were observed in the current database. While an immunotoxicity study is required to complete the database, the absence of this study is not expected to alter the aRfD or cRfD for clodinafop-propargyl. Hence, by relying on the 2000 risk assessment and the additional safety factors retained in that assessment, EPA has taken a conservative approach that is likely to overstate the estimated risk of clodinafop-propargyl.

The EPA has determined that the results of the neurotoxicity studies adequately elucidate the hazard but do not affect EPA's derivation of clodinafop-propargyl's acute reference dose (aRfD) or chronic reference dose (cRfD). The NOAELs for adverse effects seen in the neurotoxicity studies are well above the NOAELs in the studies used as PODs. Thus, the PODs used in the risk assessment for the 2000 rulemaking for clodinafop-propargyl, as well as the aRfD and the cRfD derived from those PODs, are protective of all effects, including neurotoxicity, observed in the neurotoxicity studies.

Previously, EPA considered clodinafop-propargyl as likely to be carcinogenic to humans based on increased incidences of prostate tumors in male rats, ovarian adenomas in female rats, liver tumors in male and female mice, and blood vessel tumors in female mice and estimated cancer risk using a linear (non-threshold) approach. Since that time, additional data have been submitted, including a re-evaluation of the proliferative lesions in the rat ovary and prostate as well as

mode of action data for mouse liver tumors. In 2006, EPA revised its cancer determination on clodinafop-propargyl concluding that the evidence was no greater than suggestive of carcinogenic potential and thus did not support the finding that clodinafop-propargyl was likely to be carcinogenic to humans. That conclusion was based on the following:

1. Prostate tumors (driven mainly by adenomas) were seen in one sex (male) of one species (rat) at the high dose only.

2. There is no mutagenicity concern for clodinafop-propargyl.

3. The weight-of-evidence supports activation of peroxisome proliferator-activated receptor alpha (PPAR") as the mode of action for clodinafop-induced hepatocarcinogenesis in mice. While the PPAR mode of action for liver tumors in mice is theoretically plausible in humans, hepatocarcinogenesis by this mode of action is quantitatively implausible and unlikely to take place in humans based on quantitative species differences in PPAR" activation and toxicokinetics.

4. Ovarian tumors in the rat and vascular tumors in the mouse were not considered to be treatment-related in the Second Report of the Cancer Assessment Review Committee.

Given this limited evidence of carcinogenic effects in animals or effects unlikely to be relevant to humans, the use of a linear (non-threshold) approach for assessing cancer risk is no longer appropriate. Instead, EPA has determined that the chronic threshold-based risk assessment (i.e., the cRfD approach) will be protective of any cancer risk.

Based upon the 2000 rulemaking and the other information discussed in this unit, EPA concludes that there is a reasonable certainty that no harm will result to the general population and to infants and children from aggregate exposure to clodinafop residues. EPA relies upon those risk assessments and the findings made in the **Federal Register** document in support of this action.

IV. Other Considerations

A. Analytical Enforcement Methodology

An analytical method using high-performance liquid chromatography with tandem mass spectrometry detection (LC/MS/MS), Enviro-Test Laboratories Report No. MS 247 (Method MS 247) was submitted in support of reducing the tolerance for wheat grain.

This LC/MS/MS method has a lower LOQ than the current HPLC–UV methods (REM 138.01 for clodinafop-propargyl and REM 138.10 for clodinafop) for the determination of residues of clodinafop-propargyl (CGA–184927) and its metabolite clodinafop (CGA–193469) in or on wheat commodities. Method MS 247 was adequately validated using fortified samples of wheat grain, forage, and straw.

The current enforcement methods (REM 138.01 for clodinafop-propargyl and REM 138.10 for clodinafop) can serve as confirmatory methods for Method MS 247 on wheat grain since they use a different detection system. Therefore, the LC/MS/MS Method MS 247 is adequate as an enforcement analytical method for determination of residues of clodinafop-propargyl and its metabolite clodinafop in wheat grain at 0.02 ppm (0.01 ppm for each analyte). The methods referenced in this unit may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; email address: *residuemethods@epa.gov*.

B. International Residue Limits

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international maximum residue limits (MRLs) established by the Codex Alimentarius Commission (Codex), as required by FFDCA section 408(b)(4). The Codex Alimentarius is a joint United Nations Food and Agriculture Organization/World Health Organization food standards program, and it is recognized as an international food safety standards-setting organization in trade agreements to which the United States is a party. EPA may establish a tolerance that is different from a Codex MRL; however, FFDCA section 408(b)(4) requires that EPA explain the reasons for departing from the Codex level.

The Codex has not established MRLs for clodinafop-propargyl in or on any commodities.

C. Response to Comments

EPA received an anonymous comment in response to the Notice of Filing that objected to the proposed tolerance petition. The commenter stated that the objection was to the "Syngenta application to increase [the tolerance] from .01 to .02 ppm". Because this action is to decrease the tolerance from 0.1 to 0.02 ppm, it is assumed that the commenter misinterpreted the proposed petition and would have no objections otherwise. The commenter made additional comments proposing to eliminate tolerances and pesticides altogether. The Agency understands the commenter's concerns and recognizes that some individuals believe that certain pesticide chemicals should not be permitted in our food. However, the existing legal framework provided by section 408 of the Federal Food, Drug and Cosmetic Act (FFDCA) states that tolerances may be set when persons seeking such tolerances or exemptions have demonstrated that the pesticide meets the safety standard imposed by that statute. When new or amended tolerances are requested for residues of a pesticide in food or feed, the Agency, as is required by section 408 of the FFDCA, estimates the risk of the potential exposure to these residues. The Agency has concluded after this assessment that there is a reasonable certainty that no harm will result from aggregate human exposure to clodinafop-propargyl.

EPA received a second anonymous comment in response to the Notice of Filing which urged that regulations in general be stopped because they are killing small businesses. This comment is considered irrelevant to this action because the safety standard for approving tolerances under section 408 of FFDCA focuses on potential harm to human health and does not permit consideration of effects on any type of businesses.

D. Revisions to Petitioned-for Tolerances

Finally, the EPA is revising the tolerance expression to:

1. Clarify that, as provided in FFDCA section 408(a)(3), the tolerance covers metabolites and degradates of clodinafop-propargyl not specifically mentioned; and

2. Clarify that compliance with the specified tolerance levels is to be determined by measuring only the specific compounds mentioned in the tolerance expression.

V. Conclusion

Therefore, the established tolerance for residues of clodinafop-propargyl in or on wheat, grain is reduced from 0.1 to 0.02 ppm.

VI. Statutory and Executive Order Reviews

This final rule establishes tolerances under FFDCA section 408(d) in response to a petition submitted to the Agency. The Office of Management and

Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled "Regulatory Planning and Review" (58 FR 51735, October 4, 1993). Because this final rule has been exempted from review under Executive Order 12866, this final rule is not subject to Executive Order 13211, entitled "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), nor does it require any special considerations under Executive Order 12898, entitled "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations" (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under FFDCA section 408(d), such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), do not apply.

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 9, 2000) do not apply to this final rule. In addition, this final rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1501 *et seq.*).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA) (15 U.S.C. 272 note).

VII. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: November 27, 2012.

G. Jeffrey Herndon,

Acting Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. In § 180.559, in paragraph (a), revise the introductory text; and in the table, revise the entry for "Wheat, grain" to read as follows:

§ 180.559 Clodinafop-propargyl; tolerances for residues.

(a) *General.* Tolerances are established for clodinafop-propargyl, including its metabolites and degradates, in or on the commodities in the following table. Compliance with the tolerance levels specified in the following table is to be determined by measuring only clodinafop-propargyl [(2*R*)-2-[4-[(5-chloro-3-fluoro-2-pyridinyl)oxy]phenoxy]propanoic acid, 2-propynyl ester] and its metabolite clodinafop [(2*R*)-2-[4-[(5-chloro-3-fluoro-2-pyridinyl)oxy]phenoxy]propanoic acid].

Commodity	Parts per million
* * * * *	
Wheat, grain	0.02
* * * * *	

* * * * *

[FR Doc. 2012–29248 Filed 12–4–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2010–0458; FRL–9370–8]

Picoxystrobin; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of picoxystrobin in or on multiple commodities which are identified and discussed later in this document. E.I. du Pont de Nemours & Company requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective December 5, 2012. Objections and requests for hearings must be received on or before February 4, 2013, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2010–0458, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), EPA West Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Grant Rowland, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (703) 347–0254; email address: *rowland.grant@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather

provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

B. How can I get electronic access to other related information?

You may access a frequently updated electronic version of EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's e-CFR site at *http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?&c=ecfr&tpl=/ecfrbrowse/Title40/40tab_02.tpl.*

C. How can I file an objection or hearing request?

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2010–0458 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before February 4, 2013. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2010–0458, 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 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.*

II. Summary of Petitioned-for Tolerance

In the **Federal Register** of June 23, 2010 (75 FR 35801) (FRL–8831–3), EPA issued a notice pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 0F7722) by E.I. du Pont de Nemours & Company 1007 Market Street, Wilmington, DE 19898, proposed to establish tolerances in 40 CFR part 180 for residues of the fungicide picoxystrobin, in or on the cereal grains crop group (crop group 15) except rice at 0.2 parts per million(ppm); the cereal forage and fodder crop group (crop group 16) except rice at 13.0 ppm; cereal grain aspirated grain fractions at 4.5 ppm; cereal grain oil at 1.5 ppm; the dry legume vegetables crop subgroup (crop group 6, subgroup C) except soybean at 0.1 ppm; the legume vegetable foliage crop group (crop group 7) at 18.0 ppm; soybean seed at 0.05 ppm; soybean forage at 0.8 ppm; soybean hay at 2.5 ppm; soybean aspirated grain fractions at 3.2 ppm; soybean hulls at 10.0 ppm; soybean oil at 0.05 ppm; canola seed at 0.05 ppm; meat and meat byproducts except liver of cattle, goat, hog, horse, and sheep at 0.01 ppm; fat of cattle, goat, hog, horse, and sheep at 0.05 ppm; liver of cattle, goat, hog, horse, and sheep at 0.8 ppm; meat, meat byproducts, fat, and eggs of poultry at 0.01 ppm; milk at 0.01 ppm, and cream, at 0.03 ppm. That notice referenced a summary of the petition prepared by E.I. du Pont de Nemours & Company, the registrant, which is available in the docket, *http://www.regulations.gov.* There were no comments received in response to the notice of filing.

Based upon review of the data supporting the petition, EPA has revised the proposed tolerance levels for several commodities. The reasons for these changes are explained in Unit IV.C.

III. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is "safe." Section 408(b)(2)(A)(ii) of FFDCA defines "safe" to mean that "there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information." This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to "ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue * * *."

Consistent with FFDCA section 408(b)(2)(D), and the factors specified in FFDCA section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for picoxystrobin, including exposure resulting from the tolerances established by this action. EPA's assessment of exposures and risks associated with picoxystrobin follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

The most consistently observed effects of picoxystrobin exposure across species, genders, and treatment durations were decreased body weight, body weight gain and food consumption, and diarrhea. The effects on body weight and food consumption were consistent with the commonly observed findings for compounds which disrupt mitochondria respiration system and the resulting disruption of energy production. Similar to some other strobilurins, picoxystrobin causes intestinal disturbance as indicated by increased incidence of diarrhea or duodenum mucosal thickening. These intestinal effects appeared to be related to the irritating action on the mucus membranes as demonstrated by the severe eye irritation effect seen in the primary eye irritation study on picoxystrobin.

Picoxystrobin caused changes in behavioral effects in both the acute and subchronic neurotoxicity studies with no neuropathological findings. The effects observed with acute exposure

were transient (i.e. lasted for a day) and consisted of low arousal and decreased motor activities in males and decreased rearing in females, and, with subchronic exposure, included decreased male forelimb grip and increased female hindlimb splay. In the absence of any neuropathological findings, the behavioral effects were attributed to general malaise (probably related to energy production perturbations) as evidenced by the associated decreased body weight and body weight gain.

In the rat and rabbit developmental toxicity studies, developmental toxicity was expressed as skeletal variations at doses causing maternal toxicity (i.e. diarrhea, decreased body weight, body weight gain, food consumption, and clinical signs of toxicity). In the reproduction study, parental/systemic toxicity manifested as decreased body weight and body weight gain in both the parents and offspring; no reproductive toxicity was seen.

Picoxystrobin induced a treatment-related increase in testicular interstitial cell benign tumors only in the high dose male rats. No tumors were seen in females; no treatment related-increase in any type of tumor incidence was seen in male and female mice at doses that were considered to be adequate for the assessment of carcinogenicity of picoxystrobin. There is no mutagenic concern. Based on these data, EPA has concluded that quantification of cancer risk based on a non-linear approach (i.e., reference dose (RfD) will adequately account for all chronic toxicity, including carcinogenicity, that which could result from exposure to picoxystrobin. Specific information on the studies received and the nature of the adverse effects caused by picoxystrobin as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* in document, "Picoxystrobin: Human Health Risk Assessment for Proposed Uses on Canola, Cereal Grains Except Rice, Dried Shelled Peas and Beans, and Soybeans." at pages 17–22 in docket ID number EPA–HQ–OPP–2010–0458.

B. Toxicological Points of Departure/Levels of Concern

Once a pesticide's toxicological profile is determined, EPA identifies toxicological points of departure (POD) and levels of concern to use in evaluating the risk posed by human exposure to the pesticide. For hazards that have a threshold below which there is no appreciable risk, the toxicological POD is used as the basis for derivation of reference values for risk assessment. PODs are developed based on a careful analysis of the doses in each toxicological study to determine the dose at which no adverse effects are observed (the NOAEL) and the lowest dose at which adverse effects of concern are identified (the LOAEL). Uncertainty/safety factors are used in conjunction with the POD to calculate a safe exposure level—generally referred to as a population-adjusted dose (PAD) or a reference dose (RfD)—and a safe margin of exposure (MOE). For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk. Thus, the Agency estimates risk in terms of the probability of an occurrence of the adverse effect expected in a lifetime. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, see *http://www.epa.gov/pesticides/factsheets/riskassess.htm.* A summary of the toxicological endpoints for picoxystrobin used for human risk assessment is shown in Table 1 of this unit.

TABLE 1—SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR PICOXYSTROBIN FOR USE IN HUMAN HEALTH RISK ASSESSMENT

Exposure/scenario	Point of departure and uncertainty/safety factors	RfD, PAD, LOC for risk assessment	Study and toxicological effects
Acute dietary (Females 13–49 years of age).	There were no appropriate toxicological effects attributable to a single exposure (dose) observed in available toxicity studies. Therefore, a dose and endpoint were not identified for this risk assessment.		
Acute dietary (General population including infants and children).	LOAEL = 200 mg/kg/day UF_A = 10x UF_H = 10x FQPA SF = 10x	aRfD = 0.2 mg/kg/day aPAD = 0.2 mg/kg/day	Acute Neurotoxicity—Rat LOAEL = 200 mg/kg/day based on low arousal and decreased motor activities in males, decreased rearing in females, in addition to decreased body-weight gain and food consumption in both sexes on Day 1.
Chronic dietary (All populations)	NOAEL= 4.6 mg/kg/day UF_A = 10x UF_H = 10x FQPA SF = 1x	cRfD = 0.046 mg/kg/day cPAD = 0.046 mg/kg/day	Chronic Toxicity—Dog LOAEL = 15.7 mg/kg/day based on decreased body weights, weight gains, and food consumption in both sexes.
Cancer (Oral, dermal, inhalation)	Classification: "Suggestive evidence of Carcinogenic Potential" based on tumors in one species and one sex: A treatment-related increase in testicular interstitial cell benign tumors in high dose male rats. Quantification of cancer is based on a non-linear (i.e. RfD) approach.		

FQPA SF = Food Quality Protection Act Safety Factor. LOAEL = lowest-observed-adverse-effect-level. LOC = level of concern mg/kg/day = milligram/kilogram/day. NOAEL = no-observed-adverse-effect-level. PAD = population adjusted dose (a = acute, c = chronic). RfD = reference dose. UF = uncertainty factor. UF_A = extrapolation from animal to human (interspecies). UF_H = potential variation in sensitivity among members of the human population (intraspecies).

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to picoxystrobin, EPA considered exposure under the petitioned-for tolerances. EPA assessed dietary exposures from picoxystrobin in food as follows:

i. *Acute exposure.* Quantitative acute dietary exposure and risk assessments are performed for a food-use pesticide, if a toxicological study has indicated the possibility of an effect of concern

occurring as a result of a 1-day or single exposure.

Such effects were identified for picoxystrobin. In estimating acute dietary exposure for the general population, including infants and children, EPA used food consumption information from the U.S. Department of Agriculture (USDA) National Health and Nutrition Examination Survey, What We Eat in America, (NHANES/WWEIA). As to residue levels in food, EPA's assumption of this dietary assessment included total highest field trial total residues (parent and metabolite) for all proposed crops. In addition, 100 percent crop treated (PCT) was assumed. Dietary Exposure Evaluation Model (DEEM) version 7.81 default processing factors were assumed except for where tolerances were established for processed commodities or when processing studies showed no concentration. A separate tolerance was set for wheat bran, wheat germ, barley bran and corn oil. Tolerance levels were used for livestock commodities.

ii. *Chronic exposure.* In conducting the chronic dietary exposure assessment EPA used the food consumption data from the USDA 1994–1996 and 1998 Continuing Survey of Food Intake by Individuals (CSFII). As to residue levels in food, EPA used total highest average field trial total residues (parent and metabolite) for all proposed crops. In addition, 100 PCT was assumed. DEEM version 7.81 default processing factors were assumed except for where tolerances were established for processed commodities. Tolerance levels were used for livestock commodities.

iii. *Cancer.* EPA determines whether quantitative cancer exposure and risk assessments are appropriate for a food-use pesticide based on the weight of the evidence from cancer studies and other relevant data. Cancer risk is quantified using a linear or nonlinear approach. If sufficient information on the carcinogenic mode of action is available, a threshold or nonlinear approach is used and a cancer RfD is calculated based on an earlier noncancer key event. If carcinogenic mode of action data is not available, or if the mode of action data determines a mutagenic mode of action, a default linear cancer slope factor approach is utilized. Based on the data summarized in Unit III.A., EPA has concluded that a nonlinear RfD approach is appropriate for assessing cancer risk for picoxystrobin. Cancer risk was assessed using the same exposure estimates as discussed in Unit III.C.1.ii., *chronic exposure.*

iv. *Anticipated residue and percent crop treated (PCT) information.* Section 408(b)(2)(E) of FFDCA authorizes EPA to use available data and information on the anticipated residue levels of pesticide residues in food and the actual levels of pesticide residues that have been measured in food. If EPA relies on such information, EPA must require pursuant to FFDCA section 408(f)(1) that data be provided 5 years after the tolerance is established, modified, or left in effect, demonstrating that the levels in food are not above the levels anticipated. For the present action, EPA will issue such data call-ins as are required by FFDCA section 408(b)(2)(E) and authorized under FFDCA section 408(f)(1). Data will be required to be submitted no later than 5 years from the date of issuance of these tolerances.

2. *Dietary exposure from drinking water.* The Agency used screening level water exposure models in the dietary exposure analysis and risk assessment for picoxystrobin in drinking water. These simulation models take into account data on the physical, chemical, and fate/transport characteristics of picoxystrobin. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at *http://www.epa.gov/oppefed1/models/water/index.htm.*

The drinking water assessment used a total toxic residue approach to include parent and the major environmental degradates: Compound 2, Compound 3, Compound 7, and Compound 8. Based on the Pesticide Root Zone Model/Exposure Analysis Modeling System and Screening Concentration in Ground Water models, the estimated drinking water concentrations of picoxystrobin for:

- Acute exposures are estimated to be 7.95 parts per billion (ppb) for surface water and 0.041 ppb for ground water.
- Chronic exposures for non-cancer assessments are estimated to be 2.41 ppb for surface water and 0.041 ppb for ground water.

Modeled estimates of drinking water concentrations were directly entered into the dietary exposure model. For acute dietary risk assessment, the water concentration value of 7.95 ppb was used to assess the contribution to drinking water. For chronic dietary risk assessment, the water concentration of value 2.41 ppb was used to assess the contribution to drinking water.

3. *From non-dietary exposure.* The term "residential exposure" is used in this document to refer to non-occupational, non-dietary exposure (e.g., for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets). Picoxystrobin is not registered for any specific use patterns that would result in residential exposure.

4. *Cumulative effects from substances with a common mechanism of toxicity.* Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider "available information" concerning the cumulative effects of a particular pesticide's residues and "other substances that have a common mechanism of toxicity."

EPA has not found picoxystrobin to share a common mechanism of toxicity with any other substances, and picoxystrobin does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that picoxystrobin does not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's Web site at *http://www.epa.gov/pesticides/cumulative.*

D. Safety Factor for Infants and Children

1. *In general.* Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold (10X) margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the FQPA Safety Factor (SF). In applying this provision, EPA either retains the default value of 10X, or uses a different additional safety factor when reliable data available to EPA support the choice of a different factor.

2. *Prenatal and postnatal sensitivity.* The prenatal and postnatal toxicity studies include rat and rabbit prenatal development studies, in addition to reproduction and fertility effects studies in rats. No evidence of increased qualitative or quantitative susceptibility/sensitivity was seen in any of these studies.

3. *Conclusion.* EPA has determined that reliable data show the safety of infants and children would be adequately protected if the FQPA Safety factor were reduced to 1X for chronic dietary exposure. For acute dietary exposures for the general population, including infants and children where the acute neurotoxicity is study used as an endpoint for risk assessment, EPA is

retaining a 10X FQPA safety factor. That decision is based on the following findings:

i. Although all required toxicity studies for picoxystrobin have been submitted, the acute neurotoxicity study used for acute dietary risk assessment did not demonstrate a NOAEL, and a LOAEL was used as an endpoint. Therefore, the 10X FQPA safety factor was retained for use of a LOAEL to extrapolate a NOAEL.

ii. There is no indication that picoxystrobin is a neurotoxic chemical and there is no need for a developmental neurotoxicity study or additional UFs to account for neurotoxicity.

iii. There is no evidence that picoxystrobin results in increased susceptibility in *in utero* rats or rabbits in the prenatal developmental studies or in young rats in the 2-generation reproduction study.

iv. There are no residual uncertainties identified in the exposure databases. The dietary food exposure assessments were performed based on 100 PCT, total highest field trial total residues for acute exposures, total highest average field trial total residues for chronic exposures, and tolerance levels for livestock commodities. EPA made conservative (protective) assumptions in the ground and surface water modeling used to assess exposure to picoxystrobin in drinking water. These assessments will not underestimate the exposure and risks posed by picoxystrobin.

E. Aggregate Risks and Determination of Safety

EPA determines whether acute and chronic dietary pesticide exposures are safe by comparing aggregate exposure estimates to the acute PAD (aPAD) and chronic PAD (cPAD). For linear cancer risks, EPA calculates the lifetime probability of acquiring cancer given the estimated aggregate exposure. Short-, intermediate-, and chronic-term risks are evaluated by comparing the estimated aggregate food, water, and residential exposure to the appropriate PODs to ensure that an adequate MOE exists.

1. *Acute risk.* Using the exposure assumptions discussed in this unit for acute exposure, the acute dietary exposure from food and water to picoxystrobin will occupy 1.3% of the aPAD for children 1–2 years old, the population group receiving the greatest exposure.

2. *Chronic risk.* Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to picoxystrobin from food and water will utilize 2.8% of the cPAD for children 1–2 years old, the population group receiving the greatest exposure. There are no residential uses for picoxystrobin.

3. *Short- and intermediate—term risks.* Short- and intermediate— term risk aggregate exposures take into account residential exposure plus chronic exposure to food and water (considered to be a background exposure level). Because no short-term or intermediate-term adverse effects were identified, picoxystrobin is not expected to pose a short- or intermediate— term risk.

4. *Aggregate cancer risk for U.S. population.* The Agency considers the chronic aggregate risk assessment, making use of the cPAD, to be protective of any aggregate cancer risk.

5. *Determination of safety.* Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population or to infants and children from aggregate exposure to picoxystrobin residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

Adequate enforcement methodology, (a liquid chromatography tandem mass spectrometry method (LC/MS/MS), is available to enforce the tolerance expression.

The method may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; email address: *residuemethods@epa.gov.*

B. International Residue Limits

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international maximum residue limits (MRLs) established by the Codex Alimentarius Commission (Codex), as required by FFDCA section 408(b)(4). The Codex Alimentarius is a joint United Nations Food and Agriculture Organization/World Health Organization food standards program, and it is recognized as an international food safety standards-setting organization in trade agreements to which the United States is a party. EPA may establish a tolerance that is different from a Codex MRL; however, FFDCA section 408(b)(4) requires that EPA explain the reasons for departing from the Codex level. No Codex MRLs have been established for picoxystrobin.

C. Revisions to Petitioned-for Tolerances

The Agency has revised several of the commodity definitions and modified the levels for which tolerances are being established as follows: Vegetable, legume, dried shelled, except soybean, (group 6C) at 0.1 ppm is revised to pea and bean, dried shelled, except soybean, subgroup 6C at 0.06 ppm; soybean forage at 0.08 ppm is revised to soybean, forage at 1.0 ppm; soybean hay at 2.5 ppm is revised to soybean, hay at 3.0 ppm; soybean hulls at 10 ppm is revised to soybean, hulls at 0.2 ppm; canola, seed at 0.05 ppm is revised to rapeseed subgroup 20A at 0.08 ppm; barley, grain which was proposed as crop group 15 at 0.2 ppm is revised to barley, grain at 0.3 ppm. Tolerance for soybeans oil was proposed at 0.8 ppm, but EPA has determined that a tolerance is not needed. These tolerances have been revised based on the use of the *Organization for Economic Co-operation and development tolerance calculation procedure* (OECD TCP). Further, EPA determined that the proposed tolerance for crop group 15 (grain, cereal, except rice), and crop subgroup 7A group/subgroup (vegetable, foliage of legume) each be modified and established as follows: Grain, cereal, group 15, except rice and barley at 0.04 ppm; vegetable, foliage of legume, except soybean, subgroup 7A at 40.0 ppm. Crop group 16 (grain, cereal, forage and fodder except rice) however, should each be broken up and established with individual tolerances. These tolerances are revised as follows: Grain, cereal, forage, fodder, and straw, group 16, straw at 2.0 ppm; grain, cereal, forage fodder, and straw, group 16, stover at 10.0 ppm; grain, cereal, forage, fodder and straw group 16, hay at 5.0 ppm; grain, cereal forage, fodder, and straw, group 16, forage at 15.0 ppm;

Based on the corn processing study, the proposed tolerance for cereal grain oil at 1.5 ppm is revised to corn, field, refined oil at 0.07 ppm.

The proposed tolerance for cereal (wheat), aspirated grain fractions at 4.5 ppm is being established as grain, aspirated grain fractions at 10 ppm; soybean, aspirated grain fractions at 3.2 ppm is revised to grain, aspirated grain fractions at 10 ppm as well.

Though not proposed, the Agency has determined it was appropriate to establish tolerances for wheat, bran at 0.06 ppm; wheat, germ at 0.09 ppm; and barely, bran at 0.5 ppm.

EPA also revised livestock tolerances as follows, based on the calculated dietary burden to account for the transfer of residues to livestock matrices (tissues and milk): Cattle, fat from 0.05

ppm to 0.01 ppm; goat, fat from 0.05 ppm to 0.01 ppm; hog, fat from 0.05 ppm to 0.01 ppm. horse, fat from 0.5 ppm to 0.01 ppm; sheep, fat from 0.05 ppm to 0.01 ppm; horse, liver at 0.8 ppm and horse, meat byproduct, except liver at 0.01 ppm were combined as horse, meat byproduct at 0.01 ppm. Sheep, liver at 0.8 ppm and sheep, meat byproducts, except liver at 0.01 ppm were combined as sheep, meat byproducts, at 0.01 ppm. Goat, liver at 0.8 ppm and goat, meat byproducts, except liver at 0.01 ppm were combined as goat, meat byproducts at 0.01 ppm.; hog, liver at 0.8 ppm and hog, meat byproducts, except liver at 0.01 were combined as hog, meat byproducts at 0.01 ppm. Cattle, liver at 0.8 ppm and cattle, meat byproduct, except liver at 0.01 ppm were combined as cattle, meat byproducts at 0.01 ppm. Finally a tolerance was proposed on cream at 0.03 ppm; however EPA has determined that no tolerance is needed.

V. Conclusion

Therefore, tolerances are established for residues of picoxystrobin, methyl (αE)-α-(methoxymethylene)-2-[[[6-(trifluoromethyl)-2-pyridinyl]oxy]methyl]benzeneacetate in or on barley, bran at 0.5 ppm; barley, grain at 0.3 ppm; rapeseed subgroup 20A at 0.08 ppm; cattle, fat at 0.01 ppm; cattle, meat at 0.01 ppm; cattle, meat byproducts, at 0.01 ppm; corn, field, refined oil at 0.07 ppm; goat, fat at 0.01 ppm; goat, meat at 0.01 ppm; goat meat byproduct. at 0.01 ppm; grain, aspirated grain fractions at 10 ppm; grain, cereal, group 15, except rice and barely at 0.04 ppm; grain, cereal, forage, fodder, and straw, group 16, hay at 5.0 ppm; grain, cereal, forage, fodder, and straw, group 16, forage at 15 ppm; grain, cereal, forage, fodder, and straw group 16, stover at 10 ppm; grain, cereal, forage, fodder, and straw, group 16, straw at 2 ppm; hog, fat at 0.01 ppm; hog, meat at 0.01 ppm; hog, meat byproducts, at 0.01 ppm; horse, fat at 0.01 ppm; horse, meat at 0.01 ppm; horse, meat byproducts, at 0.01 ppm; milk at 0.01 ppm; pea and bean, dried shelled, except soybean, subgroup 6C at 0.06 ppm; eggs at 0.01 ppm; poultry, fat at 0.01 ppm; poultry, meat at 0.01 ppm; poultry, meat byproducts at 0.01 ppm; sheep, fat at 0.01 ppm; sheep, meat at 0.01 ppm; sheep, meat byproducts, at 0.01 ppm; soybean, forage at 1 ppm; soybean, hay at 3 ppm; soybean, hulls at 0.2 ppm; soybean, seed at 0.05 ppm; vegetable, foliage of legume, except soybean, subgroup 7A at 40 ppm; wheat, bran at 0.06 ppm; and wheat, germ at 0.09 ppm.

VI. Statutory and Executive Order Reviews

This final rule establishes tolerances under FFDCA section 408(d) in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled "Regulatory Planning and Review" (58 FR 51735, October 4, 1993). Because this final rule has been exempted from review under Executive Order 12866, this final rule is not subject to Executive Order 13211, entitled "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), nor does it require any special considerations under Executive Order 12898, entitled "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations" (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under FFDCA section 408(d), such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), do not apply.

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 9, 2000) do not apply to this final rule. In addition, this final rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1501 *et seq.*).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA) (15 U.S.C. 272 note).

VII. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: November 26, 2012.

Steven Bradbury,

Director, Office of Pesticides Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. Add § 180.669 to subpart C to read as follows:

§ 180.669 Picoxystrobin; tolerances for residues.

(a) *General.* Tolerances are established for residues of the fungicide picoxystrobin, including its metabolites and degradates, in or on the commodities listed below. Compliance with the tolerance levels specified below is to be determined by measuring only picoxystrobin, methyl (α*E*)-α-(methoxymethylene)-2-[[[6-(trifluoromethyl)-2-pyridinyl]oxy]methyl]benzeneacetate.

Commodity	Parts per million
Barley, bran	0.5
Barley, grain	0.3
Cattle, fat	0.01
Cattle, meat	0.01
Cattle, meat byproducts	0.01
Corn, field, refined oil	0.07
Eggs	0.01
Goat, fat	0.01
Goat, meat	0.01

Commodity	Parts per million
Goat, meat byproducts	0.01
Grain, aspirated grain fractions	10
Grain, cereal, forage, fodder, and straw, group 16, forage	15
Grain, cereal, forage, fodder, and straw, group 16, hay	5
Grain, cereal, forage, fodder, and straw, group 16, stover	10
Grain, cereal, forage, fodder, and straw, group 16, straw	2
Grain, cereal, group 15, except rice and barley	0.04
Hog, fat	0.01
Hog, meat	0.01
Hog, meat byproducts	0.01
Horse, fat	0.01
Horse, meat	0.01
Horse, meat byproducts	0.01
Milk	0.01
Pea and bean, dried shelled, except soybean, subgroup 6C	0.06
Poultry, fat	0.01
Poultry, meat	0.01
Poultry, meat byproducts	0.01
Rapeseed subgroup 20A	0.08
Sheep, fat	0.01
Sheep, meat	0.01
Sheep, meat byproducts	0.01
Soybean, forage	1
Soybean, hay	3
Soybean, hulls	0.2
Soybean, seed	0.05
Vegetable, foliage of legume, except soybean, subgroup 7A	40
Wheat, bran	0.06
Wheat, germ	0.09

(b) *Section 18 emergency exemptions.* [Reserved]

(c) *Tolerances with regional registrations.* [Reserved]

(d) *Indirect or inadvertent residues.* [Reserved]

[FR Doc. 2012–29250 Filed 12–4–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2011–0743; FRL–9364–7]

Dodine; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of dodine, (*N*-dodecyl guanidine acetate) in or on multiple commodities and also removes multiple, previously established tolerances which are identified and discussed later in this document. Agriphar S.A., c/o Ceres International LLC requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective December 5, 2012. Objections and requests for hearings must be received on or before February 4, 2013, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2011–0743, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), EPA West Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Tamue L. Gibson, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (703) 305–9096; email address: *gibson.tamue@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

B. How can I get electronic access to other related information?

You may access a frequently updated electronic version of EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's e-CFR site at *http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?&c=ecfr&tpl=/ecfrbrowse/Title40/40tab_02.tpl.*

C. How can I file an objection or hearing request?

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2011–0743 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before February 4, 2013. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2011–0743, 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 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.*

II. Summary of Petitioned-for Tolerance

In the **Federal Register** of August 22, 2012 (77 FR 50661) (FRL–9358–9), EPA issued a notice pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 1F7872) by Agriphar S.A.,

c/o Ceres International LLC, 1087 Heartsease Drive, West Chester, PA 19382. The petition requested that 40 CFR 180.172 be amended by establishing tolerances for residues of the fungicide dodine, (*N*-dodecyl guanidine acetate), in or on stone fruits (group 12) at 5 parts per million (ppm); tree nuts (group 14) at 0.3 ppm; and almond, hulls at 20 ppm. The petitioner also requested that the tolerances in 40 CFR 180.172 be amended by removing established tolerances for residues of dodine as follows: Cherry, sweet at 3 ppm; cherry, tart at 3 ppm; peach at 5 ppm; pecan at 0.3 ppm; and walnut at 0.3 ppm. These tolerances would be redundant if the crop group tolerances for stone fruits (group 12) and tree nuts (group 14) are established. That notice referenced a summary of the petition prepared by Agriphar S.A., c/o Ceres International LLC, the registrant, which is available in the docket, *http://www.regulations.gov*. There were no comments received in response to the notice of filing.

Based upon review of the data supporting the petition, EPA has raised the requested tolerance level for almond, hull. The reason for this change is explained in Unit IV.C.

III. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is "safe." Section 408(b)(2)(A)(ii) of FFDCA defines "safe" to mean that "there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information." This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to "ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue * * *."

Consistent with FFDCA section 408(b)(2)(D), and the factors specified in FFDCA section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for dodine, including exposure resulting from the tolerances established by this action. EPA's assessment of exposures and risks associated with dodine follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

Dodine is moderately toxic via the acute oral, dermal and inhalation routes of exposure. It is a severe eye irritant and causes severe dermal irritation; it is not a skin sensitizer. A definitive target organ has not been identified for dodine. The most common effects observed in sub-chronic and chronic studies were decreases in food consumption, body weight and/or body weight gain. Possible neurological clinical signs (excessive salivation and hunched posture/hypoactivity) were observed in chronic studies in rats and mice but were not dose-related or statistically significant. Excessive salivation in the chronic study in dogs was not consistent with a neurological adverse effect since it was seen prior to dosing and was a persistent finding throughout the study. Therefore, there is no evidence of neurotoxicity and the acute and subchronic neurotoxicity studies are not required (HASPOC, October 25, 2012). The current database does not indicate concerns for immunotoxicity and the registrant has agreed to perform an immunotoxicity study (OCSPP Guideline 870.7800). Therefore, the Food Quality Protection Act (FQPA) safety factor is reduced to 1X.

There is no evidence of increased susceptibility (quantitative or qualitative) in pups versus adults based on rat and rabbit developmental studies and the rat multi-generation reproduction study. In rat and rabbit prenatal developmental studies, there was no toxicity identified in the fetuses up to the highest dose tested (HDT). In the 2-generation reproduction study, decreases in body weight gain and food consumption were seen in pups at the same dose at which maternal toxicity (decreased body weight, body weight gain and food consumption) was observed.

There was equivocal evidence of carcinogenicity in animal carcinogenicity studies; however, a weight-of-evidence evaluation of the carcinogenic potential of dodine was performed, and based on the results it was concluded that dodine should be classified as Not Likely to be Carcinogenic to Humans based on the following:

(1) There was no evidence of tumors in male mice or in rats of either sex;

(2) In female mice, the increase in incidence of combined tumors is marginal (8.3%) compared to historical controls (8%), and there were no pre-neoplastic lesions that can be associated with the tumor response, and therefore no evidence that the high dose was associated with further progression to carcinoma;

(3) There was no evidence of genotoxicity, and therefore no mutagenicity concern; and

(4) The Structure Activity Relationship (SAR) assessment does not indicate probable carcinogenicity. Factors bearing on this weight of the evidence determination are described in "Dodine: Human Health Risk Assessment for Proposed Use Bananas and Peanuts," pages 20–21 in docket ID number EPA–HQ–OPP–2007–0221, at *http://www.regulations.gov*. In the absence of carcinogenicity concern, risk assessment using the chronic population adjusted dose will be protective for any chronic toxicity.

Specific information on the studies received and the nature of the adverse effects caused by dodine as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* in document "Dodine. Amended Human Health Risk Assessment to Support Use on Stone Fruit and Tree Nut Crops," pages 14 and 42 in docket ID number EPA–HQ–OPP–2011–0743.

B. Toxicological Points of Departure/Levels of Concern

Once a pesticide's toxicological profile is determined, EPA identifies toxicological points of departure (POD) and levels of concern to use in evaluating the risk posed by human exposure to the pesticide. For hazards that have a threshold below which there is no appreciable risk, the toxicological POD is used as the basis for derivation of reference values for risk assessment. PODs are developed based on a careful analysis of the doses in each toxicological study to determine the dose at which no adverse effects are observed (the NOAEL) and the lowest dose at which adverse effects of concern are identified (the LOAEL). Uncertainty/safety factors are used in conjunction with the POD to calculate a safe exposure level—generally referred to as

a population-adjusted dose (PAD) or a reference dose (RfD)—and a safe margin of exposure (MOE). For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk. Thus, the Agency estimates risk in terms of the probability of an occurrence of the adverse effect expected in a lifetime. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, see *http://www.epa.gov/pesticides/factsheets/riskassess.htm.*

A summary of the toxicological endpoints for dodine used for human risk assessment is shown in the following Table.

TABLE—SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR DODINE FOR USE IN DIETARY AND NON-OCCUPATIONAL HUMAN HEALTH RISK ASSESSMENTS

Exposure/scenario	Point of departure and uncertainty/safety factors	RfD, PAD, LOC for risk assessment	Study and toxicological effects
Acute dietary (Females 13–50 years of age).	N/A	N/A	No appropriate endpoint for females age 13–49.
Acute dietary (General population including infants and children).	N/A	N/A	No appropriate endpoint identified.
Chronic dietary (All populations)	NOAEL = 2 mg/kg/day UF_A = 10x UF_H = 10x FQPA SF = 1x	cRfD=0.02 mg/kg/day cPAD = 0.02 mg/kg/day.	Chronic toxicity-dog LOAEL = 10 mg/kg/day based on body weight loss in females.
Incidental oral short-term (1 to 30 days).	NOAEL = 26 mg/kg/day UF_A = 10x UF_H = 10x	Residential MOE = 100	2-Generation Reproduction-rat Offspring LOAEL = 53 mg/kg/day based on decreased body weight.
Incidental oral intermediate-term (1 to 6 months).			
Dermal short-term (1 to 30 days).	NOAEL = 200 mg/kg/day (HDT)	Residential MOE = 100	28-Day Dermal Toxicity-rat LOAEL = not identified.
Dermal intermediate-term (1 to 6 months).	UF_A = 10xUF_H = 10x.		
Inhalation short-term(1 to 30 days).	Developmental Study Maternal NOAEL = 10 mg/kg/day. IAF = 100%	Residential MOE = 100	Developmental Toxicity Study-rat Maternal LOAEL = 45 mg/kg/day based on decreased body weight gain and food consumption.
Inhalation (1 to 6 months)	UF_A = 10x UF_H = 10x.		
Cancer (oral, dermal, inhalation)	Not likely tc be carcinogenic to humans.		

FQPA SF = Food Quality Protection Act Safety Factor. HDT= Highest Dose Tested. IAF = inhalation absorption rate. LOAEL = lowest-observed-adverse-effect-level. LOC = level of concern. mg/kg/day = milligram/kilogram/day. MOE = margin of exposure. NOAEL = no-observed-adverse-effect-level. PAD = population adjusted dose (a = acute, c = chronic). RfD = reference dose. UF_A = extrapolation from animal to human (interspecies). UF_H = potential variation in sensitivity among members of the human population (intraspecies).

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to dodine, EPA considered exposure under the petitioned-for tolerances as well as all existing dodine tolerances in 40 CFR 180.172. EPA assessed dietary exposures from dodine in food as follows:

i. *Acute exposure.* Quantitative acute dietary exposure and risk assessments are performed for a food-use pesticide, if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1-day or single exposure.

No such effects were identified in the toxicological studies for dodine; therefore, a quantitative acute dietary exposure assessment is unnecessary.

ii. *Chronic exposure.* In conducting the chronic dietary exposure assessment EPA used the food consumption data from the USDA 1994–1996 and 1998 Continuing Survey of Food Intakes by Individuals (CSFII). As to residue levels in food, EPA assumed tolerance level residues for all treated crops. In terms of extent of usage, percent crop treated (PCT) information was used for apples, cherries, peaches, pears, peanuts, pecans, and strawberries. One hundred PCT was assumed for the remainder of crops.

iii. *Cancer.* Based on the data discussed in Unit III.A., EPA determined that dodine did not pose a carcinogenicity concern and that risk assessment using the chronic population adjusted dose will be protective for any chronic toxicity. Accordingly, no exposure assessment, separate from the chronic assessment, was conducted with regard to cancer risk.

iv. *PCT information.* Section 408(b)(2)(F) of FFDCA states that the Agency may use data on the actual percent of food treated for assessing chronic dietary risk only if:

- Condition a: The data used are reliable and provide a valid basis to show what percentage of the food derived from such crop is likely to contain the pesticide residue.
- Condition b: The exposure estimate does not underestimate exposure for any significant subpopulation group.
- Condition c: Data are available on pesticide use and food consumption in a particular area, the exposure estimate does not understate exposure for the population in such area.

In addition, the Agency must provide for periodic evaluation of any estimates used. To provide for the periodic evaluation of the estimate of PCT as required by FFDCA section 408(b)(2)(F), EPA may require registrants to submit data on PCT.

The Agency estimated the PCT for existing uses as follows:

The Agency used the following PCT information for the currently registered uses of dodine: 10% PCT for pecans, 5% PCT for cherries and pears, 2.5% PCT

for apples and peanuts along with 1% PCT for peaches and strawberries.

In most cases, EPA uses available data from U.S. Department of Agriculture/National Agricultural Statistics Service (USDA/NASS), proprietary market surveys, and the National Pesticide Use Database for the chemical/crop combination for the most recent 6–7 years. EPA uses an average PCT for chronic dietary risk analysis. The average PCT figure for each existing use is derived by combining available public and private market survey data for that use, averaging across all observations, and rounding to the nearest 5%, except for those situations in which the average PCT is less than 1. In those cases, 1% is used as the average PCT and 2.5% is used as the maximum PCT. EPA uses a maximum PCT for acute dietary risk analysis. The maximum PCT figure is the highest observed maximum value reported within the recent 6 years of available public and private market survey data for the existing use and rounded up to the nearest multiple of 5%.

The Agency believes that the three conditions discussed in Unit III.C.1.iv. have been met. With respect to Condition a, PCT estimates are derived from Federal and private market survey data, which are reliable and have a valid basis. The Agency is reasonably certain that the percentage of the food treated is not likely to be an underestimation. As to Conditions b and c, regional consumption information and consumption information for significant sub-populations is taken into account through EPA's computer-based model for evaluating the exposure of significant subpopulations including several regional groups. Use of this consumption information in EPA's risk assessment process ensures that EPA's exposure estimate does not understate exposure for any significant subpopulation group and allows the Agency to be reasonably certain that no regional population is exposed to residue levels higher than those estimated by the Agency. Other than the data available through national food consumption surveys, EPA does not have available reliable information on the regional consumption of food to which dodine may be applied in a particular area.

2. *Dietary exposure from drinking water.* The Agency used screening level water exposure models in the dietary exposure analysis and risk assessment for dodine in drinking water. These simulation models take into account data on the physical, chemical, and fate/transport characteristics of dodine. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at *http://www.epa.gov/oppefed1/models/water/index.htm.*

Based on the FQPA Index Reservoir Screening Tool (FIRST) and Screening Concentration in Ground Water (SCI–GROW) models, the estimated drinking water concentrations (EDWCs) of dodine for chronic exposures for non-cancer assessments are estimated to be 1.79 parts per billion (ppb) for surface water and <0.05 ppb for ground water.

Modeled estimates of drinking water concentrations were directly entered into the dietary exposure model. For chronic dietary risk assessment, the water concentration of value 1.79 ppb was used to assess the contribution to drinking water.

3. *From non-dietary exposure.* The term "residential exposure" is used in this document to refer to non-occupational, non-dietary exposure (e.g., for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets).

Dodine is not registered for any specific use patterns that would result in residential exposure. However, a closely related chemical, dodecylguanidine hydrochloride (DGH) is used as an antimicrobial in household, industrial, and commercial products having residential and occupational exposure potential. DGH is used as a bacteriostat in paints and in absorbent material in disposal diapers. Dodine and DGH have similar chemical compositions and properties and are therefore considered bio-equivalents.

Residential painters may have short term dermal and inhalation exposure as a result of using DGH treated paint. Infants and small children may have short-, intermediate-, and long-term dermal exposure as a result of wearing DGH impregnated diapers. The Agency believes that a transfer factor of 30% does not underestimate exposure in determining the amount of DGH transferred to infants from diapers based on a transfer study using dodine-treated paper exposed to extreme conditions. Inhalation exposure of infants and children is expected to be negligible. Although small children may have short-term post application oral exposure as a result of accidental ingestion of paint chips which contain DGH, the Agency does not believe that this would occur on a regular basis.

4. *Cumulative effects from substances with a common mechanism of toxicity.* Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider "available information" concerning the cumulative effects of a particular pesticide's residues and "other substances that have a common mechanism of toxicity."

EPA has not found dodine to share a common mechanism of toxicity with any other substances, and dodine does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that dodine does not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's Web site at *http://www.epa.gov/pesticides/cumulative.*

D. Safety Factor for Infants and Children

1. *In general.* Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold (10X) margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the FQPA Safety Factor (SF). In applying this provision, EPA either retains the default value of 10X, or uses a different additional safety factor when reliable data available to EPA support the choice of a different factor.

2. *Prenatal and postnatal sensitivity.* There is no evidence (quantitative or qualitative) of increased susceptibility and no residual uncertainties with regard to prenatal and/or postnatal toxicity following *in utero* exposure to rats or rabbits. In rat and rabbit prenatal developmental studies, there was no toxicity identified in the fetuses up to the HDT. In the 2-generation reproduction study, decreases in body weight gain and food consumption were seen in pups at the same dose at which maternal toxicity (decreased body weight, body weight gain and food consumption) was observed.

3. *Conclusion.* EPA has determined that reliable data show the safety of infants and children would be adequately protected if the FQPA SF were reduced to 1X. That decision is based on the following findings:

The toxicity database for dodine is mostly complete. The database contains the following toxicity studies:

i. A sub-chronic mouse toxicity study.

ii. Chronic rat, mouse, and dog toxicity studies.

iii. A 28-day dermal and dermal penetration studies (rats.

iv. Prenatal developmental studies (rats and rabbits).

v. A reproduction study in rats.

There are also acute LD_{50} studies via the oral, dermal and inhalation routes, a metabolism study, and a complete mutagenicity battery. The current database does not indicate neurotoxicity or immunotoxicity concerns. Thus, EPA has waived the acute and subchronic neurotoxicity studies. An immunotoxicity study is required pursuant to the recent amendment of EPA's data regulations to evaluate the potential of a repeated chemical exposure to produce adverse effects (i.e., suppression) on the immune system. However, because no immunotoxicity was observed in available toxicity studies. EPA has confidence that this study is unlikely to change the POD in assessing risk to infants and children.

a. There is no evidence that dodine results in increased susceptibility in *in utero* rats or rabbits in the prenatal developmental studies or in young rats in the 2-generation reproduction study.

b. There are no residual uncertainties identified in the exposure databases. The dietary food exposure assessments were performed based on Agency recommended tolerance-level residues and health protective modeling assumptions. Although PCT estimates were used for crops with existing tolerances, the use of tolerance values for residue levels will likely overestimate actual exposures. EPA made conservative (protective) assumptions in the ground and surface water modeling used to assess exposure to dodine in drinking water. EPA used similarly conservative assumptions to assess postapplication exposure of children, as well as incidental oral exposure of children and incidental oral exposure of toddlers. These assessments will not underestimate the exposure and risks posed by dodine.

E. Aggregate Risks and Determination of Safety

EPA determines whether acute and chronic dietary pesticide exposures are safe by comparing aggregate exposure estimates to the acute PAD (aPAD) and chronic PAD (cPAD). For linear cancer risks, EPA calculates the lifetime probability of acquiring cancer given the estimated aggregate exposure. Short-, intermediate-, and chronic-term risks are evaluated by comparing the estimated aggregate food, water, and residential exposure to the appropriate PODs to ensure that an adequate MOE exists.

1. *Acute risk.* An acute aggregate risk assessment takes into account acute exposure estimates from dietary consumption of food and drinking water. No adverse effect resulting from a single oral exposure was identified and no acute dietary endpoint was selected. Therefore, dodine is not expected to pose an acute risk.

2. *Chronic risk.* Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to dodine from food and water will utilize 21% of the cPAD for all infants <1 year old, the population group receiving the greatest exposure. Further, EPA has concluded that the combined long-term food, water, and dermal exposure for infants wearing diapers containing DGH treated material results in an aggregate MOE greater than 100. Because EPA's level of concern for dodine is for MOEs below 100, this MOE does not raise a risk concern.

3. *Short- and intermediate-term risk.* Short- and intermediate-term aggregate exposure takes into account short- and intermediate-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level).

Using the exposure assumptions described in this unit for short- and intermediate-term exposures, EPA has concluded the combined short- and intermediate-term combined food, water, and residential exposures aggregated result in aggregate MOEs of 4,200 for adult males handling paint and 4,500 for adult females handling paint. The exposures do not exceed the Agency's level of concern. EPA has concluded that the combined intermediate-term food, water, and dermal exposure for infants wearing diapers containing DGH treated material results in aggregate MOEs of 120 when using a 30% transfer factor. Because EPA's level of concern for dodine is for MOEs below 100, this MOE does not raise a risk concern.

4. *Aggregate cancer risk for U.S. population.* Based on the data discussed in Unit III.A., EPA concluded that dodine is not expected to pose a cancer risk to humans.

5. *Determination of safety.* Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population, or to infants and children, from aggregate exposure to dodine residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

Adequate enforcement methodology (colormetric method with spectrometric detection and various modifications is listed in FDA's Pesticide Analytical Manual (PAM), Volume II as Methods I, I(a), I(b), and I(d)) is available to enforce the tolerance expression.

B. International Residue Limits

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international maximum residue limits (MRLs) established by the Codex Alimentarius Commission (Codex), as required by FFDCA section 408(b)(4). The Codex Alimentarius is a joint United Nations Food and Agriculture Organization/World Health Organization food standards program, and it is recognized as an international food safety standards-setting organization in trade agreements to which the United States is a party. EPA may establish a tolerance that is different from a Codex MRL; however, FFDCA section 408(b)(4) requires that EPA explain the reasons for departing from the Codex level.

The Codex has not established MRLs for dodine on the tree nut crop group. The Codex has established MRLs for dodine in or on cherries, sweet and cherries, tart at 3 ppm and on peaches and nectarines at 5 ppm. The Codex MRL for cherries is not harmonized with the stone fruit crop group tolerance of 5 ppm.

Harmonization with the Codex MRL for cherries is not possible because the cherry field trial data shows that residues from the domestic, labeled use may exceed the 3 ppm Codex MRL making it impractical for limits to be harmonized based on the proposed domestic use pattern. However, the cherry data when considered as part of the data set to support a stone fruit crop group tolerance, indicate that a 5 ppm crop group tolerance would be appropriate. To harmonize to the best extent possible with Codex, the crop group tolerance will be set at 5 ppm, This at least harmonizes the Codex and U.S. tolerances for peaches and nectarines.

C. Revisions to Petitioned-for Tolerances

Based on the analysis of the residue trial data using the Organization for Economic Cooperation and Development (OECD) tolerance

calculation procedures, tolerances for almond hulls were increased.

V. Conclusion

Therefore, tolerances are established for residues of dodine, *N*-dodecylguanidine acetate, including its metabolites and degradates, in or on almond, hulls at 30 ppm; fruit, stone, crop group 12 at 5.0 ppm; and nuts, tree, crop group 14 at 0.3 ppm. This final rule removes established tolerances for cherry, sweet; cherry, tart; peach; pecan; and walnut.

VI. Statutory and Executive Order Reviews

This final rule establishes tolerances under FFDCA section 408(d) in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled "Regulatory Planning and Review" (58 FR 51735, October 4, 1993). Because this final rule has been exempted from review under Executive Order 12866, this final rule is not subject to Executive Order 13211, entitled "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), nor does it require any special considerations under Executive Order 12898, entitled "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations" (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under FFDCA section 408(d), such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), do not apply.

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 9, 2000) do not apply to this final rule. In addition, this final rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1501 *et seq.*).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA) (15 U.S.C. 272 note).

VII. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register.** This action is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: November 21, 2012.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. Amend § 180.172 as follows:

■ i. Revise the introductory text in paragraph (a).

■ ii. Remove the entries for cherry, sweet; cherry, tart; peach, pecan and walnut from the table in paragraph (a).

■ iii. Add alphabetically the entries for almond, hull; fruit, stone, crop group 12; and nuts, tree, crop group 14.

The additions and revision read as follows:

§ 180.172 Dodine; tolerances for residues.

(a) *General.* Tolerances are established for residues of the fungicide dodine, including its metabolites and degradates, in or on the commodities listed in the table below. Compliance with the tolerance levels specified in the table is to be determined by measuring only dodine, *N*-dodecylguanidine acetate; in or on the following commodities.

Commodity	Parts per million
Almond, hull	30.0
* * * * *	
Fruit, stone, crop group 12	5.0
Nuts, tree, crop group 14	0.3
* * * * *	

* * * * *

[FR Doc. 2012–29251 Filed 12–4–12; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MB Docket No. 09–52; FCC 12–127]

Policies To Promote Rural Radio Service and To Streamline Allotment and Assignment Procedures

AGENCY: Federal Communications Commission.

ACTION: Final rule; petitions for reconsideration and clarification.

SUMMARY: In this document, the Commission denied four of six Petitions for Reconsideration, Petitions for Partial Reconsideration, and Petitions for Clarification of the Second Report and Order (Second R&O) in this proceeding, granting in part and denying in part two of the petitions. The Commission clarified some of the methodology to be used in applying the new rules and procedures in the Second R&O, in particular the method of counting reception services in service gain and loss areas, to assist applicants and allotment proponents in accurately applying the new rules and procedures. The Commission also further restricted the categories of applicants and allotment proponents to whom the new rules and procedures apply, finding that equitable considerations supported such restrictions. In addition to restrictions set forth in the Second R&O, the new rules will not apply to applications and allotment proposals filed before the new rules were proposed, or to those applications and proposals that have

already been subject to Commission decisions, but that remain pending due to subsequent legal challenges.

DATES: The rules discussed in the Second Order on Reconsideration (Order) became effective on May 6, 2011 (see 76 FR 18942 (Apr. 6, 2011)) and on July 19, 2011 (see 76 FR 42575 (Jul. 19, 2011)). The Commission, in the Order, clarified some of the methods to be used in applying the new rules, and further limited the categories of parties to whom the new rules apply.

ADDRESSES: Peter Doyle or Thomas Nessinger, Federal Communications Commission, Media Bureau, Audio Division, 445 12th Street SW., Room 2–B450, Washington, DC 20445.

FOR FURTHER INFORMATION CONTACT: Peter Doyle, Chief, Media Bureau, Audio Division, (202) 418–2700 or *Peter.Doyle@fcc.gov*; Thomas Nessinger, Attorney-Advisor, Media Bureau, Audio Division, (202) 418–2700 or *Thomas.Nessinger@fcc.gov*.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Second Order on Reconsideration (Order), FCC 12–127, adopted October 11, 2012, and released October 12, 2012. The full text of the Order is available for inspection and copying during regular business hours in the FCC Reference Center, 445 12th Street SW., Room CY–A257, Portals II, Washington, DC 20554, and may also be purchased from the Commission's copy contractor, BCPI, Inc., Portals II, 445 12th Street SW., Room CY–B402, Washington, DC 20554. Customers may contact BCPI, Inc. via their Web site, *http://www.bcpi.com*, or call 1–800–378–3160. This document is available in alternative formats (computer diskette, large print, audio record, and Braille). Persons with disabilities who need documents in these formats may contact the FCC by email: *FCC504@fcc.gov* or phone: 202–418–0530 or TTY: 202–418–0432.

Synopsis of Order

1. In the Order, the Commission addressed six petitions for reconsideration, petitions for partial reconsideration, and petitions for clarification of certain procedures adopted in the Second R&O in this proceeding (76 FR 18942, April 6, 2011, FCC 11–28, 26 FCC Rcd 2556, rel. Mar. 3, 2011). These included a number of measures designed to limit the use of population as the principal metric when considering competing proposals for new radio stations, a standard that has largely favored proposals located in or near large urbanized areas, rather than those located in less well-served rural areas and smaller communities. In the Second R&O, the Commission adopted procedures to limit dispositive preferences under 47 U.S.C. 307(b) (section 307(b)) for new AM construction permits, as well as new FM allotments, in already well-served urbanized areas.

2. The Commission also adopted procedures to forestall the movement of radio service from rural areas to more urban areas absent a compelling showing of need. Among these procedures was an urbanized area service presumption (UASP), under which a proposal for new or relocated radio service that would constitute the first local transmission service at a specified community is presumed to be a proposal to serve an entire urbanized area if the community is located within the urbanized area, or if the proposal would place, or could be modified to place, a daytime principal community signal over 50 percent or more of the urbanized area. The UASP can be rebutted by a compelling showing (1) that the specified community is truly independent of the urbanized area, (2) that the community has a specific need for an outlet for local expression separate from the urbanized area and (3) that the proposed station is able to provide that outlet. The basis for such a rebuttal showing is the longstanding test first set forth in *Faye and Richard Tuck*, Memorandum Opinion and Order, 3 FCC Rcd 5374, 5376 (1988) (*Tuck*), as slightly modified in the Second R&O. The UASP applies, albeit in somewhat different forms, to applications for new AM stations, proposals for new FM allotments, and applications to change a station's community of license.

3. The Commission also limited the circumstances under which a mutually exclusive applicant for a new AM station may receive a dispositive section 307(b) preference under Priority (4), other public interest matters, of the Commission's allotment priorities. In the context of proposals for new FM allotments, raw reception population totals will receive less weight than other legitimate service-based considerations, especially service to underserved populations. The UASP also applies to applications to change a station's community of license. Additionally, with regard to such applications, the Commission mandated greater transparency in applicants' section 307(b) showings, including the submission of more detailed showings demonstrating the populations gaining and losing radio service, and the numbers of services those populations receive before and after the proposed move. The Commission also announced it would strongly disfavor any proposed community of license change that would result in the net loss of third, fourth, or fifth reception service to more than 15 percent of the population in the station's current protected contour, or loss of a second local transmission service to a community with a population of 7,500 or greater. With two exceptions, the Commission stated that the new procedures would apply to all applications or proposals pending as of the Second R&O's adoption date.

4. Most of the Petitions for Reconsideration or Partial Reconsideration (Petitions) merely repeated points from the comments filed in this proceeding that were considered and rejected in the Second R&O. On that basis, the Commission denied the Petitions filed by Friendship Broadcasting, LLC; William B. Clay; M&M Broadcasters, Ltd.; and Educational Media Foundation and the Kent Frandsen Radio Companies. The Commission granted in part and denied in part the Petitions filed by Entravision Communications Corporation (Entravision) and Radio One, Inc., et al. (Radio One Parties). The Commission did address requests for clarification of certain issues, specifically, for clarification of the methodology for calculating reception service in section 307(b) analyses under Priority (4), other public interest matters; for clarification or amendment of some of the factors used to determine whether a community is independent of an urbanized area; and for clarification of the applicability of the UASP to intra-urbanized area station relocations. The Commission also addressed the requests of petitioners M&M Broadcasters, Inc. (M&M) and Entravision to exclude certain pending community of license change applications from the new policies.

5. Although many of the arguments in the Petitions were considered and rejected in the Second R&O, the Commission found it to be in the public interest to discuss the merits of these arguments in light of its contrary determinations. While some petitioners argued that the new procedures "ignore current marketplace realities," causing radio stations to relocate to more populous areas because there is little or no money to be made in rural areas, the Commission reiterated that new stations are assigned or allotted on a demand basis, with the economic decision to locate a station in a particular community resting solely with the applicant. To the extent that changed circumstances render it an economic hardship for a station to remain in its community of license, the new

procedures allow for such a showing. The Commission again rejected the suggestion that rural residents should simply purchase any radio service they desire above "basic" broadcast service of as few as two reception services, or that section 307(b) obliges it only to assign minimal free radio service to certain Americans, based solely on where they choose to live.

6. The Radio One Parties contended that the new procedures, particularly the UASP, were arbitrary and capricious, based largely on reiterating arguments made in their comments, which were mostly confined to the context of community of license change applications. The Commission rejected the Radio One Parties' re-argument that "only" 19 percent of community of license change applications would trigger the UASP, and thus that this level of activity is insufficient to warrant remedial agency action. The Commission stated that the number of comments in the record indicating a strong interest of many radio broadcasters in relocating to more populated areas reflects the importance of the UASP as a section 307(b) licensing policy. For the reasons set forth in the Second R&O, the Commission reiterated that allowing such migration in all cases does not comport with its statutory duty under section 307(b), also noting that because the UASP is a presumption rather than a hard-and-fast rule, a licensee seeking to relocate its facilities due, for example, to changed conditions in its current community of license may rebut the presumption. Additionally, the Commission rejected the Radio One Parties' argument that the UASP constitutes an improper attempt to assume an applicant's service intentions based on the fact that the population of the proposed community of license may constitute a very small percentage of the overall coverage population. The UASP was not designed to divine an applicant's service intent, but rather to eliminate the undue, often dispositive advantage that prior section 307(b) policies conferred on proposals to serve communities located in large urbanized areas, especially in the context of selecting among mutually exclusive applications for new AM service. This advantage was based largely on the fact, supported by the record, that applicants would often designate as the community of license a community lacking local transmission service but whose population constituted a small percentage of the total audience to be served, to the detriment of mutually exclusive applicants proposing service to smaller, non-urbanized communities that might benefit more from new service.

7. The Radio One Parties again argued that the new procedures constitute a return to the policies eliminated in *The Suburban Community Policy, the Berwick Doctrine, and the De Facto Reallocation Policy,* Report and Order, 93 F.C.C.2d 436 (1993), an argument considered and rejected in the Second R&O. The Commission in that proceeding discontinued those policies based in part on application processes and procedural safeguards that now no longer exist. The Commission in the Second R&O also noted the dissimilarities between its new procedures and the processes formerly used to implement the policies that were discontinued in *Suburban Community Policy*. To the extent that similarities exist, it is because both are grounded in fulfilling the Commission's section 307(b) responsibilities. The record in this proceeding and the Commission's recent experience with broadcast auctions and community of license change proposals filed as minor modification applications—both licensing processes that post-date *Suburban Community Policy* by many years—convinced the Commission that the new procedures are necessary.

8. The Commission declined the Radio One Parties' request that it revise the eight factors, first enumerated in the *Tuck* case, that are used to evaluate the interdependence of the community of license specified by the applicant with the larger metropolitan area. It did, however, agree that some of the factors should be accorded less weight. For example, while disagreeing with the Radio One Parties' claim that the closing or consolidation of post office facilities necessarily invalidates the use of the remaining ZIP code as an indicator of community independence, the Commission agreed that the ubiquity of ZIP codes gives the presence of a dedicated ZIP code little probative significance of itself in establishing a community's independence, and thus that this factor should be given little weight. While generally declining to revise the *Tuck* factors, the Commission noted that it would provide applicants seeking to rebut the UASP wide latitude to present whatever facts they deem appropriate to its evaluation. While such showings would be scrutinized, the Commission will be receptive to presentations that may in some cases provide better and more reliable measures of community status than those set forth in *Tuck*. The Commission further emphasized that the eight *Tuck* factors are merely potential indicators of independence or interdependence, and that the burden remains on the applicant to show that the presence of such factors provides meaningful and relevant support for an "independent" community finding. The Commission also clarified that its analysis of showings rebutting the UASP will place primary emphasis on the first two prongs of the *Tuck* test, namely, the degree to which the proposed station would provide coverage to the urbanized area, and the size and proximity of the proposed community of license relative to the central city of the urbanized area.

9. The Radio One Parties also asked that the Commission clarify the methodology for measuring "reception service" for Priority (4) analyses of applications to change a station's community of license, as discussed in paragraph 39 of the Second R&O. Specifically, they ask, first, whether the contours of a non-reserved band FM station, for purposes of gain/loss analysis of a community of license change, should be calculated from the allotment coordinates at the proposed new community or from the transmitter coordinates specified in the actual proposal; second, when evaluating gain and loss areas, and in particular when determining the number of reception services to the gain and loss areas, which signal contour should be used; and third, in assessing reception service, whether "potential services," such as vacant FM allotments or granted but unbuilt construction permits, should be counted. The Commission clarified the standards for evaluating reception services in the gain and loss areas for applications to change community of license, and thus granted the Radio One Petition in part.

10. First, when determining gain and loss areas for an FM station changing its community of license, the contours should be calculated using the authorized transmitter coordinates for the current facility, and the transmitter coordinates specified for the proposed new or modified facility. This is a change from past practice, under which the staff used allotment coordinates rather than the transmitter coordinates specified in the actual proposal. That practice, however, was an artifact of former licensing procedures, under which all community of license changes for FM stations first involved a reallotment of the station's channel at the new community. Since the Commission changed its procedures in 2006 to permit the filing of community of license change proposals by minor change applications, the staff can now evaluate the actual proposed transmitter

site. It is more appropriate to do so than to use allotment coordinates that may be miles from the actual transmitter site specified in the proposal. Moreover, this new approach is consistent with Commission practice regarding AM change of community applications, for which contours are calculated from the applicants' authorized and proposed transmitter sites.

11. Second, the Commission clarified that, when determining the number of reception services in gain and loss areas, the signal level to be evaluated for non-reserved band FM stations (including noncommercial educational [NCE] stations in the non-reserved band) shall be the service contour originating at the currently authorized and proposed transmitter coordinates. The service contour shall be calculated based on the facility's authorized and proposed effective radiated power (ERP) and height above average terrain (HAAT) and shall, as described below, take into account actual terrain. This is a departure from the method previously used to determine the number of reception services in gain and loss areas, which was based on maximum class facilities for all FM stations except for full Class C and NCE stations, and did not take into account actual terrain. However, in the Second R&O, the Commission required applicants proposing to change a station's community of license to provide detailed reports of populations receiving service and the numbers of services received. This increased scrutiny of the current and proposed reception service landscape demands a realistic picture of the populations receiving various levels of service, overruling the considerations of "uniformity and certainty" in service area calculations previously cited to justify the use of maximum rather than actual facilities. *See Greenup, Kentucky and Athens, Ohio*, Memorandum Opinion and Order, 6 FCC Rcd 1493, 1494 (1991). Moreover, population counts using the new methodology do not lack certainty. Additionally, many existing stations, for technical, economic, or other reasons, may never be able to realize full class facilities. Thus, the Commission believed it more appropriate to base an evaluation of the section 307(b) merits of community of license change applications on the populations actually receiving service from stations in an area, rather than on what may be, in many cases, merely a hypothetical level of reception service. For purposes of these gain and loss area calculations, the FM service contour shall be that set forth for the class of station in 47 CFR 73.215(a)(1), and shall be calculated using actual terrain under the standard prediction methodology set forth in 47 CFR 73.313 rather than assuming uniform terrain. For NCE reserved band stations, the service contours will be determined in the same manner, using actual currently authorized and proposed facilities (including directional patterns) and actual terrain. The service contour shall be the 60 dBμ contour, calculated as set forth in 47 CFR 73.509(c)(1).

12. For an AM station, the signal level to be evaluated for purposes of gain and loss calculations in applications to change community of license shall be the predicted or measured daytime 2.0 mV/m groundwave contour, calculated from the current and proposed transmitter coordinates using authorized facilities. When calculating AM reception services in gain and loss areas under Priority (4), "reception service" should include all AM daytime reception services. In this regard, the Commission noted that the AM primary service contours are set forth in 47 CFR 73.182(d), and are the daytime 0.5 mV/m groundwave contour for communities under 2,500 population, and the daytime 2.0 mV/m groundwave contour for communities over 2,500 population. The different primary service contours take into account the higher level of environmental noise resulting from greater population density. However, using different contours for communities of different sizes will often result in complicated calculations of the number of services to certain areas lying between the daytime 2.0 mV/m and 0.5 mV/m groundwave contours of an AM station. Because 47 CFR 73.182 implicitly recognizes that all areas, of whatever population, receive primary service within an AM station's daytime 2.0 mV/m groundwave contour, for purposes of determining the number of AM services and populations in gain and loss areas, the daytime 2.0 mV/m groundwave contour should be used. Applicants for new commercial AM stations providing showings under section 307(b) should, however, continue to count populations to be served by using the primary service contours (0.5 mV/m for communities under 2,500 population, 2.0 mV/m for communities over 2,500) set forth in 47 CFR 73.182(d). An applicant for a new AM station provides a section 307(b) showing only after being directed to do so by the staff (that is, after its application has been determined to be mutually exclusive with one or more other AM proposals), and in such cases the staff typically directs the applicant to provide the populations receiving both 0.5 mV/m and 2.0 mV/m daytime service from the proposed facilities.

13. Third, for purposes of the gain and loss calculations in Priority (4) analyses, as described in paragraph 39 of the Second R&O, applicants shall count all full-service AM (including daytime-only AM),[1] FM, and NCE FM stations, including granted, but unbuilt, construction permits for new stations. However, for purposes of these calculations applicants should not count vacant FM allotments. For the reasons cited above, the increased scrutiny of reception service in gain and loss areas requires an evaluation of actual, rather than hypothetical service. Thus, the Commission will evaluate the reception service as of the time of application, and will count only those facilities that have advanced to the point of a granted construction permit. Accordingly, in conducting the remaining services analysis and making a showing as described in paragraph 39 of the Second R&O, applicants should exclude vacant FM allotments from counts of reception services. Applicants for changes to a station's community of license following release of the Order shall use these clarified procedures when determining the number of reception services to gain and loss areas, and the procedures shall also apply to pending applications. However, the Commission found that because the Radio One Petition did not constitute notice to applicants of the exact nature of any clarifications of procedure on reconsideration, it shall allow parties with pending change of community applications as of the release date of the Order the option of either amending their application showings to conform to the clarified procedures announced in the Order, or proceeding based on the

[1] For purposes of the prohibition against any facility change that would create white or gray area, however (see Second R&O, 26 FCC Rcd at 2577), daytime-only AM stations will not count as providing full-time reception service. "White" area has been defined as that which receives no full-time aural service, while "gray" area is that which receives only one full-time aural service. Full-time aural (reception) service means both day and night service. While FM service contours are consistent for all dayparts, AM service contours vary between daytime and nighttime operation, with full-time AM reception service areas being those receiving both daytime 2.0 mV/m groundwave service and nighttime interference-free (NIF) service. For most stations, the daytime 2.0 mV/m groundwave contour completely encompasses the NIF contour, thus the NIF contour constitutes the full-time service area for such stations. Where the daytime 2.0 mV/m groundwave and NIF contours neither completely encompass nor are completely encompassed by the other, due to changes in antenna pattern and/or transmitter site between daytime and nighttime operation, the full-time service area is the common area within both contours.

reception service counts in their already-filed technical showings.

14. While, as noted above, vacant FM allotments will not be included in counts of reception services, the Commission will continue to count vacant FM allotments for purposes of section 307(b) analyses under Priority (3), provision of first local transmission service. This is because only one applicant or allotment proponent can claim to provide "first" transmission service at a given community. It would be inappropriate to accept a claim by a community of license change applicant to provide first local transmission service at the new community, if a channel had already been allotted there based on a showing that the allotment would constitute the first local transmission service. Of course, should the only channel allocated to a community be re-allotted to another community, a subsequent applicant or allotment proponent could propose first local transmission service there.

15. Petitioner William Clay (Clay) sought reconsideration, arguing that the new procedures will still allow grant of most applications claiming to provide first local transmission service while primarily serving communities and populations other than the proposed community of license, because the majority of the proposed communities are not located in or near urbanized areas and are thus not subject to the UASP, and further arguing that the procedures set forth in the Second R&O still fail to guarantee service to, and an outlet for self-expression of, the nominal community of license rather than the greatest populations to be served by a proposal. Clay contended, as he did in comments, that any new procedure should grant any local service preference to the community or collection of communities most likely to benefit from a proposed new service, no matter where situated. The Commission rejected Clay's proposal as overbroad, finding that its approach struck an appropriate balance between encouraging the goals of localism, allowing an applicant to propose to provide a chosen community with an outlet for expression, and the economic reality that a broadcaster will and must also provide for the needs and interests of its entire service area, of which the designated community of license may constitute a very small percentage. The record and the Commission's experience has shown this problem to be most acute in the case of applications for new and relocated radio service in and near urbanized areas, hence the limitation of the UASP to situations in which a station is located in or will cover most of an urbanized area. The Commission found that the new procedures will promote the Commission's goals under section 307(b) in a reasonable manner. *See AT&T Corp.* v. *FCC,* 220 F.3d 607, 621 (D.C. Cir. 2000) ("As long as the agency's interpretation is reasonable, we uphold it 'regardless whether there may be other reasonable, or even more reasonable, views.'" quoting *Serono Lab, Inc.* v. *Shalala,* 158 F.3d 1313, 1321 (D.C. Cir. 1998)).

16. Entravision, in its Petition for Reconsideration and/or Clarification, raised issues concerning two aspects of the modified procedures. First, noting that the Commission had not typically required a *Tuck* showing for community of license change applications where both the current and the proposed communities of license are located in the same urbanized area, Entravision asked that the Commission clarify whether the UASP will apply, and a *Tuck* showing be required, in such situations in the future. The Commission clarified that *Tuck* showings will not be required where both the current and proposed communities are located in the same urbanized area, or the current facilities cover, and the proposed facilities would or could be modified to cover, more than 50 percent of the same urbanized area with a daytime principal community signal. However, in such community of license change cases, the UASP presumption would apply to the new community, i.e., would presumptively prohibit treating the service at the new community as a first local transmission service under Priority (3). Thus, in the absence of a showing to rebut the presumption that either the move-out or move-in community is sufficiently independent to warrant a first local transmission service priority, the applicant must make its showing under Priority (4), other public interest matters, by demonstrating from which of the two communities the station would provide service to a greater area and population within the urbanized area.

17. Entravision and M&M, as well as Educational Media Foundation and the Kent Frandsen Radio Companies (filing a joint petition), also sought changes in the categories of cases subject to the new procedures. In the Second R&O, the Commission stated that the new procedures would apply to all pending applications and allotment rulemaking proceedings, with two exceptions. The first was AM Auction 84 applications, which were filed in 2004 and the majority of which have been processed under the prior procedures. The second was "any non-final FM allotment proceeding, including 'hybrid' coordinated application/allotment proceedings, in which the Commission has modified a radio station license or granted a construction permit." 26 FCC Rcd at 2576. M&M argued that the same equities articulated to exempt these two categories should apply equally to pending community of license change applications, especially those in which other stations were required to make facility modifications. It contended that the decision to apply the new procedures to pending community of license change applications was arbitrary and capricious because "similarly situated" new AM applications and FM allotment proceedings were not treated in the same way. Entravision suggested that the Commission apply the prior procedures to any case in which there had been an "initial decision" as of March 2, 2011, the day before release of the Second R&O, even if the action was not final (i.e., if there is a pending petition for reconsideration or application for review).

18. The Commission questioned whether applicants proposing community of license modification were "similarly situated" to the two classes of applicants, permittees, and licensees that were exempted from the new policy. AM Auction 84 filing window applicants were required to file their applications during a filing window, in January 2004, that antedated the Notice of Proposed Rule Making in this proceeding (FCC 09–30, 74 FR 22498 (May 13, 2009), 24 FCC Rcd 5239 (2009)) (Rural NPRM) by over five years. Those applicants therefore had no reason to expect that their applications would be evaluated under a new section 307(b) standard. The Commission recognized, however, that the same equities apply to those few pending community of license change applicants, and petitioners seeking to amend the FM Table of Allotments, that filed their applications or rulemaking petitions before release of the Rural NPRM. Thus, on reconsideration the Commission determined that the new procedures should not apply to (1) applications for minor modification of a station to specify a new community of license filed before April 20, 2009, the release date of the Rural NPRM; or (2) FM allotment proceedings where the petition for rulemaking had been filed, and the rulemaking proceeding thus initiated, prior to the release date of the Rural NPRM.

19. Entravision, in its Petition, stated that the Commission did not "precisely answer the question" as to those cases to which the new section 307(b)

procedures would apply. Both Entravision and M&M suggested that the Commission draw a "bright line" as of the Second R&O's release date, to clarify the cases to which the new rules apply. Entravision stated that the prior section 307(b) procedures should apply in any instance in which the Commission had rendered a decision as of March 2, 2011, even if there was still a petition for reconsideration or application for review pending, as an equitable solution to keep parties from having to expend further time and resources revising their section 307(b) showings after having already obtained a favorable result from the Commission under pre-Second R&O procedures. M&M requested that the Commission only apply the new procedures to community of license change applications filed after release of the Second R&O.

20. The Commission disagreed that it was unclear, in the Second R&O, as to when the new procedures would apply, and further disagreed with M&M that all pending community of license change applications were "similarly situated" to the categories of cases the Commission exempted from the new procedures. The majority of pending community of license change applications were filed after release of the Rural NPRM, and thus were on notice that the procedures could change while their applications were pending. While the Commission further carved out a limited exception to the new procedures in FM allotment and hybrid proceedings where licenses were modified or construction permits granted, to the extent that similar equities may exist in the case of certain pending community of license change applications, it stated it would entertain requests for waiver of the revised procedures on a case-by-case basis. The Commission rejected M&M's attempt to analogize those pending community of license change applications without such equities, however, and thus M&M's request to apply the prior procedures to all such applications pending as of release of the Second R&O.

21. The Commission was more persuaded by Entravision's equitable argument to reconsider its application of the new policies. It envisioned situations in which, for example, two applications for change of community of license were granted on the same day, but one would become final under the pre-Second R&O procedures while the other would be subject to the new procedures merely because of a factor beyond the applicant's control, i.e., the filing of a petition for reconsideration or application for review of the application grant. The Commission found no principled reason to apply different procedures to such otherwise similarly situated applications, especially where any applicant facing reconsideration or review would have to go to the additional expense of revising its (previously successful) section 307(b) showing, above and beyond the expense of rebutting a reconsideration petition. On reconsideration, the Commission thus revised its previous determination as to the application of the new procedures. In addition to those categories of applications and rulemaking proceedings listed in paragraph 21 of the Order, and in the Second R&O (26 FCC Rcd at 2575–76), the Commission held that the revised section 307(b) procedures shall not apply to any pending community of license change application or FM allotment proceeding in which a decision on the application, or allotment *Report and Order,* was released prior to March 3, 2011, the release date of the Second R&O. The Commission therefore granted the Entravision Petition to the extent set forth in the Order, and denied the M&M Petition.

Report to Congress

22. Because no new rules are being adopted by the Commission in the Order, but merely clarifications of methodology and applicability of rules previously adopted, the Commission will not send a copy of the Order to Congress under the Congressional Review Act. See 5 U.S.C. 801(a)(1)(A).

Ordering Clauses

23. Accordingly, *it is ordered,* pursuant to the authority contained in sections 1, 2, 4(i), 303, 307, and 309(j) of the Communications Act of 1934, 47 U.S.C. 151, 152, 154(i), 303, 307, and 309(j), that this *Second Order on Reconsideration is adopted.*

24. *It is further ordered* that the Petition for Reconsideration & Comments Regarding the Following Matter, filed by Anthony V. Bono, Friendship Broadcasting, LLC; the Petition for Partial Reconsideration, filed by William B. Clay; the Petition for Partial Reconsideration, filed by M&M Broadcasters, Ltd.; and the Petition for Reconsideration, filed by Educational Media Foundation and the Kent Frandsen Radio Companies, *are denied. It is further ordered* that the Petition for Reconsideration and/or Clarification, filed by Entravision Communications Corporation; and the Petition for Partial Reconsideration, filed by Radio One, Inc., et al., *are granted in part and denied in part.*

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 2012–29423 Filed 12–4–12; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 120109034–2171–01]

RIN 0648–XC369

Fisheries of the Northeastern United States; Northeast Multispecies Fishery; White Hake Trimester Total Allowable Catch Area Closure for the Common Pool Fishery

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

ACTION: Temporary rule; closure.

SUMMARY: This temporary rule closes the White Hake Trimester Total Allowable Catch (TAC) Area to all common pool groundfish vessels fishing with trawl gear, sink gillnet gear, or longline/hook gear for the remainder of Trimester 2, through December 31, 2012. This action is necessary to prevent the common pool fishery from exceeding its Trimester 2 TAC or its annual catch limit for white hake. This rule is expected to slow the catch rate of white hake in the common pool fishery for the remainder of Trimester 2.

DATES: Effective December 5, 2012, through 2400 hours, December 31, 2012.

FOR FURTHER INFORMATION CONTACT: Brett Alger, Fisheries Management Specialist, 978–675–2153, Fax 978–281–9135.

SUPPLEMENTARY INFORMATION: Regulations governing the NE multispecies fishery are found at 50 CFR part 648, subpart F. Beginning in fishing year (FY) 2012 (May 1, 2012—April 30, 2013), the common pool's sub-annual catch limit (ACL) for each stock is apportioned into trimester TACs (Trimester 1 May 1—August 31; Trimester 2 September 1—December 31; and Trimester 3 January 1—April 30). The regulations at § 648.82(n) require the Regional Administrator to close the Trimester TAC Area for a stock when available information supports a determination that 90 percent of the Trimester TAC is projected to be caught. The Trimester TAC Area for a stock will close to all common pool vessels fishing

with gear capable of catching that stock for the remainder of the trimester. Any overages of a trimester TAC will be deducted from Trimester 3, and any overages of the common pool's sub-ACL at the end of the FY will be deducted from the common pool's sub-ACL the following FY. Any uncaught portion of the Trimester 1 and Trimester 2 TAC will be carried over into the next trimester. Any uncaught portion of the common pool's sub-ACL may not be carried over into the following FY.

The FY 2012 common pool sub-ACL for white hake is 26 mt (57,320 lb). The Trimester 2 TAC is 8.1 mt (17,853 lb). Because only a few vessels are responsible for the white hake catch, it was difficult to project when 90 percent of the Trimester TAC would be reached. Therefore, NMFS has monitored the white hake catch very closely to determine when 90 percent was exceeded. Based on the best available data, which includes vessel trip reports (VTRs), dealer reported landings, and vessel monitoring system (VMS) information, NMFS has projected that 90 percent of the Trimester 2 TAC for white hake was harvested on November 26, 2012. Therefore, effective December 5, 2012, the White Hake Trimester TAC Area is closed for the remainder of Trimester 2, through December 31, 2012, to all common pool vessels fishing with trawl gear, sink gillnet gear, and longline/hook gear. The White Hake Trimester TAC Area will reopen to common pool vessels fishing with trawl, sink gillnet, and longline/hook gear at the beginning of Trimester 3, at 0001 hours, January 1, 2013.

Classification

This action is required by 50 CFR part 648, and is exempt from review under Executive Order 12866.

The Assistant Administrator for Fisheries, NOAA (AA), finds good cause pursuant to 5 U.S.C. 553(b)(B) to waive prior notice and the opportunity for public comment because it would be impracticable and contrary to the public interest. This action closes the White Hake Trimester TAC Area for common pool vessels fishing with trawl gear, sink gillnet gear, or longline/hook gear through December 31, 2012. The regulations at § 648.82 require this action to ensure that the common pool fishery does not exceed its catch limits for white hake in FY 2012. The catch data indicating that 90 percent of the Trimester 2 TAC for white hake has been caught only recently became available. If implementation of this closure is delayed to solicit prior public comment, the white hake Trimester 2 TAC could be exceeded, thereby undermining the conservation objectives of the Fishery Management Plan. Any overage of the Trimester 2 TAC must be deducted from the Trimester 3 TAC, and any overage of the total sub-ACL in FY 2012 must be deducted from the FY 2013 sub-ACL. This would have adverse economic consequences on common pool vessels. The AA further finds, pursuant to 5 U.S.C. 553(d)(3), good cause to waive the 30-day delayed effectiveness period for the reasons stated above.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: November 29, 2012.

Lindsay Fullenkamp,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2012–29401 Filed 11–30–12; 4:15 pm]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 111213751–2102–02]

RIN 0648–XC376

Fisheries of the Exclusive Economic Zone Off Alaska; Reallocation of Pacific Cod in the Bering Sea and Aleutian Islands Management Area

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

ACTION: Temporary rule; reallocation.

SUMMARY: NMFS is reallocating the projected unused amounts of Pacific cod from catcher vessels greater than or equal to 60 feet length overall (LOA) using pot gear to hook-and-line catcher/processors, pot catcher/processors, and catcher vessels less than 60 feet LOA using hook-and-line or pot gear in the Bering Sea and Aleutian Islands management area. This action is necessary to allow the 2012 total allowable catch of Pacific cod to be harvested.

DATES: Effective November 30, 2012, through 2400 hrs, Alaska local time (A.l.t.), December 31, 2012.

FOR FURTHER INFORMATION CONTACT: Obren Davis, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the Bering Sea and Aleutian Islands (BSAI) according to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The 2012 Pacific cod total allowable catch (TAC) specified for catcher vessels greater than or equal to 60 feet length overall (LOA) using pot gear in the BSAI is 19,509 metric tons (mt) as established by the final 2012 and 2013 harvest specifications for groundfish in the BSAI (77 FR 10669, February 23, 2012). The Regional Administrator has determined that catcher vessels greater than or equal to 60 feet LOA using pot gear will not be able to harvest 6,300 mt of the 2012 Pacific cod TAC allocated to those vessels under § 679.20(a)(7)(ii)(A)(5). In accordance with § 679.20(a)(7)(iii) and taking into account the capabilities of the sectors to harvest reallocated amounts of Pacific cod, the Regional Administrator has also determined that this unharvested amount is unlikely to be entirely harvested through the reallocation hierarchy set forth in § 679.20(a)(7)(iii)(A). Therefore, following the reallocation hierarchies set forth in both § 679.20(a)(7)(iii)(A) and § 679.20(a)(7)(iii)(C), NMFS reallocates 500 mt to catcher vessels less than 60 ft. LOA using hook-and-line or pot gear, 800 mt to pot catcher/processors, and 5,000 mt to hook-and-line catcher/processors.[1]

The harvest specifications for Pacific cod included in the final 2012 harvest specifications for groundfish in the BSAI (77 FR 10669, February 23, 2012) and inseason adjustment (77 FR 53152, August 31, 2012) are revised as follows: 118,106 mt for hook-and-line catcher/processors, 4,284 mt for pot catcher/processors, 8,880 mt for catcher vessels less than 60 ft. LOA using hook-and-line or pot gear, and 13,209 mt for catcher vessels greater than or equal to 60 ft. LOA using pot gear.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and

[1] § 679.20(a)(7)(iii)(A) requires that the projected unharvested amount from catcher vessels greater than or equal to 60 feet length overall (LOA) using pot gear that is unlikely to be harvested through the reallocation hierarchy set forth in § 679.20(a)(7)(iii)(A) be reallocated to the pot catcher/processor sector in accordance with the reallocation hierarchy set forth in 679.20(a)(7)(iii)(C).

opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the reallocation of Pacific cod specified for the Pacific cod sectors affected by this action. Since the fishery is currently open, it is important to immediately inform the industry as to the revised allocations. Immediate notification is necessary to allow for the orderly conduct and efficient operation of this fishery, to allow the industry to plan for the fishing season, and to avoid potential disruption to the fishing fleet as well as processors. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of November 29, 2012.

The AA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

This action is required by § 679.20 and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: November 30, 2012.

Lindsay Fullenkamp,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2012–29394 Filed 11–30–12; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 77, No. 234
Wednesday, December 5, 2012

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

Agricultural Marketing Service

7 CFR Part 927

[Doc. No. AMS–FV–12–0032; FV12–927–3 PR]

Pears Grown in Oregon and Washington; Committee Membership Reapportionment for Processed Pears

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This rule invites comments on reapportionment of the membership of the Processed Pear Committee (Committee) established under the Oregon-Washington pear marketing order. The marketing order regulates the handling of processed pears grown in Oregon and Washington, and is administered locally by the Committee. This rule would reapportion the processor membership such that the three processor members and alternate members would be selected from the production area-at-large rather than from a specific district. In an industry with few processors, this change would provide the flexibility needed to help ensure that all processor member positions are filled, resulting in effective representation of the processed pear industry.

DATES: Comments must be received by February 4, 2013.

ADDRESSES: Interested persons are invited to submit written comments concerning this proposal. Comments must be sent to the Docket Clerk, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250–0237; Fax: (202) 720–8938; Internet: *http://www.regulations.gov*. All comments should reference the document number and the date and page number of this issue of the **Federal Register** and will be made available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: *http://www.regulations.gov*. All comments submitted in response to this rule will be included in the record and will be made available to the public. Please be advised that the identity of the individuals or entities submitting the comments will be made public on the Internet at the address provided above.

FOR FURTHER INFORMATION CONTACT: Teresa Hutchinson or Gary Olson, Northwest Marketing Field Office, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA; Telephone: (503) 326–2724, Fax: (503) 326–7440, or Email: *Teresa.Hutchinson@ams.usda.gov* or *GaryD.Olson@ams.usda.gov*.

Small businesses may request information on complying with this regulation by contacting Laurel May, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, Fax: (202) 720–8938, or Email: *Laurel.May@ams.usda.gov*.

SUPPLEMENTARY INFORMATION: This proposal is issued under Marketing Order No. 927, as amended (7 CFR part 927), regulating the handling of pears grown in Oregon and Washington, hereinafter referred to as the "order." The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the "Act."

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

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

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This proposal invites comments on reapportionment of the membership of the Committee established under the Oregon-Washington pear marketing order. This rule would reapportion the processor membership such that the three processor members and alternate members would be selected from the production area-at-large rather than from a specific district. With nine members present, the Committee unanimously recommended this change at a meeting held on May 30, 2012, with a request that the change be made effective on July 1, 2013.

Section 927.20(b) establishes the Processed Pear Committee consisting of ten members. Three members are growers, three members are handlers, three members are processors, and one member represents the public. For each member, there are two alternate members, designated as the "first alternate" and the "second alternate," respectively. Committee membership is apportioned among two districts. Section 927.11(b) defines the districts as follows: District 1—The State of Washington and District 2—The State of Oregon. District 1 is represented by two grower members, two handler members and two processor members. District 2 is represented by one grower member, one handler member, and one processor member.

The order provides in § 927.20(c) that USDA, upon recommendation of the Committee, may reapportion members among districts, may change the number of members and alternate members, and may change the composition by changing the ratio of members, including their alternate members.

This rule would add a new § 927.150 to the order's administrative rules and regulations reapportioning the processor membership such that the three processor members and alternate members would be selected from the production area-at-large rather than from a specific district. The Committee recommended this change because the District 2 processor member representative on the Committee is no longer processing pears. As a result, the

District 2 processor member and alternate member positions are currently vacant. This change would result in more effective representation of the processed pear industry by allowing the Committee to fill these vacant positions with processors from District 1. Since 2006, pear acreage in Oregon and Washington has decreased by 10 percent.

Reapportioning the processor membership would allow all processor member and alternate member positions to be filled. The Committee recommended maintaining the three processor member positions, but specifying that such members and alternate members may be located in either district. The proposed regulatory language includes flexibility that would provide opportunity for representation from District 2 should a processor once again process pears in that district.

Initial Regulatory Flexibility Analysis

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

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

There are approximately 1,500 producers of processed pears in the regulated production area and approximately 46 handlers of processed pears subject to regulation under the order. Small agricultural producers are defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less than $750,000, and small agricultural service firms are defined as those whose annual receipts are less than $7,000,000.

According to the Noncitrus Fruits and Nuts 2011 Preliminary Summary issued in March 2012 by the National Agricultural Statistics Service, the total farm-gate value of summer/fall processed pears grown in Oregon and Washington for 2011 was $35,315,000. Based on the number of processed pear producers in Oregon and Washington, the average gross revenue for each producer can be estimated at approximately $23,543. Furthermore, based on Committee records, the Committee has estimated that all of the Oregon-Washington pear handlers currently ship less than $7,000,000 worth of processed pears each on an annual basis. From this information, it is concluded that the majority of producers and handlers of Oregon and Washington processed pears may be classified as small entities.

There are three pear processing plants in the production area, all currently located in Washington. All three pear processors would be considered large entities under the SBA's definition of small businesses.

This rule would add a new § 927.150 to the order's administrative rules and regulations reapportioning the processor membership such that the three processor members would be selected from the production area-at-large. This rule would be effective July 1, 2013. Authority for reapportioning the Committee is provided in § 927.20(c) of the order.

The Committee believes that these proposed changes would not negatively impact producers, handlers, or processors in terms of cost. The benefits for this rule are not expected to be disproportionately greater or less for small producers, handlers, or processors than for larger entities.

The Committee discussed alternatives to this rule, including leaving the District 2 processor member and alternate member positions vacant. However, the Committee believes that three members should continue to represent processors on the Committee, except the representative should be chosen from the production area-at-large rather than from a specific district.

In accordance with the Paperwork Reduction Act of 1995, (44 U.S.C. chapter 35), the order's information collection requirements have been previously approved by the Office of Management and Budget (OMB) and assigned OMB No. 0581–0189, Generic Fruit Crops. No changes in those requirements as a result of this action are necessary. Should any changes become necessary, they would be submitted to OMB for approval.

Additional reporting or recordkeeping requirements would not be imposed on either small or large processed pear handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

AMS 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.

USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this proposed rule.

In addition, the Committee's meeting was widely publicized throughout the Oregon-Washington pear industry and all interested persons were invited to attend and participate in Committee deliberations on all issues. Like all Committee meetings, the May 30, 2012, meeting was a public meeting and all entities, both large and small, were able to express views on this issue. Finally, interested persons are invited to submit information on the regulatory and informational impacts of this action on small businesses.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *www.ams.usda.gov/MarketingOrderSmallBusinessGuide*. Any questions about the compliance guide should be sent to Laurel May at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

A 60-day comment period is provided to allow interested persons to respond to this proposal. All written comments timely received will be considered before a final determination is made on this matter.

List of Subjects in 7 CFR Part 927

Marketing agreements, Pears, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 927 is proposed to be amended as follows:

PART 927—PEARS GROWN IN OREGON AND WASHINGTON

1. The authority citation for 7 CFR part 927 continues to read as follows:

Authority: 7 U.S.C. 601–674.

2. A new undesignated center heading, "Administrative Bodies," is added before a new § 927.150 which is proposed to read as follows:

§ 927.150 Reapportionment of the Processed Pear Committee.

Pursuant to § 927.20(c), on and after July 1, 2013, the 10-member Processed Pear Committee is reapportioned and shall consist of three grower members, three handler members, three processor members, and one member representing the public. For each member, there are two alternate members, designated as the "first alternate' and the "second alternate," respectively. District 1, the State of Washington, shall be

represented by two grower members and two handler members. District 2, the State of Oregon, shall be represented by one grower member and one handler member. Processor members may be from District 1, District 2, or from both.

Dated: November 29, 2012.

David R. Shipman,

Administrator, Agricultural Marketing Service.

[FR Doc. 2012–29425 Filed 12–4–12; 8:45 am]

BILLING CODE 3410–02–P

FEDERAL HOUSING FINANCE AGENCY

12 CFR Part 1209

RIN 2590–AA57

Rules of Practice and Procedure: Enterprise and Federal Home Loan Bank Housing Goals Related Enforcement Amendment

AGENCY: Federal Housing Finance Agency.

ACTION: Proposed rule.

SUMMARY: The Federal Housing Finance Agency (FHFA) is proposing to amend its Rules of Practice and Procedure (RPP) to specify that the rules of practice and procedure for hearings on the record in Subpart C therein shall apply to any cease and desist or civil money penalty proceedings brought against the Federal National Mortgage Association (Fannie Mae), the Federal Home Loan Mortgage Corporation (Freddie Mac), or the Federal Home Loan Banks (Banks) for failure to submit or follow a housing plan or failure of an Enterprise to submit information on its housing activities, except where such rules are inconsistent with related statutory provisions, in which case the statutory provisions shall apply.

DATES: Written comments must be received on or before January 22, 2013.

ADDRESSES: You may submit your comments, identified by Regulatory Information Number (RIN) 2590–AA57, by any of the following methods:

- *Email:* Comments to Alfred M. Pollard, General Counsel, may be sent by email to *RegComments@fhfa.gov*. Please include "RIN 2590–AA57" in the subject line of the message.
- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments. If you submit your comment to the *Federal eRulemaking Portal,* please also send it by email to FHFA at *RegComments@fhfa.gov* to ensure timely receipt by the Agency. Please include "RIN 2590–AA57" in the subject line of the message.
- *Hand Delivered/Courier:* The hand delivery address is: Alfred M. Pollard, General Counsel, Attention: Comments/RIN 2590–AA57, Federal Housing Finance Agency, Eighth Floor, 400 Seventh Street SW., Washington, DC 20024. The package should be logged in at the Seventh Street entrance Guard Desk, First Floor, on business days between 9 a.m. and 5 p.m.
- *U.S. Mail, United Parcel Service, Federal Express, or Other Mail Service:* The mailing address for comments is: Alfred M. Pollard, General Counsel, Attention: Comments/RIN 2590–AA57, Federal Housing Finance Agency, Eighth Floor, 400 Seventh Street SW., Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Lyn Abrams, Assistant General Counsel, (202) 649–3059; or Sharon Like, Managing Associate General Counsel, (202) 649–3057, Office of General Counsel. These are not toll-free numbers. The mailing address for each contact is: Office of General Counsel, Federal Housing Finance Agency, Eighth Floor, 400 Seventh Street SW., Washington, DC 20024. The telephone number for the Telecommunications Device for the Hearing Impaired is (800) 877–8339.

SUPPLEMENTARY INFORMATION:

I. Comments

FHFA invites comments on all aspects of the proposed rule, and will revise the language of the proposed rule as appropriate after taking all comments into consideration. Copies of all comments will be posted without change on the FHFA Web site at *http://www.fhfa.gov*, and will include any personal information you provide, such as your name, address, email address and telephone number. In addition, copies of all comments received will be available for examination by the public on business days between the hours of 10 a.m. and 3 p.m., at the Federal Housing Finance Agency, Eighth Floor, 400 Seventh Street SW., Washington, DC 20024. To make an appointment to inspect comments, please call the Office of General Counsel at (202) 649–3804.

II. Background

A. Statutory and Regulatory Background

1. Enterprise Enforcement for Housing Plan and Failure To Submit Housing Activities Information

Prior to the enactment of the Housing and Economic Recovery Act of 2008 (HERA), the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (Safety and Soundness Act) provided the Secretary of the U.S. Department of Housing and Urban Development (HUD) with specific authority to establish, monitor and enforce housing goals for mortgages purchased by Fannie Mae and Freddie Mac (collectively, the Enterprises). In addition, section 309(m) and (n) of the Federal National Mortgage Association Charter Act and section 307(e) and (f) of the Federal Home Loan Mortgage Corporation Act (collectively, Charter Acts) required that each Enterprise submit information on its housing activities to the Secretary of HUD, the Committee on Financial Services of the House of Representatives, and the Committee on Banking, Housing and Urban Affairs of the Senate.[1] *See* 12 U.S.C. 1723a(m) and (n); 12 U.S.C. 1456(e) and (f).

The Safety and Soundness Act, prior to the HERA amendments, authorized HUD to initiate cease and desist proceedings and impose civil money penalties against an Enterprise for failure to submit or comply with a housing plan or failure to submit information on its housing activities. HUD issued regulations implementing its enforcement authority against the Enterprises for these violations. *See* 24 CFR part 81, Subpart G.

HERA amended the Safety and Soundness Act in 2008 to create FHFA as an independent agency of the federal government and, among other things, transferred the responsibility to establish, monitor and enforce the housing goals for the Enterprises from HUD to FHFA, and required that each Enterprise submit information on its housing activities to the Director of FHFA instead of to the Secretary of HUD. *See* Public Law 110–289, 122 Stat. 2654 (2008), codified at 12 U.S.C. 4501 *et seq*. The Safety and Soundness Act, as amended, requires the Director of FHFA to establish new annual housing goals for mortgages purchased by the Enterprises, effective for 2010 and beyond. FHFA reviews mortgage purchase data provided by each Enterprise in its Annual Housing Activities Report and other mortgage reports, as well as other available data, and determines whether the Enterprise has met the housing goals.

Enterprise compliance with the housing goals is enforced under section 1336 of the Safety and Soundness Act,

[1] The Charter Acts require that the Enterprises submit information on their housing activities to the Committee on Banking, Finance and Urban Affairs of the House of Representatives. The Enterprises submit this information to that Committee's successor, the Committee on Financial Services of the House of Representatives.

which provides that if an Enterprise fails to meet a housing goal determined by the Director to be feasible, the Director may, in his or her discretion, require the Enterprise to submit a housing plan describing the specific actions the Enterprise will take to achieve the goal. *See* 12 U.S.C. 4566.

Section 1336 further provides that if an Enterprise fails to submit an acceptable housing plan or fails to comply with the plan, the Director may initiate cease and desist proceedings or impose civil money penalties against the Enterprise in accordance with sections 1341 and 1345, respectively, of the Safety and Soundness Act, exercise other appropriate enforcement authority, or seek other appropriate actions. *See* 12 U.S.C. 4566(c)(1) and (c)(7), 4581, 4585. In addition, sections 1341 and 1345 provide that the Director may initiate cease and desist proceedings or impose civil money penalties, respectively, if an Enterprise fails to submit information on its housing activities. *Id.* FHFA's regulations do not currently address enforcement proceedings for these violations. Accordingly, as further discussed below, FHFA is proposing to amend its RPP to implement the hearing procedures for enforcement actions under sections 1341 to 1348 of the Safety and Soundness Act. *See* 12 U.S.C. 4581–4588.

2. Bank Housing Plan Enforcement

Section 10C(a) of the Federal Home Loan Bank Act (Bank Act), as amended by HERA (12 U.S.C. 1430c(a)), requires the Director of FHFA to establish housing goals with respect to the purchase of mortgages, if any, by the Banks. Section 10C(a) further states that the goals shall be consistent with the goals established for the Enterprises under sections 1331 through 1334 of the Safety and Soundness Act, taking into consideration the unique mission and ownership structure of the Banks. Section 10C(d) provides that the monitoring and enforcement requirements of section 1336 of the Safety and Soundness Act shall apply to the Banks in the same manner and to the same extent as they apply to the Enterprises. Thus, in accordance with section 1336, if a Bank fails to submit or follow an acceptable housing plan, the Director may initiate cease and desist proceedings or impose civil money penalties against the Bank.

FHFA's Bank housing goals regulation, which implements the statutory housing goals requirements, includes housing plan provisions similar to those in FHFA's Enterprise housing goals regulation, but like the Enterprise housing goals regulation, does not specifically address enforcement actions for failure to submit or follow a housing plan. *See* 12 CFR Part 1281.

3. Applicable Enforcement Provisions

Sections 1341 to 1348 of the Safety and Soundness Act set forth the grounds and procedures for the enforcement actions that are the subject of this proposed rule. Following is a summary of these provisions.

a. Cease and Desist Proceedings

Section 1341 of the Safety and Soundness Act sets forth the grounds for initiating cease and desist proceedings and the procedures FHFA must follow when filing a notice of charges against an Enterprise and issuing an order in such proceedings. *See* 12 U.S.C. 4581. The grounds for issuing a notice of charges are:

(1) Failure to submit housing activity information required under section 309(m) or (n) of Fannie Mae's Charter Act or section 307(e) or (f) of Freddie Mac's Charter Act;

(2) Failure to submit an acceptable housing plan with respect to the housing goals; or

(3) Failure to comply with a housing plan.[2]

b. Civil Money Penalties

Section 1345 sets forth the grounds for imposing civil money penalties under this section, which are identical to the grounds for initiating cease and desist proceedings under section 1341. *See* 12 U.S.C. 4585. This section also sets forth the procedures governing imposition of civil money penalties, the factors the Director shall consider in determining the amount of a penalty, the maximum amount of penalty the Director may impose, and authorizes the Director to bring an action in federal court to collect a penalty.

c. Hearings, Judicial Review and Enforcement

Section 1342 sets forth the hearing requirements for hearings under sections 1341 and 1345. *See* 12 U.S.C. 4582. Section 1342 specifies that hearings shall be held on the record and in accordance with the Administrative Procedures Act (APA). This section also governs the issuance of the order from the Director after the hearing. Section 1343 sets forth the procedures for judicial review of a final order pursuant to a proceeding under sections 1341 and 1345. *See* 12 U.S.C. 4583. Section 1344 authorizes the Director to bring a civil action in federal court to enforce a notice or order under sections 1341 and 1345.

d. Public Disclosure and Notice of Service

Section 1346 governs disclosure of the Director's enforcement actions under sections 1342 and 1343, public hearings, and retention of documents. *See* 12 U.S.C. 4586. Section 1347 gives the Director authority to determine, by regulation or otherwise, the manner of notice of service. *See* 12 U.S.C. 4587.

e. Subpoena Authority

Section 1348 sets forth the Director's subpoena authority for administrative proceedings under sections 1341 to 1348. *See* 12 U.S.C. 4588.

4. General Enforcement Under FHFA's RPP

Sections 1371 through 1379D of the Safety and Soundness Act authorize the Director to initiate civil administrative enforcement actions against the Enterprises, the Banks, and their entity-affiliated parties to enforce, as needed, applicable law, rules, orders and agreements pertaining to the safe and sound operation of the Enterprises and Banks. *See* 12 U.S.C. 4631—4641. FHFA's RPP implements these provisions by setting forth the authority, grounds and procedures for cease and desist proceedings, temporary cease and desist orders, civil money penalty proceedings, and removal and prohibition proceedings. Subpart C of the RPP sets forth the specific rules of practice and procedure for hearings on the record and hearings in accordance with the APA in connection with these enforcement proceedings.

However, the RPP does not implement provisions governing enforcement proceedings for failure to submit or comply with a housing plan or failure to submit information on housing activities. The hearing procedures set forth in the Safety and Soundness Act for adjudicating these actions are almost indistinguishable from the statutory procedures for adjudicating enforcement actions under sections 1371 to 1379D. Accordingly, the formal hearing procedures set forth in Subpart C of the RPP are well suited to govern enforcement proceedings under sections 1341 to 1348. FHFA stated this in the **SUPPLEMENTARY INFORMATION** published with the RPP and noted that promoting use of the Subpart C procedures for housing-goals-

[2] Sections 1341 and 1345 also include Enterprise failure to submit a report under section 1327 as grounds for enforcement actions. However, section 1327 does not exist in the Safety and Soundness Act, as amended by HERA, its subject having been subsumed in section 1314.

related enforcement proceedings both supports an economies of scale approach to regulation, and provides certainty with respect to the process. *See* 76 FR 53596, 53601–53602 (Aug. 26, 2011).

B. Conservatorship

On September 6, 2008, the Director of FHFA appointed FHFA as conservator of the Enterprises to maintain the Enterprises in a safe and sound financial condition and to help assure performance of their public mission. The Enterprises remain under conservatorship at this time.

III. Analysis of Proposed Rule

As successor to HUD in establishing, monitoring and enforcing the housing goals, FHFA is responsible for initiating and adjudicating enforcement actions for failure to submit or comply with a housing plan. FHFA is also responsible for ensuring that an Enterprise submits information on its housing activities to Congress and the Director, and FHFA has the authority to enforce this requirement.[3]

None of the Banks was subject to housing goals in 2011. Under FHFA's Bank housing goals regulation, to be subject to housing goals, the total unpaid principal balance of loans purchased through the Acquired Member Assets programs held by a Bank must exceed $2.5 billion in a given year. *See* 12 CFR Part 1281. Mortgage purchase volumes did not individually exceed $2.5 billion at any of the Banks in 2011.

To provide clarity on the rules of practice and procedure that would apply should FHFA initiate enforcement actions under sections 1341 to 1348 of the Safety and Soundness Act, the proposed rule would amend § 1209.1(c) of the RPP to specify that the rules of practice and procedure for hearings on the record in Subpart C therein shall apply to enforcement proceedings under sections 1341 to 1348, except where such rules are inconsistent with sections 1341 to 1348 or section 10C of the Bank Act, in which case those statutory provisions shall apply. The amendment would codify FHFA's intent as expressed in the **SUPPLEMENTARY INFORMATION** published with the RPP. FHFA is proposing to amend § 1209.1(c) as a simpler and more efficient approach than making conforming amendments to each of the affected sections of the RPP.

IV. Consideration of Differences Between the Banks and the Enterprises

Section 1313(f) of the Safety and Soundness Act, as amended by HERA, requires the Director, when promulgating regulations relating to the Banks, to consider the differences between the Banks and the Enterprises with respect to the Banks': cooperative ownership structure; mission of providing liquidity to members; affordable housing and community development mission; capital structure; joint and several liability; and any other differences the Director considers appropriate. *See* 12 U.S.C. 4513(f). In preparing this proposed rule, the Director considered the differences between the Banks and the Enterprises as they relate to the above factors, and determined that the Banks should not be treated differently from the Enterprises for purposes of the proposed rule, particularly as section 10C(d) of the Bank Act provides that the monitoring and enforcement requirements of section 1336 of the Safety and Soundness Act shall apply to the Banks in the same manner and to the same extent as they apply to the Enterprises. Nonetheless, FHFA requests comments on whether these factors should result in a revision of the proposed amendment as it relates to the Banks.

V. Paperwork Reduction Act

The proposed rule does not contain any information collection requirement that requires the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

VI. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires that a regulation that has a significant economic impact on a substantial number of small entities, small businesses, or small organizations must include an initial regulatory flexibility analysis describing the regulation's impact on small entities. Such an analysis need not be undertaken if the agency has certified that the regulation will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b). FHFA has considered the impact of the proposed rule under the Regulatory Flexibility Act.

The General Counsel of FHFA certifies that the proposed rule, if adopted as a final rule, is not likely to have a significant economic impact on a substantial number of small entities because the regulation is applicable only to the Enterprises and the Banks, which are not small entities for purposes of the Regulatory Flexibility Act.

List of Subjects in 12 CFR Part 1209

Administrative practice and procedure, Federal home loan banks, Mortgages, Reporting and recordkeeping requirements.

Authority and Issuance

For the reasons stated in the **SUPPLEMENTARY INFORMATION**, FHFA proposes to amend part 1209, Subchapter A, Chapter XII of title 12 of the Code of Federal Regulations as follows:

PART 1209—RULES OF PRACTICE AND PROCEDURE

1. The authority citation for part 1209 is revised to read as follows:

Authority: 5 U.S.C. 554, 556, 557, and 701 *et seq.*; 12 U.S.C. 1430c(d); 12 U.S.C. 4501, 4502, 4503, 4511, 4513, 4513b, 4517, 4526, 4566(c)(1) and (c)(7), 4581–4588, 4631–4641; and 28 U.S.C. 2461 note.

2. Amend § 1209.1 by:

a. In paragraph (c)(2), remove the word "and";

b. In paragraph (c)(3), remove "." at the end of the paragraph and add in its place "; and"; and

c. Add new paragraph (c)(4) to read as follows:

§ 1209.1 Scope.

* * * * *

(c) * * *

(4) Enforcement proceedings under sections 1341 through 1348 of the Safety and Soundness Act, as amended (12 U.S.C. 4581 through 4588), and section 10C of the Federal Home Loan Bank Act, as amended (12 U.S.C. 1430c), except where the Rules of Practice and Procedure in Subpart C are inconsistent with such statutory provisions, in which case the statutory provisions shall apply.

Dated: November 29, 2012.

Edward J. DeMarco,

Acting Director, Federal Housing Finance Agency.

[FR Doc. 2012–29419 Filed 12–4–12; 8:45 am]

BILLING CODE 8070–01–P

[3] The Banks are subject to similar reporting requirements under 12 CFR Part 1281. Because the reporting requirements for the Banks are already subject to enforcement under sections 1371 through 1379D of the Safety and Soundness Act, they are not addressed in this rulemaking.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–1273; Directorate Identifier 2012–CE–045–AD]

RIN 2120–AA64

Airworthiness Directives; Cessna Aircraft Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain Cessna Aircraft Company Models 172R and 172S airplanes. This proposed AD was prompted by reports of chafing of a new configuration of the fuel return line assembly, which was caused by the fuel return line assembly rubbing against the right steering tube assembly during rudder pedal actuation. This proposed AD would require you to install the forward and aft fuel return line support clamps and brackets; inspect for a minimum clearance between the fuel return line assembly and the steering tube assembly and clearance between the fuel return line assembly and the airplane structure; and, if any damage is found, replace the fuel return line assembly. We are proposing this AD to correct the unsafe condition on these products.

DATES: We must receive comments on this proposed AD by January 22, 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.

For service information identified in this proposed AD, contact Cessna Aircraft Company, Customer service, P.O. Box 7706, Wichita, KS 67277; telephone: (316) 517–5800; fax: (316) 517–7271; email: *customercare@cessna.textron.com*; Internet: *http://www.cessnasupport.com*. You may review copies of the referenced service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, MO 64106. For information on the availability of this material at the FAA, call (816) 329–4148.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Jeff Janusz, Aerospace Engineer, Wichita Aircraft Certification Office, FAA, 1801 S. Airport Road, Room 100, Wichita, Kansas 67209; phone: (316) 946–4148; fax: (316) 946–4107; email: *jeff.janusz@faa.gov*.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2012–1273; Directorate Identifier 2012–CE–045–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

Discussion

In January 2012, we issued AD 2012–02–02 (77 FR 6003, February 7, 2012), and in October 2012, we issued AD 2012–22–01 (77 FR 70114, November 23, 2012) for certain Cessna Aircraft Company (Cessna) Models 172R and 172S airplanes. These ADs required inspection of the fuel return line assembly for chafing; replacement of the fuel return line assembly if chafing is found; inspection of the clearance between the fuel return line assembly and both the right steering tube assembly and the airplane structure; and adjustment as necessary. The ADs resulted from reports of chafed fuel return line assemblies, which were caused by the fuel return line assembly rubbing against the right steering tube assembly during full rudder pedal actuation. We issued these ADs to detect and correct chafing of the fuel return line assembly, which could result in fuel leaking under the floor and fuel vapors entering the cabin. This condition could lead to fire under the floor or in the cabin area.

We were recently notified that the unsafe condition also applies to airplanes with different serial number effectivity.

Relevant Service Information

We reviewed Cessna Aircraft Company Service Bulletin SEB–28–01, dated September 21, 2012. The service information describes procedures for fuel return line inspection and modification.

FAA's Determination

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

Proposed AD Requirements

This proposed AD would require accomplishing the actions specified in the service information described previously.

Costs of Compliance

We estimate that this proposed AD affects 80 airplanes of U.S. registry.

We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Installation of brackets and clamps and inspection of the fuel return line assembly for chafing and clearance.	2 work-hours × $85 per hour = $170.	$78	$248	$19,840

We estimate the following costs to do any necessary replacement that would be required based on the results of the proposed inspection. We have no way of determining the number of aircraft that might need this replacement:

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Replacement of the fuel return line assembly and adjustment of the clearance between the fuel return line assembly and the steering tube assembly and the airplane structure.	2 work-hours × $85 per hour = $170.	$53	$223

According to the manufacturer, some of the costs of this proposed AD may be covered under warranty, thereby reducing the cost impact on affected individuals. We do not control warranty coverage for affected individuals. As a result, we have included all costs in our cost estimate.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Cessna Aircraft Company: Docket No. FAA–2012–1273; Directorate Identifier 2012–CE–045–AD.

(a) Comments Due Date

We must receive comments by January 22, 2013.

(b) Affected ADs

None.

(c) Applicability

This AD applies to the following Cessna Aircraft Company (Cessna) airplanes, certificated in any category:

(1) Model 172R, serial numbers (S/N) 17281573 through 17281616; and

(2) Model 172S, S/N 172S11074 through 172S11193.

(d) Subject

Joint Aircraft System Component (JASC)/ Air Transport Association (ATA) of America Code 2820, Aircraft Fuel Distribution System.

(e) Unsafe Condition

This AD was prompted by reports of chafing of a new configuration of the fuel return line assembly, which was caused by the fuel return line assembly rubbing against the right steering tube assembly during rudder pedal actuation. We are issuing this AD to correct the unsafe condition on these products.

(f) Compliance

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

(g) Inspect the Fuel Return Line Assembly

At whichever of the following compliance times that occurs later, inspect the fuel return line assembly (Cessna part number (P/N) 0516031–1) for damage following Cessna Aircraft Company Service Bulletin SEB–28–01, dated September 21, 2012.

(1) At the next annual inspection after the effective date of this AD;

(2) Within the next 100 hours time-in-service (TIS) after the effective date of this AD; or

(3) Within the next 12 calendar months after the effective date of this AD.

(h) Replace the Fuel Return Line Assembly

If you find evidence of damage of the fuel return line assembly (Cessna P/N 0516031–1) as a result of the inspection required by paragraph (g) of this AD, before further flight, replace the fuel return line assembly (Cessna P/N 0516031–1) following Cessna Aircraft Company Service Bulletin SEB–28–01, dated September 21, 2012.

(i) Install the Fuel Return Line Assembly

If you find no evidence of damage of the fuel return line assembly (Cessna P/N 0516031–1) as a result of the inspection required by paragraph (g) of this AD, before further flight, reinstall the fuel return line assembly (Cessna P/N 0516031–1) following Cessna Aircraft Company Service Bulletin SEB–28–01, dated September 21, 2012.

(j) Install Forward and Aft Fuel Return Line Support Clamps and Brackets

After installing the fuel return line assembly as required by replacement in paragraph (h) of this AD or installation in paragraph (i) of this AD, before further flight, install the forward and aft fuel return line support clamps and brackets following Cessna Aircraft Company Service Bulletin SEB–28–01, dated September 21, 2012.

(k) Inspect for a Minimum Clearance Between Certain Parts

After the installation required by paragraph (j) of this AD, before further flight, inspect for a minimum clearance between the following parts throughout the range of copilot pedal travel. The requirements of this AD take precedence over the actions required in Cessna Aircraft Company Service Bulletin SEB–28–01, dated September 21, 2012:

(1) A minimum clearance of 0.5 inch between the fuel return line assembly (Cessna P/N 0516031–1) and the steering tube assembly (Cessna P/N MC0543022–2C); and

(2) Visible positive clearance between the fuel return line assembly (Cessna P/N 0516031–1) and the airplane structure.

(l) Adjust Clearance for Fuel Return Line Assembly

If you find any clearance less than the minimum clearance required by paragraph (k) of this AD, adjust to the minimum clearance required by paragraph (k) of this AD.

(m) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Wichita Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in the Related Information section of this AD.

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

(n) Related Information

(1) For more information about this AD, contact Jeff Janusz, Aerospace Engineer, Wichita ACO, FAA, 1801 S. Airport Road, Room 100, Wichita, Kansas 67209; phone: (316) 946–4148; fax: (316) 946–4107; email: *jeff.janusz@faa.gov.*

(2) For service information identified in this AD, contact Cessna Aircraft Company, Customer service, P.O. Box 7706, Wichita, KS 67277; telephone: (316) 517–5800; fax: (316) 517–7271; *customercare@cessna.textron.com;* Internet: *http://www.cessnasupport.com.* You may review copies of the referenced service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, MO 64106. For information on the availability of this material at the FAA, call (816) 329–4148.

Issued in Kansas City, Missouri, on November 29, 2012.

Earl Lawrence,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–29402 Filed 12–4–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–1274; Directorate Identifier 2012–CE–042–AD]

RIN 2120–AA64

Airworthiness Directives; Reims Aviation S.A. Airplanes

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for Reims Aviation S.A. Model F406 airplanes. This proposed AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as improper material used in nose landing gear (NLG) attachment brackets which could lead to failure of the NLG bracket with consequent damage to the airplane while landing. We are issuing this proposed AD to require actions to address the unsafe condition on these products.

DATES: We must receive comments on this proposed AD by January 22, 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 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Reims Aviation Industries, Aérodrome de Reims Prunay, 51360 Prunay, France; telephone + 33 3 26 48 46 65; fax + 33 3 26 49 18 57; email: *stephan.lapagne@reims-aviation.fr;* Internet: *www.geciaviation.com/en/f406.html.* You may review copies of the referenced service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329–4148.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Albert Mercado, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4119; fax: (816) 329–4090; email: *albert.mercado@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–2012–1274; Directorate Identifier 2012–CE–042–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

We will post all comments we receive, without change, to *http://regulations.gov,* including any personal information you provide. We will also post a report summarizing each

substantive verbal contact we receive about this proposed AD.

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA AD No.: 2012–0202, dated October 1, 2012 (referred to after this as "the MCAI"), to correct an unsafe condition for the specified products. The MCAI states:

> During the manufacturing process, RAI found that some of the nose landing gear (NLG) attachment brackets, Part Number (P/N) 6013119–1, were made of aluminum alloy, instead of steel. The results of the investigations showed that some of these aluminum alloy brackets are likely to be installed on aeroplanes currently in service.
>
> This condition, if not detected and corrected, could lead to failure of the NLG attachment bracket and jamming of the NLG extension/retraction mechanism, possibly resulting in a runway excursion and consequent damage to the aeroplane and injury to the occupants.
>
> For the reasons described above, this AD requires inspection of the NLG attachment bracket P/N 6013119–1 and, depending on findings, replacement with a serviceable bracket made of steel.
>
> In addition, as some aluminum alloy P/N 6013119–1 NLG attachment brackets may have been supplied as spares, this AD also requires determination that the part is made of steel, prior to installation.

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

Relevant Service Information

Reims Aviation S.A. has issued Service Bulletin No. F406–74, dated September 26, 2012. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of the 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 this State of Design Authority, they have 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 and determined the unsafe condition exists and is likely to exist or develop on other products of the same type design.

Costs of Compliance

We estimate that this proposed AD will affect 7 products of U.S. registry. We also estimate that it would take about .5 work-hour per product to comply with the basic requirements of this proposed AD. The average labor rate is $85 per work-hour.

Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $42.50, or $297.50 per product.

In addition, we estimate that any necessary follow-on actions would take about 3 work-hours and require parts costing $500, for a cost of $755 per product. We have no way of determining the number of products that may need these actions.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Reims Aviation S.A.: Docket No. FAA–2012–1274; Directorate Identifier 2012–CE–042–AD.

(a) Comments Due Date

We must receive comments by January 22, 2013.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Reims Aviation S.A. F406 airplanes, all serial numbers, certificated in any category.

(d) Subject

Air Transport Association of America (ATA) Code 32: Landing Gear.

(e) Reason

This AD was prompted by reports of improper material used in nose landing gear (NLG) attachment brackets which could lead to failure of the NLG bracket with consequent damage to the airplane while landing. We are issuing this proposed AD to ensure the proper NLG attachment bracket is installed.

(f) Actions and Compliance

Unless already done, do the following actions following the instructions in Reims Aviation S.A. Service Bulletin No. F406–74, dated September 26, 2012:

(1) Within the next 25 hours time-in-service (TIS) after the effective date of this AD or within the next 30 days after the effective date of this AD, whichever occurs first, inspect the nose landing gear (NLG) attachment brackets, part number (P/N) 6013119–1, to verify if they are made of steel and not aluminum alloy.

(2) If during the inspection required in paragraph (f)(1) of this AD, you find that a NLG attachment bracket made of aluminum alloy is installed, before further flight, replace with an airworthy steel NLG attachment bracket, P/N 6013119–1.

(3) As of the effective date of this AD, do not install any NLG attachment bracket P/N 6013119–1 that has not been confirmed to be made of steel.

(g) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, Standards Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Albert Mercado, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4119; fax: (816) 329–4090; email: *albert.mercado@faa.gov*. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(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.

(3) *Reporting Requirements:* For any reporting requirement in this AD, a federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. The OMB Control Number for this information collection is 2120–0056. Public reporting for this collection of information is estimated to be approximately 5 minutes per response, including the time for reviewing instructions, completing and reviewing the collection of information. All responses to this collection of information are mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed to the FAA at: 800 Independence Ave. SW., Washington, DC 20591, Attn: Information Collection Clearance Officer, AES–200.

(h) Related Information

Refer to MCAI European Aviation Safety Agency (EASA) AD No. 2012–0202, dated October 1, 2012; and Reims Aviation S.A. Service Bulletin No. F406–74, dated September 26, 2012, for related information. For service information related to this AD, contact Reims Aviation Industries, Aérodrome de Reims Prunay, 51360 Prunay, France; telephone + 33 3 26 48 46 65; fax + 33 3 26 49 18 57; email: *stephan.lapagne@reims-aviation.fr;* Internet: *www.geciaviation.com/en/f406.html*. You may review copies of the referenced service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329–4148.

Issued in Kansas City, Missouri, on November 29, 2012.

Earl Lawrence,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–29395 Filed 12–4–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

Minority Business Development Agency

15 CFR Part 1400

[Docket No. 121130667–2667–01]

Petition for Inclusion of the Arab-American Community in the Groups Eligible for MBDA Services

AGENCY: Minority Business Development Agency, Commerce.

ACTION: Notice of proposed rulemaking and request for comments; amendment.

SUMMARY: The Minority Business Development Agency (MBDA) publishes this notice to extend the date on which it plans to make its decision on a petition from the American-Arab Anti-Discrimination Committee requesting formal designation as a group eligible for MBDA's services from November 30, 2012 to March 1, 2013.

FOR FURTHER INFORMATION CONTACT: For further information about this Notice, contact Josephine Arnold, Minority Business Development Agency, 1401 Constitution Avenue NW., Room 5053, Washington, DC 20230, (202) 482–5461.

SUPPLEMENTARY INFORMATION: On May 30, 2012, the Minority Business Development Agency (MBDA) published a notice of proposed rulemaking and request for comments regarding a petition received on January 11, 2012 from the American-Arab Anti-Discrimination Committee (ADC) requesting formal designation of Arab-Americans as a minority group that is socially or economically disadvantaged pursuant to 15 CFR part 1400. MBDA has published several notices in the **Federal Register** to extend the date for making a decision on the merits of the petition. On September 4, 2012, MBDA published an amendment to extend the deadline for the decision until November 30, 2012. The Agency has determined that an additional ninety (90) day period for consideration of the policy implications associated with the petition is necessary. Therefore, the Agency has determined that the time in which it will make its decision on the petition will be on or before March 1, 2013. This extension will not prejudice the petitioner.

Minority Business Development Agency.

David Hinson,

National Director.

[FR Doc. 2012–29431 Filed 12–4–12; 8:45 am]

BILLING CODE 3510–21–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 500, 520, 522, 524, 529, 556, and 558

[Docket No. FDA–2012–N–1067]

RIN 0910–AG17

New Animal Drugs; Updating Tolerances for Residues of New Animal Drugs in Food

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is proposing to revise the animal drug regulations regarding tolerances for residues of approved and conditionally approved new animal drugs in food by standardizing, simplifying, and clarifying the determination standards and codification style. In addition, we are proposing to add definitions for key terms. The purpose of the revision is to enhance understanding of tolerance determination and improve the readability of the regulations.

DATES: Submit either electronic or written comments by March 5, 2013. See section VI of this document for the proposed effective date of a final rule based on this proposed rule.

ADDRESSES: You may submit comments, identified by Docket No. FDA–2012–N–1067 and RIN number 0910–AG17, by any of the following methods:

Electronic Submissions

Submit electronic comments in the following way:

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

Written Submissions

Submit written submissions in the following ways:

- *Fax:* 301–827–6870.
- *Mail/Hand Delivery/Courier* (for paper or CD–ROM submissions): Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

Instructions: All submissions received must include the Agency name, Docket

No. FDA–2012–N–1067, and Regulatory Information Number (RIN) 0910–AG17 for this rulemaking. All comments received may be posted without change to *http://www.regulations.gov,* including any personal information provided. For additional information on submitting comments, see the "Comments" heading of the **SUPPLEMENTARY INFORMATION** section of this document.

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

FOR FURTHER INFORMATION CONTACT: Dong Yan, Center for Veterinary Medicine (HFV–151), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 240–276–8117, email: *dong.yan@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Sections 512(b)(1)(H), 512(i), and 571(a)(2)(A) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 360b(b)(1)(H), 360b(i), and 360ccc(a)(2)(A)) provide the authority for the Secretary of Health and Human Services (the Secretary) to establish and publish regulations setting tolerances for residues of approved and conditionally approved new animal drugs. The Secretary delegated this authority to the Commissioner of Food and Drugs. FDA's regulations setting forth the tolerances for residues of new animal drugs in food are codified in part 556 of Title 21 of the Code of Federal Regulations (21 CFR part 556) (40 FR 13802 at 13942, March 27, 1975). The part 556 regulations describe general considerations regarding tolerances for residues of new animal drugs in food in subpart A and specific tolerances for residues of new animal drugs in subpart B. Subpart B has been amended frequently as new animal drugs have been approved for use in food-producing animals. Food from treated animals with new animal drug residues that exceed established tolerances is adulterated under section 402(a)(2)(C)(ii) of the FD&C Act (21 U.S.C. 342(a)(2)(C)(ii)).

FDA's human food safety evaluation of residues of new animal drugs has evolved over the past 50 years. Before the mid-1970s, FDA based tolerances primarily on a small number of toxicity studies, typically 90-day feeding studies in laboratory animals. From the results of these studies, FDA determined the "no-observed-effect-level" (NOEL). The acceptable daily intake (ADI) for total residue of a drug was calculated by dividing the NOEL by the appropriate safety factor to adjust for the differences between test animals and humans. To calculate the safe concentrations, FDA considered food consumption values and human body weight. Consumption was estimated as a total dietary exposure of 1,500 grams of food per day. Historically, FDA used an average human weight of 50 or 60 kilograms. Because these toxicology studies did not assess lifetime effects (which could only be observed in long-term feeding studies), FDA applied a 2,000-fold safety factor to the NOELs. FDA generally set the tolerance for "negligible" residues of these drugs at 0.1 part per million (ppm) in muscle and 10 parts per billion in milk, even if the computed tolerance exceeded the calculated values.

In later years, FDA assigned what it called "finite tolerances." Finite tolerances were calculated using procedures similar to those described previously, except, unlike tolerances set for "negligible" residues, finite tolerances were set at the calculated level. Finite tolerances had to be supported, at a minimum, by lifetime feeding studies in two rodent species, a 6-month or longer study in a non-rodent mammalian species, and a three-generation reproduction study. Because finite tolerances were based on more extensive studies, FDA generally applied a lower (100-fold) safety factor in calculating the ADI.

The earliest established tolerances generally referred to the parent drug. Consequently, residue chemistry studies, including residue depletion studies that served as the basis for assigning withdrawal periods for tissues and for milk (milk discard time), and the analytical methods used to measure residue levels focused on the parent drug.

From the mid-1970s to the present, FDA's human food safety evaluation of animal drug residues has evolved with advancements in science. As a result, the procedures described in the existing § 556.1 for setting drug tolerances no longer accurately reflect current regulatory science. In addition, current part 556 employs a patchwork of various styles for listing tolerances that have evolved over the past 40 years. As a result, the listings in part 556 are not uniform in format, and, in some instances, do not provide all relevant information in a consistent manner. For example, the regulations provide the ADI and safe concentrations for some, but not all, drugs. In addition, the regulations list some tolerances as being for "negligible" residue, and others as "no residue," "zero," or "not required," but they do not explain what these important terms mean. The proposed rule addresses these inconsistencies by simplifying and standardizing the determination standards and codification style and by adding definitions for key terms.

II. Description of Proposed Rule

FDA proposes to revise part 556 by standardizing and simplifying the codification style and adding definitions for key terms. First, proposed § 556.1 provides a revised scope for part 556. Second, proposed § 556.3 provides definitions of key terms FDA uses in the regulations. Third, proposed § 556.5 explains the general considerations for using the tolerance information for veterinary drug residues. Finally, FDA proposes a uniform format for listing tolerances in subpart B, by, among other things, removing obsolete or confusing terms and cross-referencing tolerances to the approved conditions of use for that new animal drug.

A. Subpart A—General Provisions

1. Scope (Proposed § 556.1)

FDA proposes to delete existing § 556.1 ("General considerations; tolerances for residues of new animal drugs in food") and replace it with a description of the scope. FDA proposes to discuss general considerations for setting tolerances in new § 556.5.

Proposed § 556.1 reiterates the requirement in sections 512(b)(1)(H) and 571(a)(2)(A) of the FD&C Act that applicants seeking approval or conditional approval of new animal drugs must submit a proposed tolerance as part of new animal drug applications when necessary to assure that the proposed use of the new animal drug will be safe. The proposed section states that FDA assigns tolerances for animal drugs used in food-producing animals as part of the application approval process and then codifies them in subpart B of part 556. Proposed § 556.1 also clarifies that compounds that have been found to be carcinogenic are regulated under subpart E of part 500 (21 CFR part 500).

2. Definitions (Proposed § 556.3)

FDA proposes to define in § 556.3 certain key terms used in animal drug residue chemistry and some terms frequently used in part 556. In the proposed rule, the definitions appear in alphabetical order. In this preamble, the definitions are discussed in an order

that facilitates the explanation of the interrelated concepts the terms represent.

a. *Terms related to determining tolerances.* FDA's human food safety evaluation focuses on residues of new animal drugs in the edible tissues of the treated animal. FDA proposes to define "edible tissues" as muscle, liver, kidney, fat, skin with fat in natural proportions, whole eggs, whole milk, and honey. FDA proposes to define "residue," as it is defined in 21 CFR 530.3, to mean any compound present in edible tissues that results from the use of a drug, and includes the drug, its metabolites, and any other substance formed in or on food because of the drug's use. Under the proposed rule, the "total residue" includes every residue of a given drug. FDA proposes to define total residue as the aggregate of all compounds that result from the use of an animal drug, including the drug, its metabolites, and any other substances formed in or on food because of such drug use.

Under the proposal, the definition of a NOEL means the highest dose level of a drug tested that produces no observable effects. ADI means the amount of total residue that can safely be consumed per day over a human's lifetime. The ADI is calculated by dividing the NOEL (from the most appropriate toxicological study) by a safety factor. The safety factor reflects, among other things, the extrapolation of long-term effects from shorter-term exposures, extrapolation of animal data to humans, and variability in sensitivity among human populations. Sometimes, the concept of an "acceptable single-dose intake" or "ASDI" is used to calculate tolerances. FDA is proposing to define "ASDI" as the amount of total residue that may safely be consumed in a single meal. The ASDI may be used to derive the tolerance for residues of a drug at an injection site where the drug is administered according to the label.

Under the proposed rule, a "tolerance" means the maximum concentration of a marker residue or other residue indicated for monitoring that can legally remain in a specific edible tissue of a treated animal. A "marker residue" means the residue selected for assay by the regulatory method. In general, the marker residue is a subset of the total residue; for example, the marker residue could be the parent drug, a metabolite, or a combination of residues. The concentration of the marker residue in the target tissue is in a known relationship to the concentration of the total residue in the target tissue. The "regulatory method" means the aggregate of all experimental procedures for measuring and confirming the presence of the marker residue in the target tissue of the target animal. The "target tissue" means the edible tissue selected to monitor for residues in the target animals. When the marker residue or other residue indicated for monitoring is at or below the tolerance in the target tissue, the total drug residues in all the edible tissues (excluding milk and eggs unless otherwise specified) should be at or below the safe concentration.

b. *Terms used to characterize tolerances.* In the past, FDA has used several terms to characterize tolerances in part 556, including "zero," "no residue," "not required," and "not needed" but has not included clear definitions in part 556 for these important terms. Because the differences in these terms has not always been evident, FDA is proposing to amend part 556 by eliminating redundant terminology and adding definitions for the terms that the Agency intends to continue using to help ensure that going forward the terms will be uniformly applied by the Agency and understood by the public.

First, over the years, many people have mistakenly believed the term "zero" with respect to tolerances to mean there could be no residue remaining in an edible tissue. However, FDA acknowledges that some residue will remain in the animal, even if below a detectable level, and that a complete lack of drug residue is not achievable. In approving certain animal drugs, FDA assigned a "zero" tolerance, with "zero" meaning that no residues could be detected using the approved analytical method to detect residues of that drug. Often, the analytical method chosen to determine "zero" represented the limit of technology at the time. FDA no longer assigns "zero" tolerances for new approvals, but instead assigns a tolerance for a drug based on a toxicological and residue chemistry evaluation (see proposed § 556.5). However, FDA is not proposing to remove the previously assigned "zero" tolerances from the regulations at this time.

Second, FDA uses the term "no residue" to apply specifically to compounds of carcinogenic concern. Under section 512(d)(1)(I) of the FD&C Act, "no residue" of any drug that induces cancer when ingested by man or animal is allowed in any edible tissue of a food-producing animal, when tested using methods of examination prescribed or approved by FDA. FDA historically has interpreted the term "no residue" to mean that any residue in the target tissue must be non-detectable or below the limit of detection of the approved regulatory method (67 FR 78172, December 23, 2002). Consistent with this interpretation, FDA is proposing to define "no residue" to mean that the marker residue is below the limit of detection using the approved regulatory method. FDA is proposing to add this definition to § 500.82 under subpart E entitled "Regulation of Carcinogenic Compounds Used in Food-Producing Animals."

Third, FDA previously approved some animal drugs with a waiver of the requirement for a tolerance (*i.e.*, a tolerance was "not required" or "not needed") because they met two conditions in place at the time they were evaluated by FDA. The first condition was an assurance that residues would deplete to or below safe levels by zero-day withdrawal (*i.e.*, no withdrawal period was needed), or that an adequate withdrawal period was inherent in the proposed conditions of drug use. The second condition was a rapid depletion of residues, so there was no concern about residues resulting from misuse or overdosing. Sometimes the codified tolerance listings described these situations as ones where a tolerance was "not needed"; other times the phrase "not required" was used to convey the same meaning. To ensure consistency, FDA proposes to revise part 556 to delete descriptions of tolerances as "not needed" and replace such designations with the term "not required."

Fourth, in the past, when a drug was approved with a zero withdrawal period, FDA would not set a tolerance for the particular drug. Historically, FDA generally recommended that a sponsor of a drug seeking a zero withdrawal period conduct a total residue depletion study in which target animals were dosed with 1.5 to 2 times the recommended maximum dose of drug to simulate overdosing. If a zero withdrawal period was approved, FDA would not set a tolerance for the drug.

Currently, FDA continues to recommend these total residue depletion studies when sponsors propose zero withdrawal periods, but, when possible, FDA sets a tolerance for these drugs. Infrequently, circumstances preclude FDA from setting a tolerance. For example, some drugs may be poorly absorbed and/or metabolized rapidly to such an extent as to make selection of an analyte impractical or impossible. In these uncommon cases, FDA proposes to use the term "not required" when describing the tolerance.

FDA is proposing to define "not required" with respect to tolerances as indicating that at the time of approval, the drug met one of the following conditions: (1) No withdrawal period (*i.e.*, zero withdrawal) was necessary for residues of the drug to deplete to or below the concentrations considered to be safe or an adequate withdrawal period was inherent in the proposed drug use, and there was no concern about residues resulting from misuse or overdosing; or (2) the drug qualified for a zero withdrawal period because it was poorly absorbed or metabolized rapidly to such an extent as to make selection of an analyte impractical or impossible.

3. General Considerations (Proposed § 556.5)

Proposed § 556.5(a) states that tolerances published in subpart B of part 556 pertain only to the species and production classes of the animal for which the drug use has been approved or conditionally approved. The proposed rule provides the approved use and conditionally approved use conditions, including species and production classes, in each tolerance listing under "(c) *Related conditions of use.*" Tolerances are not provided for extralabel (*e.g.*, use in species or production classes in which the drug is not approved for use.) Extralabel use resulting in any residue above an established safe level or tolerance is unlawful and renders the drug product adulterated under section 501(a)(5) of the FD&C Act (21 U.S.C. 351(a)(5)), in that it is unsafe within the meaning of section 512 of the FD&C Act.

Proposed § 556.5(b) states that all tolerances refer to the concentrations of a marker residue, or other residue indicated for monitoring, permitted in uncooked tissues.

Proposed § 556.5(c) states that a finding that the concentration of a marker residue is at or below the tolerance in the target tissue from a tested animal indicates that all edible tissues (excluding milk and eggs unless otherwise specified) from that animal are safe. In the proposed listing format, if a listed tolerance is linked to a target tissue, the phrase "target tissue" will appear in parentheses immediately after the identified tissue. If a listed tolerance is not expressly linked to a target tissue, then the tolerance is meant to apply only to the named edible tissue, and inferences cannot be made about the safety of the other edible tissues from the target animal.

Proposed § 556.5(d) states that FDA requires that a drug sponsor develop a regulatory method to measure drug residues in edible tissues of approved target species at concentrations around the tolerance as provided in § 514.1(b)(7) of this chapter. The tolerance is directly tied to the approved regulatory method because FDA determines the tolerance using data collected with that method.

B. Subpart B—Specific Tolerances for Residues of Approved and Conditionally Approved New Animal Drugs

FDA proposes a uniform format for the individual drug tolerance listings in subpart B. FDA would list the ADI and ASDI if they are available. If the ADI and ASDI are both unavailable, FDA would reserve paragraph (a) for future use. FDA would list tolerances in paragraph (b) for each edible tissue for each species, as appropriate. When a tolerance listing states "edible tissues," it would mean all edible tissues of that species unless otherwise specified. FDA intends the revised paragraph (c) to help readers locate approved or conditionally approved uses of each drug and to identify the form of the drug (*e.g.*, free acid or base, salt, hydrate).

FDA proposes to revise subpart B by deleting tolerances for certain drugs (or species of animals) whose approvals have been withdrawn, but the corresponding tolerances were not removed from the part 556 listing; and adding tolerances for approved drugs not previously listed in this subpart. Specifically, FDA proposes to delete the tolerances for clopidol for all species other than chickens and turkeys (§ 556.160) and nystatin for swine (§ 556.470). FDA proposes to add tolerance listings for: Azaperone, bambermycins, coumaphos, efrotomycin, fenprostalene (swine), fenthion, flurogestone, and poloxalene.

Note that some listings provide more than one tolerance. For example, tilmicosin in cattle (§ 556.735(b)(1)) includes the following information: A marker residue (tilmicosin), a target tissue (liver), a tolerance of 1.2 ppm for tilmicosin in liver of cattle, and a tolerance of 0.1 ppm for tilmicosin in muscle of cattle.

This means that if the concentration of tilmicosin in the liver of a treated animal is at or below 1.2 ppm, all the edible tissues (excluding milk and eggs unless otherwise specified) from the animal are considered to be safe if ingested daily by humans over a lifetime. If the concentration of tilmicosin is assayed for only the muscle tissue and the concentration is at or below 0.1 ppm, the muscle tissue from the animal is considered to be safe if ingested daily by humans over a lifetime. Because muscle is not the target tissue, the tilmicosin concentration in muscle alone does not predict residue safety for the other edible tissues.

C. Other Proposed Changes to Part 556

This proposal includes other changes to the current part 556 regulations. First, FDA proposes to delete salt designations from the tolerance listings in subpart B. For example, maduramicin ammonium, morantel tartrate, and sulfabromomethazine sodium will be listed as maduramicin, morantel, and sulfabromomethazine, respectively. FDA proposes this change for several reasons. The residues derived from salt formulations and hydrated forms of a given drug are the same. In addition, the approved regulatory methods ordinarily measure the free drug, a metabolite, or some combination of residues, not the salts. FDA also believes such a simplification of tolerance listings will improve their readability. However, when FDA lists the ADI for a compound, the specific compound that was administered in the pivotal toxicological feeding study will be indicated, as toxicological outcome could be affected by salt formulation.

Second, FDA proposes to cross-reference drug tolerances in part 556 to the approved or conditionally approved conditions of use listed in 21 CFR parts 516, 520, 522, 524, 526, 529, and 558. These listings specify the drug, salt, dosage form, and indications for use (amount, animal species/production class, and limitations) of approved or conditionally approved animal drug products. In conjunction with adding these cross-references, FDA proposes to remove references to production classes from tolerance listings in subpart B. In a few past instances, FDA codified tolerances specifying the production class (*e.g.*, beef or dairy cattle) of food-producing species. This was done in an effort to be consistent with the listed approved conditions of use, but for only a few animal drugs listed in part 556.

FDA also proposes to delete safe concentrations from the tolerance listings in part 556. Although tolerances have been codified using the total residue, target tissue, and marker residue concepts for about 25 years, the particular types of information codified have varied. For some drugs, FDA listed only tolerances. For other drugs, FDA listed safe concentrations as well as tolerances, leading some readers to misinterpret the safe concentrations as tolerances. Because a tolerance can be a small fraction of the safe concentration, such a misunderstanding could lead to referencing an incorrect residue safety standard for a specific drug. FDA

tentatively concludes that removing safe concentrations from the codified listings will reduce the potential for this confusion. The Agency invites comment on this removal.

Further, FDA proposes to remove the word "negligible" from tolerance citations, because the word is outdated. A tolerance is the maximum concentration of a new animal drug residue that can legally remain in an edible tissue of a treated animal and raise no concern for human food safety. In other words, by definition, a tolerance essentially represents the negligible level of residue. Therefore, FDA no longer uses the word "negligible" to characterize residues.

Finally, FDA is proposing to delete the word "uncooked" from the individual listings in subpart B. Because the general considerations and the proposed definition of tolerance clarifies that all tolerances refer to the concentrations of the marker residue, or other residues indicated for monitoring, permitted in uncooked edible tissues, including the word "uncooked" in individual listings is no longer necessary.

FDA seeks comment on the proposed changes to part 556. In particular, the Agency is interested to know if the reorganization and standardization of content enhances the clarity and utility of part 556 and if the definitions of terms are clear and understandable. FDA does not, however, seek comment on the numerical drug residue tolerance values listed in subpart B as these values were determined by FDA in conjunction with the approval or conditional approval of each new animal drug application and, as such, are not the subject of public comment. An exception would be the notation of a technical error where the numerical value cited in the published document does not conform to an approved application or application for conditional approval.

III. Environmental Impact

The Agency has determined under 21 CFR 25.30(i) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

IV. Analysis of Impacts

FDA has examined the impacts of the proposed rule under Executive Order 12866, Executive Order 13563, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). Executive Orders 12866 and 13563 direct Agencies to assess all 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, and other advantages; distributive impacts; and equity). The Agency believes that this proposed rule is not a significant regulatory action as defined by the Executive Order 12866.

The Regulatory Flexibility Act requires Agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because this proposed rule would not impose compliance costs on the current or future sponsors of any approved and conditionally approved new animal drugs, the Agency proposes to certify that the final rule will not have a significant economic impact on a substantial number of small entities.

Section 202(a) of the Unfunded Mandates Reform Act of 1995 requires that Agencies prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing "any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year." The current threshold after adjustment for inflation is $139 million, using the most current (2011) Implicit Price Deflator for the Gross Domestic Product. FDA does not expect this proposed rule to result in any 1-year expenditure that would meet or exceed this amount.

V. Federalism

FDA has analyzed this proposed rule in accordance with the principles set forth in Executive Order 13132. FDA has determined that the proposed rule, if finalized, would not contain policies that would 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. Accordingly, the Agency tentatively concludes that the proposed rule does not contain policies that have federalism implications as defined in the Executive order and, consequently, a federalism summary impact statement is not required.

VI. Paperwork Reduction Act of 1995

FDA tentatively concludes that this proposed rule contains no new collections of information. Therefore, clearance by the Office of Management and Budget under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) is not required.

VII. Proposed Effective Date

FDA is proposing that any final rule that may issue based on this proposal be effective 60 days after the date of its publication in the **Federal Register**.

VIII. Comments

Interested persons may submit either written comments regarding this document to the Division of Dockets Management (see **ADDRESSES**) or electronic comments to *http://www.regulations.gov*. 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*.

List of Subjects

21 CFR Part 500

Animal drugs, Animal feeds, Cancer, Labeling, Packaging and containers, Polychlorinated biphenyls (PCBs).

21 CFR Parts 520, 522, 524, and 529

Animal drugs.

21 CFR Part 556

Animal drugs, Foods.

21 CFR Part 558

Animal drugs, Animal feeds.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, it is proposed that 21 CFR chapter I, subchapter E, be amended as follows:

PART 500—GENERAL

1. The authority citation for 21 CFR part 500 continues to read as follows:

Authority: 21 U.S.C. 321, 331, 342, 343, 348, 351, 352, 353, 360b, 371, 379e.

2. Amend § 500.82, in paragraph (b), by alphabetically adding a definition for "no residue" to read as follows:

§ 500.82 Definitions.

* * * * *

(b) * * *

No residue means the marker residue is below the limit of detection using the approved regulatory method. The "no residue" designation applies only to compounds of carcinogenic concern.

* * * * *

PART 520—ORAL DOSAGE FORM NEW ANIMAL DRUGS

3. The authority citation for 21 CFR part 520 continues to read as follows:

Authority: 21 U.S.C. 360b.

4. In § 520.1840, revise paragraph (c) to read as follows:

§ 520.1840 Poloxalene.

* * * * *

(c) *Related tolerances.* See § 556.517 of this chapter.

* * * * *

5. In § 520.2640, revise paragraph (c) to read as follows:

§ 520.2640 Tylosin.

* * * * *

(c) *Related tolerances.* See § 556.746 of this chapter.

* * * * *

PART 522—IMPLANTATION OR INJECTABLE DOSAGE FORM NEW ANIMAL DRUGS

6. The authority citation for 21 CFR part 522 continues to read as follows:

Authority: 21 U.S.C. 360b.

7. In § 522.770, revise paragraph (c) to read as follows:

§ 522.770 Doramectin.

* * * * *

(c) *Related tolerances.* See § 556.222 of this chapter.

* * * * *

8. In § 522.2640, revise paragraph (d) to read as follows:

§ 522.2640 Tylosin.

* * * * *

(d) *Related tolerances.* See § 556.746 of this chapter.

* * * * *

PART 524—OPHTHALMIC AND TOPICAL DOSAGE FORM NEW ANIMAL DRUGS

9. The authority citation for 21 CFR part 524 continues to read as follows:

Authority: 21 U.S.C. 360b.

10. In § 524.920, revise paragraph (c)(4) to read as follows:

§ 524.920 Fenthion.

* * * * *

(c) * * *

(4) *Related tolerances.* See § 556.280 of this chapter.

* * * * *

PART 529—CERTAIN OTHER DOSAGE FORM NEW ANIMAL DRUGS

11. The authority citation for 21 CFR part 529 continues to read as follows:

Authority: 21 U.S.C. 360b.

12. In § 529.1003, add paragraph (d) to read as follows:

§ 529.1003 Flurogestone acetate-impregnated vaginal sponge.

* * * * *

(d) *Related tolerances.* See § 556.290 of this chapter.

PART 556—TOLERANCES FOR RESIDUES OF NEW ANIMAL DRUGS IN FOOD

13. The authority citation for 21 CFR part 556 is revised to read as follows:

Authority: 21 U.S.C. 342, 360b, 360ccc, 371.

14. Revise part 556 to read as follows:

Subpart A—General Provisions

Sec.

Subpart B—Specific Tolerances for Residues of Approved and Conditionally Approved New Animal Drugs

Sec.

Subpart A—General Provisions

§ 556.1 Scope.

(a) The Federal Food, Drug, and Cosmetic Act requires an applicant seeking approval or conditional approval of a new animal drug to submit a proposed tolerance as part of its new animal drug application when such a tolerance is needed to assure that the proposed use of the new animal drug will be safe (see sections 512(b)(1)(H) and 571(a)(2)(A) of the Federal Food, Drug, and Cosmetic Act). FDA assigns tolerances for animal drugs used in

food-producing animals as part of the application approval process. Tolerances for approved and conditionally approved new animal drugs are codified in subpart B of this part.

(b) Compounds that have been found to be carcinogenic are regulated under subpart E of part 500 of this chapter.

§ 556.3 Definitions.

As used in this part:

Acceptable daily intake (ADI) means the amount of total residue that can safely be consumed per day over a human's lifetime without adverse health effect. The ADI is calculated by dividing the no-observed-effect-level (NOEL) (from the most appropriate toxicological study) by a safety factor. The safety factor reflects, among other things, the extrapolation of long-term effects from shorter-term exposures, extrapolation of animal data to humans, and variability in sensitivity among human populations.

Acceptable single-dose intake (ASDI) means the amount of total residue that may safely be consumed in a single meal. The ASDI may be used to derive the tolerance for residue of the drug at the injection site where the drug is administered according to the label.

Edible tissues means muscle, liver, kidney, fat, skin with fat in natural proportions, whole eggs, whole milk, and honey.

Marker residue means the residue selected for assay by the regulatory method whose concentration in the target tissue is in a known relationship to the concentration of the total residue in the target tissue. A finding that the concentration of marker residue is at or below the tolerance in the target tissue from a tested animal indicates that all edible tissues (excluding milk and eggs unless otherwise specified) from that animal are safe.

mg/kg means milligrams per kilogram.

No-Observed-Effect Level (NOEL) means the highest dose level of a drug tested that produces no observable effects.

Not required, in reference to tolerances in this part, means that at the time of approval, the drug met one of the following conditions:

(1) No withdrawal period (*i.e.* zero withdrawal) was necessary for residues of the drug to deplete to or below the concentrations considered to be safe or an adequate withdrawal period was inherent in the proposed drug use, and there was no concern about residues resulting from misuse or overdosing; or

(2) The drug qualified for a zero withdrawal period because it was poorly absorbed or metabolized rapidly so as to make selection of an analyte impractical or impossible.

ppb means parts per billion (equivalent to nanograms per gram (ng/g) or µg/kg).

ppm means parts per million (equivalent to micrograms per gram (µg/g) or mg/kg).

ppt means parts per trillion (equivalent to picograms per gram (pg/g) or nanograms per kilogram (ng/kg)).

Regulatory method means the aggregate of all experimental procedures for measuring and confirming the presence of the marker residue in the target tissue of the target animal.

Residue means any compound present in edible tissues that results from the use of a drug, and includes the drug, its metabolites, and any other substance formed in or on food because of the drug's use.

Target tissue means the edible tissue selected to monitor for residues in the target animals.

Tolerance means the maximum concentration of a marker residue, or other residue indicated for monitoring, that can legally remain in a specific edible tissue of a treated animal. (A finding, using the approved regulatory method, that the concentration of the marker residue or other residue indicated for monitoring is present in the target tissue at a concentration at or below the tolerance, indicates that all edible tissues (excluding milk and eggs unless otherwise specified) from the tested animal are safe. All tolerances refer to the concentrations of a marker residue, or other residue indicated for monitoring, permitted in uncooked tissues.)

Total residue means the aggregate of all compounds that results from the use of an animal drug, including the drug, its metabolites, and any other substances formed in or on food because of such drug use.

µg/kg means microgram per kilogram.

Zero, in reference to tolerances in this part, means no detectable residues are allowed when using a method of detection prescribed or approved by FDA. Any residue detectable using the prescribed or approved method renders the tissue unsafe.

§ 556.5 General considerations.

(a) The tolerances listed in subpart B of this part pertain only to the species and production classes of the animal for which the drug use has been approved or conditionally approved. Approved use and conditionally approved use conditions, including the species and production classes of the animals, are cited under paragraph (c) *Related conditions of use* for each tolerance listing of subpart B of this part.

(b) All tolerances refer to the concentrations of a marker residue, or other residue indicated for monitoring, permitted in uncooked tissues.

(c) After a tolerance is listed, the finding that the concentration of the marker residue in the target tissue from a tested animal is at or below the tolerance indicates that all edible tissues (excluding milk and eggs unless otherwise indicated) from that tested animal are safe for human consumption. If a listed tolerance is not expressly linked to a target tissue, then the tolerance is specific only for the named edible tissue and inferences cannot be made about the safety of the other edible tissues from the tested animal.

(d) FDA requires that a drug sponsor develop a regulatory method to measure drug residues in edible tissues of approved target species at concentrations around the tolerance as provided in § 514.1(b)(7) of this chapter. Because FDA determines the tolerance for the marker residue using data collected with the approved regulatory method, the tolerance is directly tied to that method. Approved regulatory methods are available from the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

Subpart B—Specific Tolerances for Residues of Approved and Conditionally Approved New Animal Drugs

§ 556.34 Albendazole.

(a) *Acceptable daily intake (ADI).* The ADI for total residue of albendazole is 5 µg/kg of body weight per day.

(b) *Tolerances.* The tolerances for albendazole 2-aminosulfone (marker residue) are:

(1) *Cattle*—(i) *Liver (target tissue):* 0.2 ppm.

(ii) *Muscle:* 0.05 ppm.

(2) *Sheep*—(i) *Liver (target tissue):* 0.25 ppm.

(ii) *Muscle:* 0.05 ppm.

(3) *Goat*—(i) *Liver (target tissue):* 0.25 ppm.

(ii) [Reserved]

(c) *Related conditions of use.* See § 520.45 of this chapter.

§ 556.36 Altrenogest.

(a) *Acceptable daily intake (ADI).* The ADI for total residue of altrenogest is 0.04 µg/kg of body weight per day.

(b) *Tolerances.* The tolerance for altrenogest (the marker residue) is:

(1) *Swine*—(i) *Liver (target tissue):* 4 ppb.

(ii) *Muscle:* 1 ppb.
(2) [Reserved]
(c) *Related conditions of use.* See § 520.48 of this chapter.

§ 556.38 Amoxicillin.

(a) [Reserved]
(b) *Tolerances.* The tolerances for amoxicillin are:
(1) *Cattle—Edible tissues:* 0.01 ppm.
(2) [Reserved]
(c) *Related conditions of use.* See §§ 520.88, 522.88, and 526.88 of this chapter.

§ 556.40 Ampicillin.

(a) [Reserved]
(b) *Tolerances.* The tolerances for ampicillin are:
(1) *Cattle—Edible tissues:* 0.01 ppm.
(2) *Swine—Edible tissues:* 0.01 ppm.
(c) *Related conditions of use.* See §§ 520.90e, 520.90f, and 522.90 of this chapter.

§ 556.50 Amprolium.

(a) [Reserved]
(b) *Tolerances.* The tolerances for amprolium are:
(1) *Cattle*—(i) *Liver, kidney, and muscle:* 0.5 ppm.
(ii) *Fat:* 2.0 ppm.
(2) *Chickens and turkeys*—(i) *Liver and kidney:* 1 ppm.
(ii) *Muscle:* 0.5 ppm.
(iii) *Eggs:*
(A) *Egg yolks:* 8 ppm.
(B) *Whole eggs:* 4 ppm.
(3) *Pheasants*—(i) *Liver:* 1 ppm.
(ii) *Muscle:* 0.5 ppm.
(c) *Related conditions of use.* See §§ 520.100, 558.55, and 558.58 of this chapter.

§ 556.52 Apramycin.

(a) *Acceptable daily intake (ADI).* The ADI for total residue of apramycin is 25 µg/kg of body weight per day.
(b) *Tolerance.* The tolerance for apramycin (marker residue) is:
(1) *Swine—Kidney (target tissue):* 0.1 ppm.
(2) [Reserved]
(c) *Related conditions of use.* See §§ 520.110 and 558.59 of this chapter.

§ 556.60 Arsenic.

(a) [Reserved]
(b) *Tolerances.* The tolerances for total residue of combined arsenic (calculated as As) are:
(1) *Chickens and turkeys*—(i) *Muscle and eggs:* 0.5 ppm.
(ii) *Other edible tissues:* 2 ppm.
(2) *Swine*—(i) *Liver and kidney:* 2 ppm.
(ii) *Muscle and fat:* 0.5 ppm.
(c) *Related conditions of use.* See §§ 520.2087, 520.2088, 520.2089, 558.62, 558.120, 558.369, and 558.530 of this chapter.

§ 556.68 Azaperone.

(a) *Acceptable daily intake (ADI).* The ADI for total residues of azaperone is 0.63 µg/kg of body weight per day.
(b) *Tolerances.* The tolerances for azaperone are:
(1) *Swine*—(i) *Edible tissues:* Not required.
(2) [Reserved]
(c) *Related conditions of use.* See § 522.150 of this chapter.

§ 556.70 Bacitracin.

(a) *Acceptable daily intake (ADI).* The ADI for total residue of bacitracin is 0.05 mg/kg of body weight per day.
(b) *Tolerances.* The tolerances for bacitracin are:
(1) *Cattle—Edible tissues:* 0.5 ppm.
(2) *Chickens, turkeys, pheasants, quail—Edible tissues:* 0.5 ppm.
(3) *Swine—Edible tissues:* 0.5 ppm.
(c) *Related conditions of use.* See §§ 520.154, 558.76, and 558.78 of this chapter.

§ 556.75 Bambermycins.

(a) [Reserved]
(b) *Tolerances.* The tolerances for bambermycins are:
(1) *Cattle—Edible tissues (excluding milk):* Not required.
(2) *Chickens and turkeys—Edible tissues (excluding eggs):* Not required.
(3) *Swine—Edible tissues:* Not required.
(c) *Related conditions of use.* See § 558.95 of this chapter.

§ 556.100 Carbadox.

(a) [Reserved]
(b) *Tolerance.* The tolerance for quinoxaline-2-carboxylic acid (marker residue) is:
(1) *Swine—Liver (target tissue):* 30 ppb.
(2) [Reserved]
(c) *Related conditions of use.* See § 558.115 of this chapter.

§ 556.110 Carbomycin.

(a) [Reserved]
(b) *Tolerances.* The tolerances for carbomycin are:
(1) *Chickens—Edible tissues (excluding eggs):* Zero.
(2) [Reserved]
(c) *Related conditions of use.* See § 520.1660a of this chapter.

§ 556.113 Ceftiofur.

(a) *Acceptable daily intake and acceptable single-dose intake*—(1) *Acceptable daily intake (ADI).* The ADI for total residue of ceftiofur is 30 µg/kg of body weight per day.
(2) *Acceptable single-dose intake (ASDI).* The ASDI total residue for ceftiofur is 0.830 mg/kg of body weight. The ASDI is the amount of total residue of ceftiofur that may safely be consumed in a single meal.
(b) *Tolerances.* The tolerances for desfuroylceftiofur (marker residue) are:
(1) *Cattle*—(i) *Kidney (target tissue):* 0.4 ppm.
(ii) *Liver:* 2 ppm.
(iii) *Muscle:* 1 ppm.
(iv) *Milk:* 0.1 ppm.
(2) *Chickens and turkeys—Edible tissues (excluding eggs):* Not required.
(3) *Goats*—(i) *Kidney (target tissue):* 8 ppm.
(ii) *Liver:* 2 ppm.
(iii) *Muscle:* 1 ppm.
(iv) *Milk:* 0.1 ppm.
(4) *Sheep—Edible tissues (excluding milk):* Not required.
(5) *Swine*—(i) *Kidney (target tissue):* 0.25 ppm.
(ii) *Liver:* 3 ppm.
(iii) *Muscle:* 2 ppm.
(c) *Related conditions of use.* See §§ 522.313 and 526.313 of this chapter.

§ 556.115 Cephapirin.

(a) [Reserved]
(b) *Tolerances.* The tolerances for cephapirin are:
(1) *Cattle*—(i) *Edible tissues (excluding milk):* 0.1 ppm.
(ii) *Milk:* 0.02 ppm.
(2) [Reserved]
(c) *Related conditions of use.* See §§ 526.363 and 526.365 of this chapter.

§ 556.120 Chlorhexidine.

(a) [Reserved]
(b) *Tolerances.* The tolerances for chlorhexidine are:
(1) *Cattle—Edible tissues (excluding milk):* Zero.
(2) [Reserved]
(c) *Related conditions of use.* See § 529.400 of this chapter.

§ 556.150 Chlortetracycline.

(a) *Acceptable daily intake (ADI).* The ADI for total residue of tetracyclines including chlortetracycline, oxytetracycline, and tetracycline is 25 µg/kg of body weight per day.
(b) *Tolerances.* The tolerances for the sum of tetracycline residues are:
(1) *Cattle*—(i) *Liver:* 6 ppm.
(ii) *Kidney and fat:* 12 ppm.
(iii) *Muscle:* 2 ppm.
(2) *Chickens, turkeys, and ducks*—(i) *Liver:* 6 ppm.
(ii) *Kidney and fat:* 12 ppm.
(iii) *Muscle:* 2 ppm.
(iv) *Eggs:* 0.4 ppm for chlortetracycline only.
(3) *Sheep*—(i) *Liver:* 6 ppm.
(ii) *Kidney and fat:* 12 ppm.
(iii) *Muscle:* 2 ppm.
(4) *Swine*—(i) *Liver:* 6 ppm.
(ii) *Kidney and fat:* 12 ppm.
(iii) *Muscle:* 2 ppm.

(c) *Related conditions of use.* See §§ 520.445, 558.128, 558.145, and 558.155 of this chapter.

§ 556.160 Clopidol.

(a) [Reserved]

(b) *Tolerances.* The tolerances for clopidol are:

(1) *Chickens and turkeys*—(i) *Liver and kidney:* 15 ppm.

(ii) *Muscle:* 5 ppm.

(2) [Reserved]

(c) *Related conditions of use.* See § 558.175 of this chapter.

§ 556.163 Clorsulon.

(a) *Acceptable daily intake (ADI).* The ADI for total residue of clorsulon is 8 µg/kg of body weight per day.

(b) *Tolerances.* The tolerances for clorsulon (marker residue) are:

(1) *Cattle*—(i) *Kidney (target tissue):* 1.0 ppm.

(ii) *Muscle:* 0.1 ppm.

(2) [Reserved]

(c) *Related conditions of use.* See §§ 520.462 and 522.1193 of this chapter.

§ 556.165 Cloxacillin.

(a) [Reserved]

(b) *Tolerances.* The tolerances for cloxacillin are:

(1) *Cattle—Edible tissues:* 0.01 ppm.

(2) [Reserved]

(c) *Related conditions of use.* See § 526.464 of this chapter.

§ 556.167 Colistimethate.

(a) [Reserved]

(b) *Tolerances.* The tolerances for colistimethate are:

(1) *Chickens—Edible tissues (excluding eggs):* Not required.

(2) [Reserved]

(c) *Related conditions of use.* See § 522.468 of this chapter.

§ 556.168 Coumaphos.

(a) [Reserved]

(b) *Tolerances.* The tolerances for coumaphos (measured as coumaphos and its oxygen analog, O,O-diethyl O–3-chloro-4-methyl-2-oxo-2 H–1-benzopyran-7-yl phosphate) are:

(1) *Cattle*—(i) *Edible tissues (excluding milk):* 1 ppm.

(ii) *Milk fat:* 0.5 ppm.

(2) *Chickens*—(i) *Edible tissues (excluding eggs):* 1 ppm.

(ii) *Eggs:* 0.1 ppm.

(c) *Related conditions of use.* See § 558.185 of this chapter.

§ 556.169 Danofloxacin.

(a) *Acceptable daily intake (ADI).* The ADI for total residue of danofloxacin is 2.4 µg/kg of body weight per day.

(b) *Tolerances.* The tolerances for danofloxacin (marker residue) are:

(1) *Cattle*—(i) *Liver (target tissue):* 0.2 ppm.

(ii) *Muscle:* 0.2 ppm.

(2) [Reserved]

(c) *Related conditions of use.* See § 522.522 of this chapter.

§ 556.170 Decoquinate.

(a) *Acceptable daily intake (ADI).* The ADI for total residue of decoquinate is 75 µg/kg of body weight per day.

(b) *Tolerances.* The tolerances for decoquinate are:

(1) *Cattle*—(i) *Muscle:* 1 ppm.

(ii) *Other edible tissues (excluding milk):* 2 ppm.

(2) *Chickens*—(i) *Muscle:* 1 ppm.

(ii) *Other edible tissues (excluding eggs):* 2 ppm.

(3) *Goats*—(i) *Muscle:* 1 ppm.

(ii) *Other edible tissues (excluding milk):* 2 ppm.

(c) *Related conditions of use.* See § 558.195 of this chapter.

§ 556.180 Dichlorvos.

(a) [Reserved]

(b) *Tolerances.* The tolerances for dichlorvos are:

(1) *Swine—Edible tissues:* 0.1 ppm.

(2) [Reserved]

(c) *Related conditions of use.* See § 558.205 of this chapter.

§ 556.185 Diclazuril.

(a) *Acceptable daily intake (ADI).* The ADI for total residue of diclazuril is 25 µg/kg of body weight per day.

(b) *Tolerances.* The tolerances for diclazuril are:

(1) *Chickens and turkeys*—(i) *Liver:* 3 ppm.

(ii) *Muscle:* 0.5 ppm.

(iii) *Skin/fat:* 1 ppm.

(2) [Reserved]

(c) *Related conditions of use.* See § 558.198 of this chapter.

§ 556.200 Dihydrostreptomycin.

(a) [Reserved]

(b) *Tolerances.* The tolerances for dihydrostreptomycin are:

(1) *Cattle*—(i) *Kidney:* 2.0 ppm.

(ii) *Other edible tissues (excluding milk):* 0.5 ppm.

(iii) *Milk:* 0.125 ppm.

(2) *Swine*—(i) *Kidney:* 2.0 ppm.

(ii) *Other edible tissues:* 0.5 ppm.

(c) *Related conditions of use.* See §§ 520.2158b, 520.2158c, 522.650, and 526.1696b of this chapter.

§ 556.222 Doramectin.

(a) *Acceptable daily intake (ADI).* The ADI for total residue of doramectin is 0.75 µg/kg of body weight per day.

(b) *Tolerances.* The tolerances for doramectin (marker residue) are:

(1) *Cattle*—(i) *Liver (target tissue):* 100 ppb.

(ii) *Muscle:* 30 ppb.

(2) *Swine—Liver (target tissue):* 160 ppb.

(c) *Related conditions of use.* See §§ 522.770 and 524.770 of this chapter.

§ 556.224 Efrotomycin.

(a) *Acceptable daily intake (ADI).* The ADI for total residue of efrotomycin is 10 µg/kg of body weight per day.

(b) *Tolerances.* The tolerances for efrotomycin are:

(1) *Swine—Edible tissues:* Not required.

(2) [Reserved]

(c) *Related conditions of use.* See § 558.235 of this chapter.

§ 556.226 Enrofloxacin.

(a) *Acceptable daily intake (ADI).* The ADI for total residue of enrofloxacin is 3 µg/kg of body weight per day.

(b) *Tolerances.* The tolerances for enrofloxacin are:

(1) *Cattle—Liver (target tissue):* 0.1 ppm desethylene ciprofloxacin (marker residue).

(2) Swine—*Liver (target tissue):* 0.5 ppm enrofloxacin (marker residue).

(c) *Related conditions of use.* See § 522.812 of this chapter.

§ 556.227 Eprinomectin.

(a) *Acceptable daily intake (ADI).* The ADI for total residue of eprinomectin is 10 µg/kg of body weight per day.

(b) *Tolerances.* The tolerances for eprinomectin B_{1a} (marker residue) are:

(1) *Cattle*—(i) *Liver (target tissue):* 1.5 ppm.

(ii) *Muscle:* 100 ppb.

(iii) *Milk:* 12 ppb.

(2) [Reserved]

(c) *Related conditions of use.* See §§ 522.814 and 524.814 of this chapter.

§ 556.230 Erythromycin.

(a) [Reserved]

(b) *Tolerances.* The tolerances for erythromycin are:

(1) *Cattle*—(i) *Edible tissues (excluding milk):* 0.1 ppm.

(ii) *Milk:* Zero.

(2) *Chickens and turkeys*—(i) *Edible tissues (excluding eggs):* 0.125 ppm.

(ii) *Eggs:* 0.025 ppm.

(3) *Swine—Edible tissues:* 0.1 ppm.

(c) *Related conditions of use.* See §§ 520.823, 522.820, 526.820, and 558.248 of this chapter.

§ 556.240 Estradiol and related esters.

(a) [Reserved]

(b) *Tolerances.* Residues of estradiol are not permitted in excess of the following increments above the concentrations of estradiol naturally present in untreated animals:

(1) *Cattle*—(i) *Muscle:* 120 ppt.

(ii) *Fat:* 480 ppt.

(iii) *Kidney:* 360 ppt.

(iv) *Liver:* 240 ppt.

(2) [Reserved]

(c) *Related conditions of use.* See §§ 522.840, 522.842, 522.850, 522.1940, 522.2477, and 522.2478 of this chapter.

§ 556.260 Ethopabate.

(a) [Reserved]

(b) *Tolerances.* The tolerances for ethopabate, measured as metaphenetidine, are:

(1) *Chickens*—(i) *Liver:* 1.5 ppm.

(ii) *Kidney:* 1.5 ppm.

(iii) *Muscle:* 0.5 ppm.

(2) [Reserved]

(c) *Related conditions of use.* See § 558.58 of this chapter.

§ 556.273 Famphur.

(a) [Reserved]

(b) *Tolerances.* The tolerances for famphur including its oxygen analog are:

(1) *Cattle—Edible tissues (excluding milk):* 0.1 ppm.

(2) [Reserved]

(c) *Related conditions of use.* See §§ 520.1242g, 524.900, and 558.254 of this chapter.

§ 556.275 Fenbendazole.

(a) *Acceptable daily intake (ADI).* The ADI for total residue of fenbendazole is 40 µg/kg of body weight per day.

(b) *Tolerances.* The tolerances for fenbendazole are:

(1) *Cattle*—(i) *Liver (target tissue):* 0.8 ppm fenbendazole (marker residue).

(ii) *Muscle:* 0.4 ppm fenbendazole.

(iii) *Milk:* 0.6 ppm fenbendazole sulfoxide.

(2) *Goats*—(i) *Liver (target tissue):* 0.8 ppm fenbendazole (marker residue).

(ii) *Muscle:* 0.4 ppm fenbendazole.

(3) *Swine*—(i) *Liver (target tissue):* 6 ppm fenbendazole (marker residue).

(ii) *Muscle:* 2 ppm fenbendazole.

(4) *Turkeys*—(i) *Liver (target tissue):* 6 ppm fenbendazole sulfone (marker residue).

(ii) *Muscle:* 2 ppm fenbendazole sulfone.

(c) *Related conditions of use.* See §§ 520.905 and 558.258 of this chapter.

§ 556.277 Fenprostalene.

(a) *Acceptable daily intake (ADI).* The ADI for total residue of fenprostalene is 0.08 µg/kg of body weight per day.

(b) *Tolerances.* The tolerances for fenprostalene are:

(1) *Cattle—Edible tissues (excluding milk):* Not required.

(2) *Swine—Edible tissues:* Not required.

(c) *Related conditions of use.* See § 522.914 of this chapter.

§ 556.280 Fenthion.

(a) [Reserved]

(b) *Tolerance.* The tolerances for fenthion are:

(1) *Cattle—Edible tissues (excluding milk):* 0.1 ppm.

(2) [Reserved]

(c) *Related conditions of use.* See § 524.920 of this chapter.

§ 556.283 Florfenicol.

(a) *Acceptable daily intake (ADI).* The ADI for total residue of florfenicol is 10 µg/kg of body weight per day.

(b) *Tolerances.* The tolerances for florfenicol amine (marker residue) are:

(1) *Cattle*—(i) *Liver (target tissue):* 3.7 ppm.

(ii) *Muscle:* 0.3 ppm.

(2) *Swine*—(i) *Liver (target tissue):* 2.5 ppm.

(ii) *Muscle:* 0.2 ppm.

(3) *Catfish*—Muscle (target tissue): 1 ppm.

(4) *Freshwater-reared warmwater finfish (other than catfish) and salmonids—Muscle/skin (target tissue):* 1 ppm.

(c) *Related conditions of use.* See §§ 520.955, 522.955, 522.956, and 558.261 of this chapter.

§ 556.286 Flunixin.

(a) *Acceptable daily intake (ADI).* The ADI for total residue of flunixin is 0.72 µg/kg of body weight per day.

(b) *Tolerances.* The tolerances for flunixin are:

(1) *Cattle*—(i) *Liver (target tissue):* 125 ppb flunixin free acid (marker residue).

(ii) *Muscle:* 25 ppb flunixin free acid.

(iii) *Milk:* 2 ppb 5-hydroxy flunixin (marker residue).

(2) *Swine*—(i) *Liver (target tissue):* 30 ppb flunixin free acid (marker residue).

(ii) *Muscle:* 25 ppb flunixin free acid.

(c) *Related conditions of use.* See §§ 522.956 and 522.970 of this chapter.

§ 556.290 Flurogestone.

(a) [Reserved]

(b) *Tolerances.* The tolerances for flurogestone are:

(1) *Sheep—Edible tissues (excluding milk):* Not required.

(2) [Reserved]

(c) *Related conditions of use.* See § 529.1003 of this chapter.

§ 556.292 Gamithromycin.

(a) *Acceptable daily intake (ADI).* The ADI for total residue of gamithromycin is 10 µg/kg of body weight per day.

(b) *Tolerances.* The tolerances for gamithromycin (marker residue) are:

(1) *Cattle*—(i) *Liver (target tissue):* 500 ppb.

(ii) *Muscle:* 150 ppb.

(2) [Reserved]

(c) *Related conditions of use.* See § 522.1014 of this chapter.

§ 556.300 Gentamicin.

(a) *Acceptable daily intake (ADI).* The ADI for total residue of gentamicin is 60 µg/kg of body weight per day.

(b) *Tolerances.* The tolerances for gentamicin are:

(1) *Chickens and turkeys—Edible tissues (excluding eggs):* 0.1 ppm.

(2) *Swine*—(i) *Liver:* 0.3 ppm.

(ii) *Kidney (target tissue):* 0.4 ppm gentamicin (marker residue).

(iii) *Fat:* 0.4 ppm.

(iv) *Muscle:* 0.1 ppm.

(c) *Related conditions of use.* See §§ 522.1044, 524.1044e, and 529.1044b of this chapter.

§ 556.304 Gonadotropin.

(a) *Acceptable daily intake (ADI).* The ADI for residues of total gonadotropins (human chorionic gonadotropin and pregnant mare serum gonadotropin) is 42.25 International Units per kilogram of body weight per day.

(b) *Tolerances.* The tolerances for gonadotropin are:

(1) *Cattle—Edible tissues (excluding milk):* Not required.

(2) *Fish—Edible tissues:* Not required.

(3) *Swine—Edible tissues:* Not required.

(c) *Related conditions of use.* See §§ 522.1077, 522.1078, 522.1079, and 522.1081 of this chapter.

§ 556.308 Halofuginone.

(a) *Acceptable daily intake (ADI).* The ADI for total residue of halofuginone hydrobromide is 0.7 µg/kg of body weight per day.

(b) *Tolerances.* The tolerances for halofuginone (marker residue) are:

(1) *Chickens—Liver (target tissue):* 0.16 ppm.

(2) *Turkeys—Liver (target tissue):* 0.13 ppm.

(c) *Related conditions of use.* See § 558.265 of this chapter.

§ 556.310 Haloxon.

(a) [Reserved]

(b) *Tolerances.* The tolerances for haloxon are:

(1) *Cattle—Edible tissues (excluding milk):* 0.1 ppm.

(2) [Reserved]

(c) *Related conditions of use.* See § 520.1120 of this chapter.

§ 556.330 Hygromycin B.

(a) [Reserved]

(b) *Tolerances.* The tolerances for hygromycin B are:

(1) *Chickens—Edible tissues:* Zero.

(2) *Swine—Edible tissues:* Zero.

(c) *Related conditions of use.* See § 558.274 of this chapter.

§ 556.344 Ivermectin.

(a) *Acceptable daily intake (ADI).* The ADI for total residue of ivermectin is 1 µg/kg of body weight per day.

(b) *Tolerances.* The tolerances for 22,23-dihydroavermectin B_{1a} (marker residue) are:

(1) *American bison—Liver (target tissue):* 15 ppb.
(2) *Cattle*—(i) *Liver (target tissue):* 100 ppb.
(ii) *Muscle:* 10 ppb.
(3) *Reindeer—Liver (target tissue):* 15 ppb.
(4) *Sheep— Liver (target tissue):* 30 ppb.
(5) *Swine*—(i) *Liver (target tissue):* 20 ppb.
(ii) *Muscle:* 20 ppb.
(c) *Related conditions of use.* See §§ 520.1192, 520.1195, 520.1197, 522.1192, 522.1193, 524.1193, and 558.300 of this chapter.

§ 556.346 Laidlomycin.

(a) *Acceptable daily intake (ADI).* The ADI for total residue of laidlomycin is 7.5 µg/kg of body weight per day.
(b) *Tolerance.* The tolerance for laidlomycin (marker residue) is:
(1) *Cattle—Liver (target tissue):* 0.2 ppm.
(2) [Reserved]
(c) *Related conditions of use.* See § 558.305 of this chapter.

§ 556.347 Lasalocid.

(a) *Acceptable daily intake (ADI).* The ADI for total residue of lasalocid is 10 µg/kg of body weight per day.
(b) *Tolerances.* The tolerances for lasalocid (marker residue) are:
(1) *Cattle—Liver (target tissue):* 0.7 ppm.
(2) *Chickens*—(i) *Skin with adhering fat (target tissue):* 1.2 ppm.
(ii) *Liver:* 0.4 ppm.
(3) *Rabbits—Liver (target tissue):* 0.7 ppm.
(4) *Sheep—Liver (target tissue):* 1.0 ppm.
(5) *Turkeys*—(i) *Liver (target tissue):* 0.4 ppm.
(ii) *Skin with adhering fat:* 0.4 ppm.
(c) *Related conditions of use.* See § 558.311 of this chapter.

§ 556.350 Levamisole.

(a) [Reserved]
(b) *Tolerances.* The tolerances for levamisole are:
(1) *Cattle—Edible tissues (excluding milk):* 0.1 ppm.
(2) *Sheep—Edible tissues (excluding milk):* 0.1 ppm.
(3) *Swine—Edible tissues:* 0.1 ppm.
(c) *Related conditions of use.* See §§ 520.1242, 522.1244, and 524.1240 of this chapter.

§ 556.360 Lincomycin.

(a) *Acceptable daily intake (ADI).* The ADI for total residue of lincomycin is 25 µg/kg of body weight per day.
(b) *Tolerances.* The tolerances for lincomycin are:
(1) *Chickens—Edible tissues (excluding eggs):* Not required.
(2) *Swine*—(i) *Liver:* 0.6 ppm.
(ii) *Muscle:* 0.1 ppm.
(c) *Related conditions of use.* See §§ 520.1263b, 520.1263c, 522.1260, and 558.325 of this chapter.

§ 556.375 Maduramicin.

(a) [Reserved]
(b) *Tolerance.* The tolerance for maduramicin (marker residue) is:
(1) *Chickens—Fat (target tissue):* 0.38 ppm.
(2) [Reserved]
(c) *Related conditions of use.* See § 558.340 of this chapter.

§ 556.380 Melengestrol.

(a) [Reserved]
(b) *Tolerance.* The tolerance for melengestrol is:
(1) *Cattle—Fat:* 25 ppb.
(2) [Reserved]
(c) *Related conditions of use.* See § 558.342 of this chapter.

§ 556.410 Metoserpate.

(a) [Reserved]
(b) *Tolerances.* The tolerances for metoserpate are:
(1) *Chickens—Edible tissues (excluding eggs):* 0.02 ppm.
(2) [Reserved]
(c) *Related conditions of use.* See § 520.1422 of this chapter.

§ 556.420 Monensin.

(a) *Acceptable daily intake (ADI).* The ADI for total residue of monensin is 12.5 µg/kg of body weight per day.
(b) *Tolerances.* The tolerances for monensin are:
(1) *Cattle*—(i) *Liver:* 0.10 ppm.
(ii) *Muscle, kidney, and fat:* 0.05 ppm.
(iii) *Milk:* Not required.
(2) *Chickens and turkeys—Edible tissues (excluding eggs):* Not required.
(3) *Goats—Edible tissues (excluding milk):* 0.05 ppm.
(4) *Quail—Edible tissues (excluding eggs):* Not required.
(c) *Related conditions of use.* See § 558.355 of this chapter.

§ 556.425 Morantel.

(a) *Acceptable daily intake (ADI).* The ADI for total residue of morantel tartrate is 10 µg/kg of body weight per day.
(b) *Tolerances.* The tolerances for N-methyl-1,3-propanediamine (marker residue) are:
(1) *Cattle*—(i) *Liver (target tissue):* 0.7 ppm.
(ii) *Milk:* Not required.
(2) *Goats*—(i) *Liver (target tissue):* 0.7 ppm.
(ii) *Milk:* Not required.
(c) *Related conditions of use.* See §§ 520.1450 and 558.360 of this chapter.

§ 556.426 Moxidectin.

(a) *Acceptable daily intake (ADI).* The ADI for total residue of moxidectin is 4 µg/kg of body weight per day.
(b) *Tolerances.* The tolerances for moxidectin (marker residue) are:
(1) *Cattle*—(i) *Fat (target tissue):* 900 ppb.
(ii) *Liver:* 200 ppb.
(iii) *Muscle:* 50 ppb.
(iv) *Milk:* 40 ppb.
(2) *Sheep*—(i) *Fat (target tissue):* 900 ppb.
(ii) *Liver:* 200 ppb.
(iii) *Muscle:* 50 ppb.
(c) *Related conditions of use.* See §§ 520.1454, 522.1450, and 524.1450 of this chapter.

§ 556.428 Narasin.

(a) *Acceptable daily intake (ADI).* The ADI for total residue of narasin is 5 µg/kg of body weight per day.
(b) *Tolerance.* The tolerance for narasin (marker residue) is:
(1) *Chickens—Abdominal fat (target tissue):* 480 ppb.
(2) [Reserved]
(c) *Related conditions of use.* See § 558.363 of this chapter.

§ 556.430 Neomycin.

(a) *Acceptable daily intake (ADI).* The ADI for total residue of neomycin is 6 µg/kg of body weight per day.
(b) *Tolerances.* The tolerances for neomycin are:
(1) *Cattle*—(i) *Kidney (target tissue):* 7.2 ppm.
(ii) *Liver:* 3.6 ppm.
(iii) *Muscle:* 1.2 ppm.
(iv) *Fat:* 7.2 ppm.
(v) *Milk:* 0.15 ppm.
(2) *Sheep and Goats*—(i) *Kidney (target tissue):* 7.2 ppm.
(ii) *Liver:* 3.6 ppm.
(iii) *Muscle:* 1.2 ppm.
(iv) *Fat:* 7.2 ppm.
(v) *Milk:* 0.15 ppm.
(3) *Swine*—(i) *Kidney (target tissue):* 7.2 ppm.
(ii) *Liver:* 3.6 ppm.
(iii) *Muscle:* 1.2 ppm.
(iv) *Fat:* 7.2 ppm.
(4) *Turkeys*—(i) *Skin with adhering fat:* 7.2 ppm.
(ii) *Liver:* 3.6 ppm.
(iii) *Muscle:* 1.2 ppm.
(c) *Related conditions of use.* See §§ 520.1484, 524.1600b, and 558.364 of this chapter.

§ 556.440 Nequinate.

(a) [Reserved]
(b) *Tolerances.* The tolerances for nequinate are:
(1) *Chickens—Edible tissues (excluding eggs):* 0.1 ppm.
(2) [Reserved]

(c) *Related canditians af use.* See § 558.365 of this chapter.

§ 556.445 Nicarbazin.

(a) [Reserved]

(b) *Talerances.* The tolerances for nicarbazin are:

(1) *Chickens*—(i) *Muscle:* 4 ppm.

(ii) *Liver:* 4 ppm.

(2) [Reserved]

(c) *Related canditians af use.* See § 558.366 of this chapter.

§ 556.460 Novobiocin.

(a) [Reserved]

(b) *Talerances.* The tolerances for novobiocin are:

(1) *Cattle*—(i) *Edible tissues (excluding milk):* 1 ppm.

(ii) *Milk:* 0.1 ppm.

(2) *Chickens, turkeys, ducks—Edible tissues (excluding eggs):* 1 ppm.

(c) *Related canditians af use.* See §§ 526.1590, 526.1696d, and 558.415 of this chapter.

§ 556.470 Nystatin.

(a) [Reserved]

(b) *Tolerances.* The tolerances for nystatin are:

(1) *Cattle—Edible tissues (excluding milk):* Zero.

(2) *Chickens and turkeys—Edible tissues:* Zero.

(c) *Related canditians af use.* See §§ 524.1600b and 558.430 of this chapter.

§ 556.480 Oleandomycin.

(a) [Reserved]

(b) *Tolerances.* The tolerances for oleandomycin are:

(1) *Chickens and turkeys—Edible tissues (excluding eggs):* 0.15 ppm.

(2) *Swine—Edible tissues:* 0.15 ppm.

(c) *Related canditians af use.* See § 558.435 of this chapter.

§ 556.490 Ormetoprim.

(a) [Reserved]

(b) *Talerances.* The tolerances for ormetoprim are:

(1) *Chickens, turkeys, ducks, and chukar partridges—Edible tissues (excluding eggs):* 0.1 ppm.

(2) *Salmonids and catfish—Edible tissues:* 0.1 ppm.

(c) *Related canditians af use.* See § 558.575 of this chapter.

§ 556.495 Oxfendazole.

(a) *Acceptable daily intake (ADI).* The ADI for total residue of oxfendazole is 7 µg/kg of body weight per day.

(b) *Tolerance.* The tolerance for fenbendazole (marker residue) is:

(1) *Cattle—Liver (target tissue):* 0.8 ppm.

(2) [Reserved]

(c) *Related canditions of use.* See §§ 520.1629 and 520.1630 of this chapter.

§ 556.500 Oxytetracycline.

(a) *Acceptable daily intake (ADI).* The ADI for total tetracycline residues (chlortetracycline, oxytetracycline, and tetracycline) is 25 µg/kg of body weight per day.

(b) *Tolerances.* The tolerances for the sum of tetracycline residues are:

(1) *Cattle*—(i) *Muscle:* 2 ppm.

(ii) *Liver:* 6 ppm.

(iii) *Fat and kidney:* 12 ppm.

(iv) *Milk:* 0.3 ppm.

(2) *Chickens and turkeys*—(i) *Muscle:* 2 ppm.

(ii) *Liver:* 6 ppm.

(iii) *Fat and kidney:* 12 ppm.

(3) *Finfish—Muscle (with adhering skin when edible):* 2 ppm.

(4) *Labster—Muscle:* 2 ppm.

(5) *Swine and Sheep*—(i) *Muscle:* 2 ppm.

(ii) *Liver:* 6 ppm.

(iii) *Fat and kidney:* 12 ppm.

(c) *Related conditions of use.* See §§ 520.1660, 522.1660, 522.1662, 524.1662b, 529.1660, and 558.450 of this chapter.

§ 556.510 Penicillin.

(a) [Reserved]

(b) *Talerances.* The tolerances for penicillin are:

(1) *Cattle*—(i) *Edible tissues (excluding milk):* 0.05 ppm.

(ii) *Milk:* Zero.

(2) *Chickens—Edible tissues:* Zero.

(3) *Pheasants and quail—Edible tissues:* Zero.

(4) *Sheep and Swine—Edible tissues:* Zero.

(5) *Turkeys—Edible tissues (excluding eggs):* 0.01 ppm.

(c) *Related canditians of use.* See §§ 520.1696, 522.1696, 526.1696, and 558.460 of this chapter.

§ 556.513 Piperazine.

(a) [Reserved]

(b) *Talerances.* The tolerances for piperazine are:

(1) *Chickens and turkeys—Edible tissues (excluding eggs):* 0.1 ppm.

(2) *Swine—Edible tissues:* 0.1 ppm.

(c) *Related canditians af use.* See § 520.1807 of this chapter.

§ 556.515 Pirlimycin.

(a) *Acceptable daily intake (ADI).* The ADI for total residue of pirlimycin is 0.01 mg/kg of body weight per day.

(b) *Talerances.* The tolerances for pirlimycin (marker residue) are:

(1) *Cattle*—(i) *Liver (target tissue):* 0.5 ppm.

(ii) *Muscle:* 0.3 ppm.

(iii) *Milk:* 0.4 ppm.

(2) [Reserved]

(c) *Related canditians af use.* See § 526.1810 of this chapter.

§ 556.517 Poloxalene.

(a) [Reserved]

(b) *Tolerances.* The tolerances for poloxalene are:

(1) *Cattle—Edible tissues (excluding milk):* Not required.

(2) [Reserved]

(c) *Related canditians af use.* See §§ 520.1840, 558.464, and 558.465 of this chapter.

§ 556.540 Progesterone.

(a) [Reserved]

(b) *Talerances.* Residues of progesterone are not permitted in excess of the following increments above the concentrations of progesterone naturally present in untreated animals:

(1) *Cattle and sheep*—(i) *Muscle:* 5 ppb.

(ii) *Liver:* 15 ppb.

(iii) *Kidney:* 30 ppb.

(iv) *Fat:* 30 ppb.

(2) [Reserved]

(c) *Related canditians af use.* See §§ 522.1940 and 529.1940 of this chapter.

§ 556.560 Pyrantel.

(a) [Reserved]

(b) *Talerances.* The tolerances for pyrantel are:

(1) *Swine*—(i) *Liver and kidney:* 10 ppm.

(ii) *Muscle:* 1 ppm.

(2) [Reserved]

(c) *Related canditians af use.* See §§ 520.2045 and 558.485 of this chapter.

§ 556.570 Ractopamine.

(a) *Acceptable daily intake (ADI).* The ADI for total residue of ractopamine hydrochloride is 1.25 µg/kg of body weight per day.

(b) *Talerances.* The tolerances for ractopamine (marker residue) are:

(1) *Cattle*—(i) *Liver (target tissue):* 0.09 ppm.

(ii) *Muscle:* 0.03 ppm.

(2) *Swine*—(i) *Liver (target tissue):* 0.15 ppm.

(ii) *Muscle:* 0.05 ppm.

(3) *Turkeys*—(i) *Liver (target tissue):* 0.45 ppm.

(ii) *Muscle:* 0.1 ppm.

(c) *Related canditians of use.* See § 558.500 of this chapter.

§ 556.580 Robenidine.

(a) [Reserved]

(b) *Talerances.* The tolerances for robenidine are:

(1) *Chickens*—(i) *Skin and fat:* 0.2 ppm.

(ii) *Other edible tissues (excluding eggs):* 0.1 ppm.

(2) [Reserved]

(c) *Related canditians af use.* See § 558.515 of this chapter.

§ 556.592 Salinomycin.

(a) *Acceptable daily intake (ADI).* The ADI for total residue of salinomycin is 5 µg/kg of body weight per day.

(b) *Tolerances.* The tolerances for salinomycin are:

(1) *Chickens—Edible tissues (excluding eggs):* Not required.

(2) *Quail—Edible tissues (excluding eggs):* Not required.

(c) *Related conditions of use.* See § 558.550 of this chapter.

§ 556.597 Semduramicin.

(a) *Acceptable daily intake (ADI).* The ADI for total residue of semduramicin is 3 µg/kg of body weight per day.

(b) *Tolerances.* The tolerances for semduramicin are:

(1) *Chickens*—(i) *Liver:* 400 ppb.

(ii) *Muscle:* 130 ppb.

(2) [Reserved]

(c) *Related conditions of use.* See § 558.555 of this chapter.

§ 556.600 Spectinomycin.

(a) *Acceptable daily intake (ADI).* The ADI for total residue of spectinomycin is 25 µg/kg of body weight per day.

(b) *Tolerances.* The tolerances for spectinomycin are:

(1) *Cattle*—(i) *Kidney (target tissue):* 4 ppm spectinomycin (marker residue).

(ii) *Muscle:* 0.25 ppm.

(2) *Chickens and turkeys—Edible tissues (excluding eggs):* 0.1 ppm.

(3) *Swine—Edible tissues:* Not required.

(c) *Related conditions of use.* See §§ 520.1265, 520.2123b, 520.2123c, 522.2120, and 522.2121 of this chapter.

§ 556.610 Streptomycin.

(a) [Reserved]

(b) *Tolerances.* The tolerances for streptomycin are:

(1) *Cattle and Swine*—(i) *Kidney:* 2.0 ppm.

(ii) *Other edible tissues (excluding milk):* 0.5 ppm.

(2) *Chickens*—(i) *Kidney:* 2.0 ppm.

(ii) *Other edible tissues (excluding eggs):* 0.5 ppm.

(c) *Related conditions of use.* See § 520.2158 of this chapter.

§ 556.620 Sulfabromomethazine.

(a) [Reserved]

(b) *Tolerances.* The tolerances for sulfabromomethazine are:

(1) *Cattle*—(i) *Edible tissues (excluding milk):* 0.1 ppm.

(ii) *Milk:* 0.01 ppm.

(2) [Reserved]

(c) *Related conditions of use.* See § 520.2170 of this chapter.

§ 556.625 Sulfachloropyrazine.

(a) [Reserved]

(b) *Tolerances.* The tolerances for sulfachloropyrazine are:

(1) *Chickens—Edible tissues (excluding eggs):* Zero.

(2) [Reserved]

(c) *Related conditions of use.* See § 520.2184 of this chapter.

§ 556.630 Sulfachlorpyridazine.

(a) [Reserved]

(b) *Tolerances.* The tolerances for sulfachlorpyridazine are:

(1) *Cattle and Swine—Edible tissues (excluding milk):* 0.1 ppm.

(2) [Reserved]

(c) *Related conditions of use.* See §§ 520.2200 and 522.2200 of this chapter.

§ 556.640 Sulfadimethoxine.

(a) [Reserved]

(b) *Tolerances.* The tolerances for sulfadimethoxine are:

(1) *Catfish and salmonids—Edible tissues:* 0.1 ppm.

(2) *Cattle*—(i) *Edible tissues (excluding milk):* 0.1 ppm.

(ii) *Milk:* 0.01 ppm.

(3) *Chickens, turkeys, ducks and chukar partridges—Edible tissues (excluding eggs):* 0.1 ppm.

(c) *Related conditions of use.* See §§ 520.2220, 522.2220, and 558.575 of this chapter.

§ 556.650 Sulfaethoxypyridazine.

(a) [Reserved]

(b) *Tolerances.* The tolerances for sulfaethoxypyridazine are:

(1) *Cattle*—(i) *Edible tissues (excluding milk):* 0.1 ppm.

(ii) *Milk:* Zero.

(2) *Swine—Edible tissues:* Zero.

(c) *Related conditions of use.* See §§ 520.2240 and 522.2240 of this chapter.

§ 556.660 Sulfamerazine.

(a) [Reserved]

(b) *Tolerances.* The tolerances for sulfamerazine are:

(1) *Trout—Edible tissues:* Zero.

(2) [Reserved]

(c) *Related conditions of use.* See § 558.582 of this chapter.

§ 556.670 Sulfamethazine.

(a) [Reserved]

(b) *Tolerances.* The tolerances for sulfamethazine are:

(1) *Cattle—Edible tissues (excluding milk):* 0.1 ppm.

(2) *Chickens and turkeys—Edible tissues (excluding eggs):* 0.1 ppm.

(3) *Swine—Edible tissues:* 0.1 ppm.

(c) *Related conditions of use.* See §§ 520.2260, 520.2261, 522.2260, 558.145, and 558.630 of this chapter.

§ 556.685 Sulfaquinoxaline.

(a) [Reserved]

(b) *Tolerances.* The tolerances for sulfaquinoxaline are:

(1) *Cattle—Edible tissues (excluding milk):* 0.1 ppm.

(2) *Chickens and turkeys—Edible tissues (excluding eggs):* 0.1 ppm.

(c) *Related conditions of use.* See §§ 520.2325 and 558.586 of this chapter.

§ 556.690 Sulfathiazole.

(a) [Reserved]

(b) *Tolerances.* The tolerances for sulfathiazole are:

(1) *Swine—Edible tissues:* 0.1 ppm.

(2) [Reserved]

(c) *Related conditions of use.* See § 558.155 of this chapter.

§ 556.700 Sulfomyxin.

(a) [Reserved]

(b) *Tolerances.* The tolerances for sulfomyxin are:

(1) *Chickens and turkeys—Edible tissues (excluding eggs):* Zero.

(2) [Reserved]

(c) *Related conditions of use.* See § 522.2340 of this chapter.

§ 556.710 Testosterone.

(a) [Reserved]

(b) *Tolerances.* Residues of testosterone are not permitted in excess of the following increments above the concentrations of testosterone naturally present in untreated animals:

(1) *Cattle*—(i) *Fat:* 2.6 ppb.

(ii) *Kidney:* 1.9 ppb.

(iii) *Liver:* 1.3 ppb.

(iv) *Muscle:* 0.64 ppb.

(2) [Reserved]

(c) *Related conditions of use.* See § 522.842 of this chapter.

§ 556.720 Tetracycline.

(a) *Acceptable daily intake (ADI).* The ADI for total tetracycline residues (chlortetracycline, oxytetracycline, and tetracycline) is 25 µg/kg of body weight per day.

(b) *Tolerances.* The tolerances for the sum of tetracycline residues are:

(1) *Cattle and Sheep*—(i) *Kidney and fat:* 12 ppm.

(ii) *Liver:* 6 ppm.

(iii) *Muscle:* 2 ppm.

(2) *Chickens and turkeys*—(i) *Kidney and fat:* 12 ppm.

(ii) *Liver:* 6 ppm.

(iii) *Muscle:* 2 ppm.

(3) *Swine*—(i) *Kidney and fat:* 12 ppm.

(ii) *Liver:* 6 ppm.

(iii) *Muscle:* 2 ppm.

(c) *Related conditions of use.* See §§ 520.2345c and 520.2345d of this chapter.

§ 556.730 Thiabendazole.

(a) [Reserved]

(b) *Tolerances.* The tolerances for thiabendazole are:

(1) *Cattle*—(i) *Edible tissues (excluding milk):* 0.1 ppm.

(ii) *Milk:* 0.05 ppm.
(2) *Swine—Edible tissues:* 0.1 ppm.
(3) *Sheep and Goats*—(i) *Edible tissues (excluding milk):* 0.1 ppm.
(ii) *Milk:* 0.05 ppm.
(4) *Pheasants—Edible tissues (excluding eggs):* 0.1 ppm.
(c) *Related conditions of use.* See §§ 520.2380a, 520.2380b, 520.2380c, and 558.615 of this chapter.

§ 556.733 Tildipirosin.

(a) *Acceptable daily intake (ADI).* The ADI for total residue of tildipirosin is 10 µg/kg of body weight per day.
(b) *Tolerances.* The tolerances for tildipirosin (the marker residue) are:
(1) *Cattle*—(i) *Liver (the target tissue):* 10 ppm.
(ii) [Reserved]
(2) [Reserved]
(c) *Related conditions of use.* See § 522.2460 of this chapter.

§ 556.735 Tilmicosin.

(a) *Acceptable daily intake (ADI).* The ADI for total residue of tilmicosin is 25 µg/kg of body weight per day.
(b) *Tolerances.* The tolerances for tilmicosin (marker residue) are:
(1) *Cattle*—(i) *Liver (target tissue):* 1.2 ppm.
(ii) *Muscle:* 0.1 ppm.
(2) *Sheep*—(i) *Liver (target tissue):* 1.2 ppm.
(ii) *Muscle:* 0.1 ppm.
(3) *Swine*—(i) *Liver (target tissue):* 7.5 ppm.
(ii) *Muscle:* 0.1 ppm.
(c) *Related conditions of use.* See §§ 522.2471 and 558.618 of this chapter.

§ 556.738 Tiamulin.

(a) *Acceptable daily intake (ADI).* The ADI for total residue of tiamulin is 25 µg/kg of body weight per day.
(b) *Tolerance.* The tolerance for 8-alpha-hydroxymutilin (marker residue) is:
(1) *Swine—Liver (target tissue):* 0.6 ppm.
(2) [Reserved]
(c) *Related conditions of use.* See §§ 520.2455 and 558.600 of this chapter.

§ 556.739 Trenbolone.

(a) *Acceptable daily intake (ADI).* The ADI for total residue of trenbolone is 0.4 µg/kg of body weight per day.
(b) *Tolerances.* The tolerances for trenbolone are:
(1) *Cattle—Edible tissues (excluding milk):* Not required.
(2) [Reserved]
(c) *Related conditions of use.* See §§ 522.2476, 522.2477, and 522.2478 of this chapter.

§ 556.741 Tripelennamine.

(a) [Reserved]
(b) *Tolerances.* The tolerances for tripelennamine are:
(1) *Cattle*—(i) *Edible tissues (excluding milk):* 200 ppb.
(ii) *Milk:* 20 ppb.
(2) [Reserved]
(c) *Related conditions of use.* See § 522.2615 of this chapter.

§ 556.745 Tulathromycin.

(a) *Acceptable daily intake (ADI).* The ADI for total residue of tulathromycin is 15 µg/kg of body weight per day.
(b) *Tolerances.* The tolerances for CP–60,300 (marker residue) are:
(1) *Cattle—Liver (target tissue):* 5.5 ppm.
(2) *Swine—Kidney (target tissue):* 15 ppm.
(c) *Related conditions of use.* See § 522.2630 of this chapter.

§ 556.746 Tylosin.

(a) [Reserved]
(b) *Tolerances.* The tolerances for tylosin are:
(1) *Cattle*—(i) *Liver, kidney, fat, and muscle:* 0.2 ppm.
(ii) *Milk:* 0.05 ppm.
(2) *Chickens and turkeys*—(i) *Liver, kidney, fat, and muscle:* 0.2 ppm.
(ii) *Eggs:* 0.2 ppm.
(3) *Swine—Liver, kidney, fat, and muscle:* 0.2 ppm.
(c) *Related conditions of use.* See §§ 520.2640, 522.2640, 558.625, and 558.630 of this chapter.

§ 556.748 Tylvalosin.

(a) *Acceptable daily intake (ADI).* The ADI for total residues of tylvalosin is 47.7 µg/kg of body weight per day.
(b) *Tolerances.* A tolerance for tylvalosin in edible tissues of swine is not required.
(c) *Related conditions of use.* See § 520.2645 of this chapter.

§ 556.750 Virginiamycin.

(a) *Acceptable daily intake (ADI).* The ADI for total residue of virginiamycin is 250 µg/kg of body weight per day.
(b) *Tolerances.* The tolerances for virginiamycin are:
(1) *Cattle—Edible tissues (excluding milk):* Not required.
(2) *Chickens—Edible tissues (excluding eggs):* Not required.
(3) *Swine*—(i) *Kidney, skin, and fat:* 0.4 ppm.
(ii) *Liver:* 0.3 ppm.
(iii) *Muscle:* 0.1 ppm.
(4) *Turkeys—Edible tissues (excluding eggs):* Not required.
(c) *Related conditions of use.* See § 558.635 of this chapter.

§ 556.760 Zeranol.

(a) *Acceptable daily intake (ADI).* The ADI for total residue of zeranol is 1.25 µg/kg of body weight per day.
(b) *Tolerances.* The tolerances for zeranol are:
(1) *Cattle—Edible tissues (excluding milk):* Not required.
(2) *Sheep—Edible tissues (excluding milk):* 20 ppb.
(c) *Related conditions of use.* See § 522.2680 of this chapter.

§ 556.765 Zilpaterol.

(a) *Acceptable daily intake (ADI).* The ADI for total residue of zilpaterol is 0.083 µg/kg of body weight per day.
(b) *Tolerances.* The tolerances for zilpaterol freebase (marker residue) are:
(1) *Cattle—Liver (target tissue):* 12 ppb.
(2) [Reserved]
(c) *Related conditions of use.* See § 558.665 of this chapter.

§ 556.770 Zoalene.

(a) [Reserved]
(b) *Tolerances.* The tolerances for zoalene and its metabolite 3-amino-5-nitro-o-toluamide are:
(1) *Chickens*—(i) *Liver and kidney:* 6 ppm.
(ii) *Muscle:* 3 ppm.
(iii) *Fat:* 2 ppm.
(2) *Turkeys—Liver and muscle:* 3 ppm.
(c) *Related conditions of use.* See § 558.680 of this chapter.

PART 558—NEW ANIMAL DRUGS FOR USE IN ANIMAL FEEDS

15. The authority citation for 21 CFR part 558 continues to read as follows:

Authority: 21 U.S.C. 360b, 371.

16. In § 558.95, add paragraph (c) to read as follows:

§ 558.95 Bambermycins.

* * * * *

(c) *Related tolerances.* See § 556.75 of this chapter.

* * * * *

17. In § 558.185, revise paragraph (c) to read as follows:

§ 558.185 Coumaphos.

* * * * *

(c) *Related tolerances.* See § 556.168 of this chapter.

* * * * *

18. In § 558.235, add paragraph (c) to read as follows:

§ 558.235 Efrotomycin.

* * * * *

(c) *Related tolerances.* See § 556.224 of this chapter.

19. In § 558.464, add paragraph (c) to read as follows:

§ 558.464 Poloxalene.

* * * * *

(c) *Related tolerances.* See § 556.517 of this chapter.

20. In § 558.465, add paragraph (c) to read as follows:

§ 558.465 Poloxalene free-choice liquid Type C feed.

* * * * *

(c) *Related tolerances.* See § 556.517 of this chapter.

21. In § 558.625, revise paragraph (e) to read as follows:

§ 558.625 Tylosin.

* * * * *

(e) *Related tolerances.* See § 556.746 of this chapter.

* * * * *

22. In § 558.630, revise paragraph (d) to read as follows:

§ 558.630 Tylosin and sulfamethazine.

* * * * *

(d) *Related tolerances.* See §§ 556.670 and 556.746 of this chapter.

* * * * *

Dated: November 26, 2012.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2012–29322 Filed 12–4–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 31

[REG–130074–11]

RIN 1545–BK54

Rules Relating to Additional Medicare Tax

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations relating to Additional Hospital Insurance Tax on income above threshold amounts ("Additional Medicare Tax"), as added by the Affordable Care Act. Specifically, these proposed regulations provide guidance for employers and individuals relating to the implementation of Additional Medicare Tax. This document also contains proposed regulations relating to the requirement to file a return reporting Additional Medicare Tax, the employer process for making adjustments of underpayments and overpayments of Additional Medicare Tax, and the employer and employee processes for filing a claim for refund for an overpayment of Additional Medicare Tax. This document also provides notice of a public hearing on these proposed rules.

DATES: Written or electronic comments must be received by March 5, 2013. Requests to speak (with outlines of topics to be discussed) at the public hearing scheduled for April 4, 2013, must be received by March 5, 2013.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–130074–11), Room 5205, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–130074–11), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC, or sent electronically, via the Federal eRulemaking Portal at *www.regulations.gov* (IRS REG–130074–11). The public hearing will be held in the Auditorium, Internal Revenue Building, 1111 Constitution Avenue NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Andrew K. Holubeck or Ligeia M. Donis at (202) 622–6040; concerning submission of comments, the hearing, and/or to be placed on the building access list to attend the hearing, please contact Oluwafunmilayo (Funmi) Taylor at *Oluwafunmilayo.P.Taylor@irscounsel.treas.gov* or (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in these proposed regulations was previously reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control number 1545–2097. Comments on the collection of information should be sent to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the collection of information should be received by February 4, 2013. Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the functions of the IRS, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

The collection of information in these proposed regulations is in §§ 31.6011(a)–1, 31.6011(a)–2, 31.6205–1, 31.6402(a)–2, 31.6413(a)–1, and 31.6413(a)–2. This information is required by the IRS to verify compliance with return requirements under section 6011, employment tax adjustments under sections 6205 and 6413, and claims for refund of overpayments under section 6402. This information will be used to determine whether the amount of tax has been reported and calculated correctly. The likely respondents are employers and individuals.

Estimated total annual reporting and/or recordkeeping burden: 1,900,000 hours.

Estimated average annual burden per respondent: 1 hour.

Estimated number of respondents: 1,900,000.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

These proposed regulations are issued in connection with the Additional Hospital Insurance Tax on income above threshold amounts ("Additional Medicare Tax"), as added by section 9015 of the Patient Protection and Affordable Care Act (PPACA), Public Law 111–148 (124 Stat. 119 (2010)), and as amended by section 10906 of the PPACA and section 1402(b) of the Health Care and Education Reconciliation Act of 2010, Public Law 111–152 (124 Stat. 1029 (2010)) (collectively, the "Affordable Care Act"). The proposed regulations include amendments to § 1.1401–1 of the Income Tax Regulations, and §§ 31.3101–2, 31.3102–1, 31.3102–4, 31.3202–1, 31.6011(a)–1, 31.6011(a)–2, 31.6205–1, 31.6402(a)–2, 31.6413(a)–1, and 31.6413(a)–2 of the Employment Tax Regulations. The proposed regulations provide guidance for

employers and individuals relating to the implementation of Additional Medicare Tax, including the requirement to withhold Additional Medicare Tax on certain wages and compensation, the requirement to file a return reporting Additional Medicare Tax, the employer process for adjusting underpayments and overpayments of Additional Medicare Tax, and the employer and employee processes for filing a claim for refund of Additional Medicare Tax.

For purposes of these proposed regulations, the term *employment taxes* means the Federal Insurance Contributions Act (FICA) tax imposed on employers and employees, the Railroad Retirement Tax Act (RRTA) tax imposed on employers and employees, and federal income tax withholding (ITW).

Federal Insurance Contributions Act and Railroad Retirement Tax Act Taxes

Tax under the FICA is composed of Old-Age, Survivors, and Disability Insurance (OASDI) tax, also referred to as social security tax, and Hospital Insurance (HI) tax, also referred to as Medicare tax. The Medicare portion of FICA tax is imposed separately on the employer, under section 3111(b), and the employee, under section 3101(b), in an amount equal to a percentage of wages. Under section 3102, the employer is required to collect the employee portion of FICA tax by deducting the amount of the tax from wages, as and when paid, and is liable for payment of the tax required to be collected. Until collected, the employee also is liable for the employee portion of the tax. See § 31.3102–1(d).

Under the RRTA, railroad employment is subject to a separate and distinct system of taxes from those imposed under the FICA. The RRTA serves as the functional equivalent of FICA for railroad employers, employees, and employee representatives (a group unique to the railroad industry). Tax under the RRTA is divided into tiers and each tier finances different benefits. Tier 1 RRTA tax provides equivalent social security and Medicare benefits. Section 3201(a) imposes Tier 1 RRTA tax on employees and section 3211(a) imposes Tier 1 RRTA tax on employee representatives, in an amount equal to the applicable percentage of compensation. For employees, the applicable percentage under section 3201(a) is the sum of the rates of tax under section 3101(a) and (b). For employee representatives, the applicable percentage under section 3211(a) is the sum of the rates of tax under sections 3101(a) and (b) and 3111(a) and (b).

Under section 3202, the employer is required to collect the employee portions of RRTA tax by deducting the amount of the taxes from compensation as and when paid, and is liable for payment of the taxes required to be collected. Until collected, the employee also is liable for the employee portion of the tax. See § 31.3202–1(e).

The Affordable Care Act added section 3101(b)(2). Section 3101(b)(2) increases the employee portion of Medicare tax for wages received in any taxable year beginning after December 31, 2012, by an additional 0.9 percent of FICA wages which are in excess of certain threshold amounts. Additional Medicare Tax differs from Medicare tax in that Additional Medicare Tax is not imposed until wages exceed a threshold amount, and the threshold amount for application of the tax is based on the filing status of the individual. Under section 3101(b)(2), the threshold amount is $250,000 in the case of a joint return, $125,000 in the case of a married taxpayer filing a separate return, and $200,000 in any other case. Additional Medicare Tax also differs from Medicare Tax in that there is no employer portion to correspond to the amount owed by the employee.

Additional Medicare Tax applies to RRTA compensation paid to railroad employees and employee representatives. See reference to section 3101(b) in sections 3201(a) and 3211(a). Accordingly, Tier 1 RRTA tax imposed under sections 3201(a) and 3211(a) will be increased for compensation received in any taxable year beginning after December 31, 2012, by an additional 0.9 percent of RRTA compensation which is in excess of certain threshold amounts as enumerated in section 3101(b)(2). The threshold amount for Additional Medicare Tax applies separately to the FICA and the RRTA. Accordingly, an individual will not combine FICA wages and RRTA compensation in determining whether Additional Medicare Tax applies under FICA or under RRTA.

The Affordable Care Act added section 3102(f). Section 3102(f)(1) provides that an employer's obligation under section 3102(a) to withhold Addjtional Medicare Tax applies only to the extent that the wages the employee receives from the employer are in excess of $200,000 in a calendar year. Section 3102(f)(1) further provides that in satisfying its obligation to withhold Additional Medicare Tax, the employer may disregard the amount of wages received by the employee's spouse.

Calculating wages for purposes of withholding Additional Medicare Tax is no different than calculating wages for FICA generally. Thus, for example, if an employee has amounts deferred under a nonqualified deferred compensation plan and the nonqualified deferred compensation (NQDC) is taken into account as wages for FICA tax purposes under the special timing rule described in § 31.3121(v)(2)–1(a)(2), the NQDC would likewise be taken into account under the special timing rule for purposes of determining an employer's obligation to withhold Additional Medicare Tax.

Similarly, when an employee is concurrently employed by related corporations and one of the corporations disburses wages for services performed for each of the employers and the arrangement otherwise satisfies the common paymaster provisions of section 3121(s), liability for FICA tax with respect to the wages disbursed by the common paymaster is computed as if there was a single employer. In this case, the obligation to withhold Additional Medicare Tax on wages in excess of $200,000 disbursed by the common paymaster would also be determined as if there was a single employer.

Section 3102(f)(2) specifies that to the extent Additional Medicare Tax is not withheld by the employer, the employee must pay the tax. This is consistent with the general FICA rule in § 31.3102–1(d), which provides that the employee is liable for the employee portion of FICA tax until collected by the employer.

Section 3102(f)(3) provides that if an employer fails to withhold Additional Medicare Tax, and the tax is subsequently paid by the employee, the IRS will not collect the tax from the employer. Section 3102(f)(3) specifies, however, that the employer would remain subject to any applicable penalties or additions to tax for failure to withhold Additional Medicare Tax as required. Section 3102(f)(3), reflecting that Additional Medicare Tax is imposed only on employees and is ultimately based on the employee's filing status, is similar to section 3402(d), which abates the employer's liability for ITW when the employee has paid the income tax.

Self-Employment Contributions Act Taxes

Section 1401 imposes social security and Medicare taxes on the self-employment income of every individual at the same combined employer and employee rates applicable under the FICA.

The Affordable Care Act added section 1401(b)(2). Section 1401(b)(2)(A) increases the Medicare tax on self-

employment income for any taxable year beginning after December 31, 2012, by an additional 0.9 percent of self-employment income which is in excess of certain threshold amounts. As with Additional Medicare Tax under the FICA, the threshold amounts for an individual to be subject to Additional Medicare Tax under the Self-Employment Contributions Act (SECA) are determined by the individual's filing status. The threshold amounts enumerated under section 1401(b)(2)(A), are $250,000 in the case of a joint return, $125,000 in the case of a married taxpayer filing a separate return, and $200,000 in any other case.

Section 1401(b)(2)(B) provides for coordination with Additional Medicare Tax under the FICA and specifies that the threshold amounts under section 1401(b)(2)(A) are reduced (but not below zero) by the amount of wages taken into account in determining Additional Medicare Tax under the FICA. Section 1401(b)(2)(B) does not provide for similar coordination with Additional Medicare Tax under the RRTA. Therefore, the amount of RRTA compensation taken into account in determining Additional Medicare Tax under the RRTA will not reduce the threshold amounts under section 1401(b)(2)(A) for determining Additional Medicare Tax under the SECA.

Estimated Taxes

Section 6654 imposes an addition to tax in the case of an individual's underpayment of estimated tax. Generally, the addition to tax imposed under section 6654 will not apply to individuals who have sufficient ITW on wages or who make estimated tax payments throughout the year. Employees may request additional ITW on wages on Form W–4, "Withholding Allowance Certificate," to reduce the need to make estimated tax payments to cover the individual's tax liability.

Under section 6654(m), which was added by the Affordable Care Act, Additional Medicare Tax is treated as a tax subject to estimated tax payment requirements. In the case of employees, Additional Medicare Tax is collected through withholding on FICA wages or RRTA compensation in excess of $200,000 in a calendar year. In addition, employees may request additional ITW on wages on Form W–4 and use this additional ITW to apply against taxes shown on their return, including any Additional Medicare Tax liability. To the extent not withheld, Additional Medicare Tax must be included when making estimated tax payments.

Interest-Free Adjustments of Employment Taxes

The current regulations under section 6205 set forth the procedures for making interest-free adjustments for underpayments of employment taxes. Generally, under the regulations, if an employer ascertains an underpayment of FICA or RRTA tax, the employer can make an underpayment adjustment, within the period of limitations for assessment, by reporting the additional amount due on an adjusted return for the return period in which the wages or compensation was paid. For underpayments of ITW, subject to limited exceptions for correcting worker misclassification errors or for administrative errors (that is, errors involving the inaccurate reporting of the amount actually withheld) and for audit adjustments, an adjustment may be made only for errors ascertained during the calendar year in which the wages were paid.

The current regulations under section 6413(a) set forth the procedures for making interest-free adjustments for overpayments of employment taxes. Under the regulations, if an employer ascertains within the applicable period of limitations on credit or refund that an overpayment error was made, the employer is generally required to repay or reimburse its employees the amount of overcollected employee FICA tax or employee RRTA tax prior to the expiration of the applicable period of limitations on credit or refund. The regulations further provide that once an employer repays or reimburses an employee, the employer may report both the employee and employer portions of FICA or RRTA tax as an overpayment on an adjusted return within the period of limitations on credit or refund. The employer must generally certify on the adjusted return that it has repaid or reimbursed its employees.

Similar rules apply for making interest-free adjustments for overpayments of ITW, except that an interest-free adjustment may only be made if the employer ascertains the error and repays or reimburses its employees within the same calendar year that the wages were paid, unless the employer is correcting an administrative error.

Claims for Refund of Employment Taxes

In lieu of making an interest-free adjustment under section 6413(a) for an overpayment, employers may file a claim for refund pursuant to section 6402. Under section 6402(a), the IRS may credit the amount of an overpayment, including any interest, against any tax liability of the person who made the overpayment and shall, subject to certain offsets, refund any balance to such person. A claim for refund under section 6402(a) must be filed within the period of limitations on credit or refund. Section 6414 permits refunds of ITW only to the extent the amount of the ITW overpayment was not actually deducted and withheld from an employee.

The current regulations under section 6402(a) set out the procedures for filing a claim for refund of overpaid FICA and RRTA taxes. The regulations permit an employer to file a claim for refund of an overpayment of FICA or RRTA tax, but generally require the employer to certify as part of the claim process that the employer has repaid or reimbursed the employee's share of the overpayment of FICA or RRTA tax to the employee or has secured the written consent of the employee to allowance of the refund or credit.

Generally, under the current section 6402 regulations, an employee may file a claim for refund of overpaid FICA or RRTA tax as long as the employee has not been repaid or reimbursed by the employer and does not give the employer consent to file a claim on his or her behalf, and the employee has not taken the overcollection into account in claiming a credit against, or refund of, his or her income tax, in the case of a claim under section 6413(c) for overpaid employee social security tax.

The current regulations under section 6414 set out the procedures for filing a claim for refund of overpaid ITW and provide that an employer may not file a claim for refund of an overpayment of ITW to the extent the amount was deducted or withheld from an employee.

Explanation of Provisions

The proposed regulations provide rules for the withholding, computation, reporting, and payment of Additional Medicare Tax on wages, self-employment income, and RRTA compensation. The proposed regulations also provide rules for when and how employers may make an interest-free adjustment to correct an overpayment or an underpayment of Additional Medicare Tax and how employers and employees may claim refunds for overpayments of Additional Medicare Tax. These procedural rules for interest-free adjustments and claims for refund track the existing rules that apply to ITW rather than the rules that apply to FICA tax. The regulations take this approach because Additional Medicare Tax, like ITW, does not include an employer portion, and the

ultimate liability is reconciled on the individual employee's income tax return.

Rates and Computation of Employee FICA Tax

The proposed regulations under section 3101(b) update the rates of tax for the social security and Medicare tax on employees, and add a paragraph describing the rate of Additional Medicare Tax. The proposed regulations also provide an updated example illustrating that the social security and Medicare rates applicable to the calendar year in which wages are received apply to compute the tax liability.

Employer's Obligation To Withhold Additional Medicare Tax

The proposed regulations under sections 3102 and 3202(a) describe the extent to which an employer is required to withhold Additional Medicare Tax. The proposed regulations under section 3102(f) provide that an employer must withhold Additional Medicare Tax from an employee's wages only to the extent that the employee receives wages from the employer in excess of $200,000 in a calendar year. In determining whether wages exceed $200,000, an employer does not take into account the employee's filing status or other wages or compensation which may impact the employee's liability for the tax. An employee may not request that the employer deduct and withhold Additional Medicare Tax on wages of $200,000 or less. However, an employee who anticipates liability for Additional Medicare Tax may request that the employer deduct and withhold an additional amount of ITW under § 31.3402(i)–2 on Form W–4. This additional ITW can apply against taxes shown on Form 1040, "U.S. Individual Tax Return," including any Additional Medicare Tax liability. An employee might request that the employer deduct and withhold an additional amount of ITW on wages that are not in excess of $200,000 if, for example, the employee is married and files a joint return, and anticipates liability for Additional Medicare Tax because the combined wages of the employee and the employee's spouse will exceed $250,000. The proposed regulations under sections 3102(f) and 3202(a) include examples illustrating the extent of the employer's obligation to withhold Additional Medicare Tax.

Further, the proposed regulations under section 3102(f) provide that to the extent Additional Medicare Tax is not withheld by the employer, the employee is liable for the tax. The proposed regulations also provide that the IRS will not collect from an employer the amount of Additional Medicare Tax it failed to withhold from wages paid to an employee if the employee subsequently pays the Additional Medicare Tax. However, the proposed regulations also specify that the employer would remain subject to any applicable penalties or additions to tax for failure to withhold Additional Medicare Tax as required.

Although Additional Medicare Tax applies to RRTA compensation, the Affordable Care Act did not add provisions similar to section 3102(f) to the RRTA, nor does the RRTA cross-reference section 3102(f). However, in light of the general similarities between the FICA and the RRTA and the principles discussed above, and in order to provide guidance to railroad employers regarding their liability to withhold Additional Medicare Tax, the proposed regulations under section 3202(a) incorporate the same rules as provided in section 3102(f). Therefore, the proposed regulations under section 3202(a) provide that railroad employers must withhold Additional Medicare Tax from an employee's compensation only to the extent the employee receives compensation from the employer in excess of $200,000 in a calendar year. Similar to the FICA rule, an employee may not request that the employer deduct and withhold Additional Medicare Tax on compensation of $200,000 or less. Instead, an employee who anticipates liability for Additional Medicare Tax may request that the employer deduct and withhold an additional amount of ITW under § 31.3402(i)–2 on Form W–4 to apply against taxes shown on Form 1040, including any Additional Medicare Tax liability. The regulations under section 3202 further provide that: (1) To the extent Additional Medicare Tax is not withheld by the employer, the employee is liable for the tax; (2) the IRS will not collect Additional Medicare Tax from an employer who fails to withhold Additional Medicare Tax on compensation paid by the employer, if the tax is subsequently paid by the employee; and (3) the employer will remain subject to any applicable penalties or additions to tax for failure to withhold Additional Medicare Tax as required.

Employee's Obligation To Report and Pay Additional Medicare Tax

The proposed regulations under sections 3102(f) and 3202(a) provide that an employee is liable for Additional Medicare Tax on wages or compensation to the extent that the tax is not withheld by the employee's employer. This is consistent with the general rule in §§ 31.3102–1(d) and 31.3202–1(e) for FICA and RRTA purposes, respectively, that provides that the employee is liable for the tax until collected by the employer. Under the proposed regulations under section 6011, an individual must report Additional Medicare Tax on Form 1040. An individual will claim credit for any withheld Additional Medicare Tax on Form 1040 and pay any such tax due that was not previously paid through withholding or estimated tax. For example, if an employee and his or her spouse each had wages of $200,000 or less, such that their employers did not withhold Additional Medicare Tax from the employee's or the spouse's wages, but the combined wages of the employee and the employee's spouse exceed the threshold for a joint return under section 3101(b)(2) (that is, exceed $250,000), the proposed regulations indicate that the employee and the employee's spouse are liable to pay Additional Medicare Tax. The proposed regulations under sections 3102(f) and 3202(a) include examples illustrating this principle for FICA wages and RRTA compensation, respectively.

Self-Employed Individual's Obligation To Pay Additional Medicare Tax

The proposed regulations under section 1401(b) describe the extent to which an individual who has self-employment income is liable for Additional Medicare Tax. Specifically, the proposed regulations describe how the applicable threshold amounts under section 1401(b)(2)(A) are reduced (but not below zero) by the amount of FICA wages taken into account in determining Additional Medicare Tax liability. Thus, the proposed regulations under section 1401(b)(2) illustrate the application of the reduced threshold amounts for purposes of determining liability for Additional Medicare Tax attributable to the individual's self-employment income.

The Affordable Care Act did not provide for a reduction in the self-employment income threshold amounts by the amount of any RRTA compensation taken into account in determining liability for Additional Medicare Tax. Accordingly, an individual who receives both RRTA compensation and self-employment income would not reduce the self-employment income threshold amounts under section 1401(b)(2)(A) by the amount of RRTA compensation taken into account in determining Additional Medicare Tax liability.

Interest-Free Adjustments of Additional Medicare Tax

The proposed regulations under sections 6205 provide that adjustments of underpayments of Additional Medicare Tax may be made only if the error is ascertained in the same year the wages or compensation was paid, unless: (1) The underpayment is attributable to an administrative error, (2) section 3509 applies to determine the amount of the underpayment, due to the employer's failure to treat the individual as an employee, or (3) the adjustment is the result of an IRS examination.

Similarly, the proposed regulations under section 6413 provide that an adjustment of overpaid Additional Medicare Tax may only be made if the employer ascertains the error in the year the wages or compensation was paid and repays or reimburses the employee the amount of the overcollection prior to the end of the calendar year. As in the case of all overpayment adjustments, the requirement to repay or reimburse does not apply to the extent that, after reasonable efforts, the employer cannot locate the employee. However, if an employer has not repaid or reimbursed the amount of the overcollection to the employee, an adjustment cannot be made.

Claims for Refund of Additional Medicare Tax

The proposed regulations under section 6402 provide a process by which employers and employees claim refunds of overpaid Additional Medicare Tax. Under the proposed regulations, employers may claim refunds of overpaid Additional Medicare Tax only if the employer did not deduct or withhold the overpaid Additional Medicare Tax from the employee's wages or compensation.

For employees, the proposed regulations eliminate the requirements that the employee first seek a refund from the employer and provide a statement in support of the employee's claim. Further, the proposed regulations direct the employee to claim the refund or credit of overpaid Additional Medicare Tax by taking the overpayment into account in claiming a credit against, or refund of, tax on an individual tax return (for example, Form 1040) for the year in which the overpayment was made, or for a taxable year for which a tax return has been filed, by filing Form 1040X, "Amended U.S. Individual Income Tax Return." This process is in lieu of filing a claim for refund for overpaid Additional Medicare Tax on Form 843, "Claim for Refund and Request for Abatement." Employees may only claim a refund of Additional Medicare Tax if they have not received repayment or reimbursement from their employer in the context of an interest-free adjustment.

Proposed Effective/Applicability Dates

These regulations are proposed to be effective the date the final regulations are published in the **Federal Register**. The regulations under the Internal Revenue Code (Code) sections 1401, 3101, 3102, and 3202 are proposed to apply to quarters beginning after the date the final regulations are published in the **Federal Register**. The regulations under Code section 6011 are proposed to apply to taxable years beginning after the date the final regulations are published in the **Federal Register**. The regulations under Code sections 6205, 6402, and 6413 are proposed to apply to adjustments made and claims for refund filed after the date the final regulations are published in the **Federal Register**.

The Treasury Department and IRS intend to finalize these proposed regulations in 2013. Taxpayers may rely on these proposed regulations for tax periods beginning before the date that the final regulations are published in the **Federal Register**.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations.

The proposed regulations under section 6011 affect all taxpayers that file individual tax returns and are subject to Additional Medicare Tax. The proposed regulations under sections 6205, 6402, and 6413 affect all taxpayers that file employment tax returns, as well as taxpayers that file claims for refund of employment taxes. Therefore, the IRS has determined that these proposed regulations will have an impact on a substantial number of small entities.

The IRS has determined, however, that the impact on entities affected by the proposed regulations will not be significant. The proposed regulations require taxpayers who file employment tax returns and who make interest-free adjustments to their employment taxes for either underpayments or overpayments of Additional Medicare Tax or who file claims for refund for an overpayment of Additional Medicare Tax to provide an explanation setting forth the basis for the correction or the claim in detail, designating the return period in which the error was ascertained and the return period being corrected, and setting forth such other information as may be required by the instructions to the form. In addition, for adjustments of overpayments of Additional Medicare Tax, employers must also obtain and retain the written receipt of the employee showing the date and amount of the repayment to the employee or retain evidence of reimbursement. This collection of information is not new to the proposed regulations. The proposed regulations merely apply the existing procedural requirements, with appropriate modifications, to corrections of Additional Medicare Tax. The filing of a claim for refund and the making of an interest-free adjustment pursuant to the proposed regulations are voluntary on the part of taxpayers.

Based on these facts, the IRS hereby certifies that the collection of information contained in these proposed regulations will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required.

Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The Treasury Department and the IRS specifically request comments on the clarity of the proposed rules and how they can be made easier to understand. All comments will be available for public inspection and copying. All comments that are submitted by the public will be available for public inspection and copying at *http://www.regulations.gov.* or upon request. A public hearing has been scheduled for April 4, 2013, beginning at 10 a.m., in the Auditorium, Internal Revenue Building, 1111 Constitution Avenue NW., Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts.

For information about having your name placed on the building access list to attend the hearing, see the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit comments and an outline of the topics to be discussed and the time to be devoted to each topic by February 28, 2013.

A period of 10 minutes will be allotted to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal authors of these proposed regulations are Sydney L. Gernstein and Ligeia M. Donis of the Office of the Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and the Treasury Department participated in their development.

List of Subjects

26 CFR Part 1

Income Taxes, Reporting and recordkeeping requirements.

26 CFR Part 31

Employment taxes, Income taxes, Penalties, Pensions, Railroad retirement, Reporting and recordkeeping requirements, Social Security, Unemployment compensation.

Proposed Amendments to the Regulations

Accordingly, 26 CFR parts 1 and 31 are proposed to be amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 1.1401–1 is amended by revising paragraph (b) and adding new paragraphs (d) and (e) to read as follows:

§ 1.1401–1 Tax on self-employment income.

* * * * *

(b) The rates of tax on self-employment income are as follows (these regulations do not reflect off-Code revisions to the below rates):

(1) For Old-age, Survivors, and Disability Insurance:

Taxable year	Percent
Beginning after December 31, 1983 and before January 1, 1988	11.40
Beginning after December 31, 1987 and before January 1, 1990	12.12
Beginning after December 31, 1989	12.40

(2)(i) For Hospital Insurance:

Taxable year	Percent
Beginning after December 31, 1983 and before January 1, 1985	2.60
Beginning after December 31, 1984 and before January 1, 1986	2.70
Beginning after December 31, 1985	2.90

(ii) For Additional Medicare Tax:

Taxable year	Percent
Beginning after December 31, 2012	0.9

* * * * *

(d) *Special rules regarding Additional Medicare Tax.* (1) *General rule.* An individual is liable for Additional Medicare Tax to the extent that his or her self-employment income exceeds the following threshold amounts.

Filling status	Threshold
Married individual filing a joint return	$250,000
Married individual filing a separate return	125,000
Any other case	200,000

Note: These threshold amounts are specified under section 1401(b)(2)(A).

(2) *Coordination with Federal Insurance Contributions Act.* (i) *General rule.* Under section 1401(b)(2)(B), the applicable threshold specified under section 1401(b)(2)(A) is reduced (but not below zero) by the amount of wages (as defined in section 3121(a)) taken into account in determining Additional Medicare Tax under section 3101(b)(2) with respect to the taxpayer. This rule does not apply to Railroad Retirement Tax Act (RRTA) compensation (as defined in section 3231(e)).

(ii) *Examples.* The rules provided in paragraph (d)(2)(i) of this section are illustrated by the following examples:

Example 1. A, a single filer, has $130,000 in self-employment income and $0 in wages. A is not liable to pay Additional Medicare Tax.

Example 2. B, a single filer, has $220,000 in self-employment income and $0 in wages. B is liable to pay Additional Medicare Tax on $20,000 ($220,000 in self-employment income minus the threshold of $200,000).

Example 3. C, a single filer, has $145,000 in self-employment income and $130,000 in wages. C's wages are not in excess of $200,000 so C's employer did not withhold Additional Medicare Tax. However, the $130,000 of wages reduces the self-employment income threshold to $70,000 ($200,000 threshold minus the $130,000 of wages). C is liable to pay Additional Medicare Tax on $75,000 of self-employment income ($145,000 in self-employment income minus the reduced threshold of $70,000).

Example 4. E, who is married and files a joint return, has $140,000 in self-employment income. F, E's spouse, has $130,000 in wages. F's wages are not in excess of $200,000 so F's employer did not withhold Additional Medicare Tax. However, the $130,000 of F's wages reduces E's self-employment income threshold to $120,000 ($250,000 threshold minus the $130,000 of wages). E and F are liable to pay Additional Medicare Tax on $20,000 of E's self-employment income ($140,000 in self-employment income minus the reduced threshold of $120,000).

Example 5. D, who is married and files married filing separately, has $150,000 in self-employment income and $200,000 in wages. D's wages are not in excess of $200,000 so D's employer did not withhold Additional Medicare Tax. However, the $200,000 of wages reduces the self-employment income threshold to $0 ($125,000 threshold minus the $200,000 of wages). D is liable to pay Additional Medicare Tax on $75,000 of wages ($200,000 in wages minus the $125,000 threshold for a married filing separately return) and on $150,000 of self-employment income ($150,000 in self-employment income minus the reduced threshold of $0).

(e) *Effective/applicability date.* Paragraphs (b) and (d) of this section apply to quarters beginning after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

PART 31—EMPLOYMENT TAXES AND COLLECTION OF INCOME TAX AT THE SOURCE

Par. 3. The authority citation for part 31 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 4. Revise § 31.3101–2 to read as follows:

§ 31.3101–2 Rates and computation of employee tax.

(a) *Old-Age, Survivors, and Disability Insurance.* The rates of employee tax for Old-Age, Survivors, and Disability Insurance (OASDI) with respect to wages received in calendar years after 1983 are as follows (these regulations do not reflect off-Code revisions to the below rates):

Calendar year	Percent
1984, 1985, 1986, or 1987	5.7
1988 or 1989	6.06
1990 and subsequent years ...	6.2

(b)(1) *Hospital Insurance.* The rates of employee tax for Hospital Insurance (HI) with respect to wages received in calendar years after 1973 are as follows:

Calendar year	Percent
1974, 1975, 1976, or 1977	0.90
1978	1.00
1979 or 1980	1.05
1981, 1982, 1983, or 1984	1.30
1985	1.35
1986 and subsequent years	1.45

(2) *Additional Medicare Tax.* (i) The rate of Additional Medicare Tax with respect to wages received in taxable years beginning after December 31, 2012, is as follows:

Taxable year	Percent
Beginning after December 31, 2012	0.9

(ii) Individuals are liable for Additional Medicare Tax with respect to wages received in taxable years beginning after December 31, 2012, which are in excess of:

Filling status	Threshold
Married individual filing a joint return	$250,000
Married individual filing a separate return	125,000
Any other case	200,000

(c) *Computation of employee tax.* The employee tax is computed by applying to the wages received by the employee the rates in effect at the time such wages are received.

Example. In 1989, A performed services for X which constituted employment (see § 31.3121(b)–2). In 1990 A receives from X $1,000 as remuneration for such services. The tax is payable at the 6.2 percent OASDI rate and the 1.45 percent HI rate in effect for the calendar year 1990 (the year in which the wages are received) and not at the 6.06 percent OASDI rate and the 1.45 percent HI rate which were in effect for the calendar year 1989 (the year in which the services were performed).

(d) *Effective/applicability date.* Paragraphs (a), (b), and (c) of this section apply to quarters beginning after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

Par. 5. Section 31.3102–1 is amended by adding a new sentence at the end of paragraph (a) and a new paragraph (f) to read as follows:

§ 31.3102–1 Collection of, and liability for, employee tax; in general.

(a) * * * For special rules relating to Additional Medicare Tax imposed under section 3101(b)(2), see § 31.3102–4.

* * * * *

(f) *Effective/applicability date.* Paragraph (a) of this section applies to quarters beginning after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

Par. 6. Section 31.3102–4 is added to read as follows:

§ 31.3102–4 Special rules regarding Additional Medicare Tax.

(a) *Collection of tax from employee.* An employer is required to collect from each of its employees the tax imposed by section 3101(b)(2) (Additional Medicare Tax) with respect to wages for employment performed for the employer by the employee only to the extent the employer pays wages to the employee in excess of $200,000 in a calendar year. This rule applies regardless of the employee's filing status or other income. Thus, the employer disregards any amount of wages or Railroad Retirement Tax Act (RRTA) compensation paid to the employee's spouse. The employer also disregards any RRTA compensation paid by the employer to the employee or any wages or RRTA compensation paid to the employee by another employer.

Example. H, who is married and files a joint return, receives $100,000 in wages from his employer for the calendar year. I, H's spouse, receives $300,000 in wages from her employer for the same calendar year. H's wages are not in excess of $200,000, so H's employer does not withhold Additional Medicare Tax. I's employer is required to collect Additional Medicare Tax only with respect to wages it pays which are in excess of the $200,000 threshold (that is, $100,000) for the calendar year.

(b) *Collection of amounts not withheld.* To the extent the employer does not collect Additional Medicare Tax imposed on the employee by section 3101(b)(2), the employee is liable to pay the tax.

Example. J, who is married and files a joint return, receives $190,000 in wages from his employer for the calendar year. K, J's spouse, receives $150,000 in wages from her employer for the same calendar year. Neither J's nor K's wages are in excess of $200,000, so neither J's nor K's employers are required to withhold Additional Medicare Tax. J and K are liable to pay Additional Medicare Tax on $90,000 ($340,000 minus the $250,000 threshold for a joint return).

(c) *Employer's liability for tax.* If the employer deducts less than the correct amount of Additional Medicare Tax, or if it fails to deduct any part of Additional Medicare Tax, it is nevertheless liable for the correct amount of tax that it was required to withhold, until the employee pays the tax. If an employee subsequently pays the tax that the employer failed to deduct, the tax will not be collected from the employer. The employer, however, will remain subject to any applicable penalties or additions to tax resulting from the failure to withhold as required.

(d) *Effective/applicability date.* This section applies to quarters beginning after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

Par. 7. Section 31.3202–1 is amended by adding new paragraphs (g) and (h) to read as follows:

§ 31.3202–1 Collection of, and liability for, employee tax.

* * * * *

(g) *Special rules regarding Additional Medicare Tax.* (1) An employer is required to collect from each of its employees the portion of the tax imposed by section 3201(a) (as calculated under section 3101(b)(2)) (Additional Medicare Tax) with respect to compensation for employment performed for the employer by the employee only to the extent the employer pays compensation to the employee in excess of $200,000 in a calendar year. This rule applies regardless of the employee's filing status or other income. Thus, the employer disregards any amount of compensation or Federal Insurance Contributions Act (FICA) wages paid to the employee's spouse. The employer also disregards any FICA wages paid by the employer to the employee or any compensation or FICA wages paid to the employee by another employer.

Example. A, who is married and files a joint return, receives $100,000 in compensation from her employer for the calendar year. B, A's spouse, receives $300,000 in compensation from his employer for the same calendar year. A's compensation is not in excess of $200,000, so A's employer does not withhold Additional Medicare Tax. B's employer is required to collect Additional Medicare Tax only with respect to compensation it pays to B that is in excess of the $200,000 threshold (that is, $100,000) for the calendar year.

(2) To the extent the employer does not collect Additional Medicare Tax imposed on the employee by section 3201(a) (as calculated under section 3101(b)(2)), the employee is liable to pay the tax.

Example. C, who is married and files a joint return, receives $190,000 in compensation from her employer for the calendar year. D, C's spouse, receives $150,000 in compensation from his employer for the same calendar year. Neither C's nor D's compensation is in excess of $200,000, so neither C's nor D's employers are required to withhold Additional Medicare Tax. C and D are liable to pay Additional Medicare Tax on $90,000 ($340,000 minus the $250,000 threshold for a joint return).

(3) If the employer deducts less than the correct amount of Additional Medicare Tax, or if it fails to deduct any part of Additional Medicare Tax, it is nevertheless liable for the correct amount of tax that it was required to withhold, until the employee pays the tax. If an employee subsequently pays the tax that the employer failed to deduct, the tax will not be collected from the employer. The employer, however, will remain subject to any applicable penalties or additions to tax resulting from the failure to withhold as required.

(h) *Effective/applicability date.* Paragraph (g) of this section applies to quarters beginning after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

Par. 8. Section 31.6011(a)–1 is amended by adding new paragraphs (h) and (i) to read as follows:

§ 31.6011(a)–1 Returns under Federal Insurance Contributions Act.

* * * * *

(h) *Returns by employees in respect of Additional Medicare Tax.* An employee who is paid wages, as defined in sections 3121(a), subject to the tax under section 3101(b)(2) (Additional Medicare Tax), must make a return for the taxable year in respect of such tax. The return shall be made on Form 1040. The form to be used by residents of the U.S. Virgin Islands, Guam, American Samoa, or the Northern Mariana Islands is Form 1040–SS, "U.S. Self-Employment Tax Return (Including Additional Child Tax Credit for Bona Fide Residents of Puerto Rico)." The form to be used by residents of Puerto Rico is either Form 1040–SS or Form 1040–PR, "Planilla para la Declaración de la Contribución Federal sobre el Trabajo por Cuenta Propia (Incluyendo el Crédito Tributario Adicional por Hijos para Residentes Bona Fide de Puerto Rico)."

(i) *Effective/applicability date.* Paragraph (h) of this section applies to taxable years beginning after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

Par. 9. Section 31.6011(a)–2 is amended by adding new paragraphs (d) and (e) to read as follows:

§ 31.6011(a)–2 Returns under Railroad Retirement Tax Act.

* * * * *

(d) *Returns by employees and employee representatives in respect of Additional Medicare Tax.* An employee or employee representative who is paid compensation, as defined in section 3231(e), subject to the tax under sections 3201(a) (as calculated under section 3101(b)(2)) or section 3211(a) (as calculated under section 3101(b)(2)) (Additional Medicare Tax), must make a return for the taxable year in respect of such tax. The return shall be made on Form 1040. The form to be used by residents of the U.S. Virgin Islands, Guam, American Samoa, or the Northern Mariana Islands is Form 1040–SS, "U.S. Self-Employment Tax Return (Including Additional Child Tax Credit for Bona Fide Residents of Puerto Rico)." The form to be used by residents of Puerto Rico is either Form 1040–SS or Form 1040–PR, "Planilla para la Declaración de la Contribución Federal sobre el Trabajo por Cuenta Propia (Incluyendo el Crédito Tributario Adicional por Hijos para Residentes Bona Fide de Puerto Rico)."

(e) *Effective/applicability date.* Paragraph (d) of this section applies to taxable years beginning after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

Par. 10. Section 31.6205–1 is amended by:

1. Revising the first sentence in paragraph (b)(2)(i).
2. Adding a new second sentence to paragraphs (b)(2)(ii) and (b)(2)(iii).
3. Adding two new sentences after the sixth sentence in paragraph (b)(3).
4. Adding a new paragraph (b)(4).
5. Revising paragraph (d)(1).
6. Adding a new paragraph (e).

The revisions and additions read as follows:

§ 31.6205–1 Adjustments of underpayments.

* * * * *

(b) * * *

(2) * * * (i) If an employer files a return on which FICA tax or RRTA tax is required to be reported, and reports on the return less than the correct amount of employee or employer FICA or RRTA tax with respect to a payment of wages or compensation, and if the employer ascertains the error after filing the return, the employer shall correct the error through an interest-free adjustment as provided in this section, except as provided in paragraph (b)(4) of this section for Additional Medicare Tax. * * *

(ii) * * * However, if the employer also reported less than the correct amount of Additional Medicare Tax, the employer shall correct the underwithheld and underpaid Additional Medicare Tax in accordance with paragraph (b)(4) of this section. * * *

(iii) * * * However, if the employer also reported less than the correct amount of Additional Medicare Tax, the employer shall correct the underwithheld and underpaid Additional Medicare Tax in accordance with paragraph (b)(4) of this section. * * *

(3) * * * However, an adjustment of Additional Medicare Tax required to be withheld under section 3101(b)(2) or section 3201(a) may only be reported pursuant to this section if the error is ascertained within the same calendar year that the wages were paid to the employee, or if section 3509 applies to determine the amount of the underpayment, or if the adjustment is reported on a Form 2504 or Form 2504–WC. See paragraph (b)(4) of this section. * * *

(4) *Additional Medicare Tax.* If an employer files a return on which FICA tax or RRTA tax is required to be reported, and reports on the return less than the correct amount of Additional Medicare Tax required to be withheld with respect to a payment of wages or compensation, and if the employer ascertains the error after filing the return, the employer shall correct the error through an interest-free adjustment as provided in this section. An adjustment of Additional Medicare Tax may only be reported pursuant to this paragraph (b)(4) if the error is ascertained within the same calendar year that the wages or compensation were paid to the employee, unless the underpayment is attributable to an administrative error (that is, an error involving the inaccurate reporting of the amount actually withheld), section 3509 applies to determine the amount of the underpayment, or the adjustment is reported on a Form 2504 or Form 2504–WC. The employer shall adjust the underpayment of Additional Medicare Tax by reporting the additional amount due on an adjusted return for the return period in which the wages or compensation were paid, accompanied by a detailed explanation of the amount being reported on the adjusted return and any other information as may be required by this section and by the instructions relating to the adjusted return. The reporting of the

underpayment on an adjusted return constitutes an adjustment within the meaning of this section only if the adjusted return is filed within the period of limitations for assessment for the return period being corrected, and by the due date for filing the return for the return period in which the error is ascertained. For purposes of the preceding sentence, the due date for filing the adjusted return is determined by reference to the return being corrected, without regard to the employer's current filing requirements. For example, an employer with a current annual filing requirement who is correcting an error on a previously filed quarterly return must file the adjusted return by the due date for filing a quarterly return for the quarter in which the error is ascertained. The amount of the underpayment adjusted in accordance with this section must be paid to the IRS by the time the adjusted return is filed. If an adjustment is reported pursuant to this section, but the amount of the adjustment is not paid when due, interest accrues from that date (see section 6601).

* * * * *

(d) * * * (1) *Federal Insurance Contributions Tax Act and Railroad Retirement Tax Act.* If an employer collects less than the correct amount of employee FICA or RRTA tax from an employee with respect to a payment of wages or compensation, the employer must collect the amount of the undercollection by deducting the amount from remuneration of the employee, if any, paid after the employer ascertains the error. If an employer collects less than the correct amount of Additional Medicare Tax required to be withheld under section 3101(b)(2) or section 3201(a), the employer must collect the amount of the undercollection on or before the last day of the calendar year by deducting the amount from remuneration of the employee, if any, paid after the employer ascertains the error. Such deductions may be made even though the remuneration, for any reason, does not constitute wages or compensation. The correct amount of employee tax must be reported and paid, as provided in paragraph (b) of this section, whether or not the undercollection is corrected by a deduction made as prescribed in this paragraph (d)(1), and even if the deduction is made after the return on which the employee tax must be reported is due. If such a deduction is not made, the obligation of the employee to the employer with respect to the undercollection is a matter for settlement between the employee and the employer. If an employer makes an erroneous collection of employee tax from two or more of its employees, a separate settlement must be made with respect to each employee. An overcollection of employee tax from one employee may not be used to offset an undercollection of such tax from another employee. For provisions relating to the employer's liability for the tax, whether or not it collects the tax from the employee, see §§ 31.3102–1(d), 31.3102–4(c), and 31.3202–1. This paragraph (d)(1) does not apply if section 3509 applies to determine the employer's liability.

* * * * *

(e) *Effective/applicability date.* Paragraphs (b) and (d) of this section apply to adjustments made after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

Par. 11. Section 31.6402(a)–2 is amended by:

1. Revising paragraph (a)(1)(i) and the first sentence in paragraph (a)(1)(ii).
2. Re-designating paragraphs (a)(1)(iii), (a)(1)(iv), (a)(1)(v), and (a)(1)(vi), as new paragraphs (a)(1)(iv), (a)(1)(v), (a)(1)(vi), and (a)(1)(vii), respectively.
3. Adding a new paragraph (a)(1)(iii).
4. Revising newly-designated paragraphs (a)(1)(iv) and (a)(1)(v).
5. Revising paragraph (b).
6. Adding a new paragraph (c).

§ 31.6402(a)–2 Credit or refund of tax under Federal Insurance Contributions Act or Railroad Retirement Tax Act.

(a) * * * (1) * * *

(i) Except as provided in paragraph (a)(1)(iii) of this section, any person may file a claim for credit or refund for an overpayment (except to the extent that the overpayment must be credited pursuant to § 31.3503–1) if the person paid to the Internal Revenue Service (IRS) more than the correct amount of employee Federal Insurance Contributions Act (FICA) tax under section 3101 or employer FICA tax under section 3111, employee Railroad Retirement Tax Act (RRTA) tax under section 3201, employee representative RRTA tax under section 3211, or employer RRTA tax under section 3221, or interest, addition to the tax, additional amount, or penalty with respect to any such tax.

(ii) Except as provided in paragraph (a)(1)(iii) of this section, the claim for credit or refund must be made in the manner and subject to the conditions stated in this section. * * *

(iii) *Additional Medicare Tax.* No refund or credit to the employer will be allowed for the amount of any overpayment of Additional Medicare Tax imposed under section 3101(b)(2) or section 3201(a) (as calculated under section 3101(b)(2)), which the employer deducted or withheld from an employee.

(iv) For adjustments without interest of overpayments of FICA or RRTA taxes, including Additional Medicare Tax, see § 31.6413(a)–2.

(v) For corrections of FICA and RRTA tax paid under the wrong chapter, see § 31.6205–1(b)(2)(ii) and (b)(2)(iii) and § 31.3503–1.

* * * * *

(b) *Claim by employee*—(1) *In general.* Except as provided in (b)(3) of this section, if more than the correct amount of employee tax under section 3101 or section 3201 is collected by an employer from an employee and paid to the IRS, the employee may file a claim for refund of the overpayment if—

(i) The employee does not receive repayment or reimbursement in any manner from the employer and does not authorize the employer to file a claim and receive refund or credit,

(ii) The overcollection cannot be corrected under § 31.3503–1, and

(iii) In the case of overpaid employee social security tax due to having received wages or compensation from multiple employers, the employee has not taken the overcollection into account in claiming a credit against, or refund of, his or her income tax, or if so, such claim has been rejected. See § 31.6413(c)–1.

(2) *Statements supporting employee's claim.* (i) Except as provided in (b)(3) of this section, each employee who makes a claim under paragraph (b)(1) of this section shall submit with such claim a statement setting forth (a) the extent, if any, to which the employer has repaid or reimbursed the employee in any manner for the overcollection, and (b) the amount, if any, of credit or refund of such overpayment claimed by the employer or authorized by the employee to be claimed by the employer. The employee shall obtain such statement, if possible, from the employer, who should include in such statement the fact that it is made in support of a claim against the United States to be filed by the employee for refund of employee tax paid by such employer to the IRS. If the employer's statement is not submitted with the claim, the employee shall make the statement to the best of his or her knowledge and belief, and shall include therein an explanation of his or her inability to obtain the statement from the employer.

(ii) Except as provided in paragraph (b)(3) of this section, each individual

who makes a claim under paragraph (b)(1) of this section also shall submit with such claim a statement setting forth whether the individual has taken the amount of the overcollection into account in claiming a credit against, or refund of, his or her income tax, and the amount, if any, so claimed (see § 31.6413(c)–1).

(3) *Additional Medicare Tax.* (i) If more than the correct amount of Additional Medicare Tax under section 3101(b)(2) or section 3201(a) (as calculated under section 3101(b)(2)), is collected by an employer from an employee and paid to the IRS, the employee may file a claim for refund of the overpayment and receive a refund or credit if the overcollection cannot be corrected under §31.3503–1 and if the employee has not received repayment or reimbursement from the employer in the context of an interest-free adjustment. The claim for refund shall be made on Form 1040, "U.S. Individual Income Tax Return," by taking the overcollection into account in claiming a credit against, or refund of, tax. The form to be used by residents of the U.S. Virgin Islands, Guam, American Samoa, or the Northern Mariana Islands is Form 1040–SS, "U.S. Self-Employment Tax Return (Including Additional Child Tax Credit for Bona Fide Residents of Puerto Rico)." The form to be used by residents of Puerto Rico is either Form 1040–SS or Form 1040–PR, "Planilla para la Declaración de la Contribución Federal sobre el Trabajo por Cuenta Propia (Incluyendo el Crédito Tributario Adicional por Hijos para Residentes Bona Fide de Puerto Rico)." The employee may not authorize the employer to claim the credit or refund for the employee. See § 31.6402(a)–2(a)(1)(iii).

(ii) In the case of an overpayment of Additional Medicare Tax under section 3101(b)(2) or section 3201(a) for a taxable year of an individual for which a Form 1040 (or other applicable return in the Form 1040 series) has been filed, a claim for refund shall be made by the individual on Form 1040X, "Amended U.S. Individual Income Tax Return."

(c) *Effective/applicability date.* This section applies to claims for refund filed after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

Par. 12. Section 31.6413(a)–1 is amended by:

1. Revising the first sentence in paragraph (a)(2)(i).

2. Re-designating paragraphs (a)(2)(ii), (a)(2)(iii), (a)(2)(iv), (a)(2)(v), (a)(2)(vi), and (a)(2)(vii), as new paragraphs (a)(2)(iii), (a)(2)(iv), (a)(2)(v), (a)(2)(vi), (a)(2)(vii), and (a)(2)(viii), respectively.

3. Adding a new paragraph (a)(2)(ii).

4. Adding a new sentence after the first sentence in newly-designated paragraph (a)(2)(iv).

5. Adding a new sentence after the second sentence in newly-designated paragraph (a)(2)(v).

6. Revising newly-designated paragraph (a)(2)(viii).

7. Adding a new paragraph (c).

The revisions and additions read as follows:

§ 31.6413(a)–1 Repayment or reimbursement by employer of tax erroneously collected from employee.

(a) * * *

(2) * * * (i) Except as provided in paragraph (a)(2)(ii) of this section, if an employer files a return for a return period on which FICA tax or RRTA tax is reported, collects from an employee and pays to the IRS more than the correct amount of the employee FICA or RRTA tax, and if the employer ascertains the error after filing the return and within the applicable period of limitations on credit or refund, the employer shall repay or reimburse the employee in the amount of the overcollection prior to the expiration of such limitations period. * * *

(ii) If an employer files a return for a return period on which Additional Medicare Tax under section 3101(b)(2) or section 3201(a) is reported, collects from an employee and pays to the IRS more than the correct amount of Additional Medicare Tax required to be withheld from wages or compensation, and if the employer ascertains the error after filing the return but before the end of the calendar year in which the wages were paid, the employer shall repay or reimburse the employee in the amount of the overcollection prior to the end of the calendar year. However, this paragraph does not apply to the extent that, after reasonable efforts, the employer cannot locate the employee.

* * * * *

(iv) * * * However, for purposes of overcollected Additional Medicare Tax under section 3101(b)(2) or section 3201(a), the employer shall reimburse the employee by applying the amount of the overcollection against the employee FICA or RRTA tax which attaches to wages or compensation paid by the employer to the employee in the calendar year in which the overcollection is made. * * *

(v) * * * This paragraph (a)(2)(v) does not apply for purposes of overcollected Additional Medicare Tax under section 3101(b)(2) or section 3201(a) which must be repaid or reimbursed to the employee in the calendar year in which the overcollection is made. * * *

* * * * *

(viii) For corrections of FICA and RRTA tax paid under the wrong chapter, see § 31.6205–1(b)(2)(ii) and (b)(2)(iii) and § 31.3503–1.

* * * * *

(c) *Effective/applicability date.* Paragraph (a) of this section applies to adjustments made after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

Par. 13. Section 31.6413(a)–2 is amended by:

1. Adding a new sentence after the first sentence in paragraph (a)(1).

2. Adding a new sentence after the second sentence in paragraph (b)(2)(i).

3. Adding a new paragraph (e).

The revisions and additions read as follows:

§ 31.6413(a)–2 Adjustments of overpayments.

(a) * * *

(1) * * * However, this section only applies to overcollected or overpaid Additional Medicare Tax under section 3101(b)(2) or section 3201(a) if the employer has repaid or reimbursed the amount of the overcollection of such tax to the employee in the year in which the overcollection was made. * * *

* * * * *

(b) * * *

(2) * * * (i) * * * However, for purposes of Additional Medicare Tax under section 3101(b)(2) or section 3201(a), if the amount of the overcollection is not repaid or reimbursed to the employee under § 31.6413(a)–1(a)(2)(ii), there is no overpayment to be adjusted under this section and the employer may only adjust an overpayment of such tax attributable to an administrative error, that is, an error involving the inaccurate reporting of the amount withheld, pursuant to this section. * * *

* * * * *

(e) *Effective/applicability date.* Paragraphs (a) and (b) of this section apply to adjustments made after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2012–29237 Filed 11–30–12: 2:00 pm]

BILLING CODE P

DEPARTMENT OF THE TREASURY

Fiscal Service

31 CFR Part 356

[Docket No. BPD–2012–0002]

Sale and Issue of Marketable Book-Entry Treasury Bills, Notes, and Bonds

AGENCY: Office of the Assistant Secretary for Financial Markets; Fiscal Service, Treasury.

ACTION: Advance Notice of Proposed Rulemaking.

SUMMARY: The Department of the Treasury ("Treasury") intends to issue a new type of marketable security with a floating rate interest payment. We are issuing this Advance Notice of Proposed Rulemaking to solicit comments on the design details, terms and conditions, and other features of this new type of security. We also invite other comments relevant to the issuance of this new security.

DATES: Submit comments on or before January 22, 2013.

ADDRESSES: Comments may be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov*, in accordance with the instructions. Comments will be available at *http://www.regulations.gov* as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. You may download this notice from *http://www.regulations.gov* or the Bureau of the Public Debt's Web site at *http://www.treasurydirect.gov*. Questions about submitting comments should be directed to Lori Santamorena at (202) 504–3632. You may also send paper comments to Bureau of the Public Debt, Government Securities Regulations Staff, 799 9th Street NW., Washington, DC 20239–0001. Comments received will be available for public inspection and copying at the Treasury Department Library, Main Treasury Building, 1500 Pennsylvania Avenue NW., Washington, DC 20220. To visit the library, call (202) 622–0990 for an appointment. In general, comments received, including attachments and other supporting materials, are part of the public record and are available to the public. Do not submit any information in your comments or supporting materials that you consider confidential or inappropriate for public disclosure.

FOR FURTHER INFORMATION CONTACT: Colin Kim, Director, Office of Debt Management, Office of the Assistant Secretary for Financial Markets, at *debt.management@treasury.gov*.

SUPPLEMENTARY INFORMATION: The Secretary of the Treasury is authorized under chapter 31 of title 31, United States Code, to issue United States obligations and to offer them for sale under such terms and conditions as the Secretary may prescribe. The Uniform Offering Circular, in conjunction with the announcement for each auction, provides the terms and conditions for the sale and issuance of marketable Treasury bills, notes, and bonds in an auction to the public.[1]

Treasury intends to issue a new type of marketable security with a floating rate interest payment. We are currently considering two *Index Rates*[2] for this purpose, a Treasury bill rate and a Treasury general collateral repurchase agreement rate. Through this notice, we are soliciting comments on the design details of the planned floating rate security and which index (those mentioned above or another index) should result in Treasury attaining the lowest borrowing cost over time for government financing needs. At the end of this notice is a hypothetical term sheet (Appendix A) and a link to proposed formulas (Appendix B) applicable to the structure being considered.

This Advance Notice of Proposed Rulemaking is not an offering of securities and any of the currently contemplated features of floating rate securities described in this notice may change. The terms and conditions of particular securities that Treasury may offer will be provided in the Uniform Offering Circular and the applicable offering announcement.

Treasury intends to issue floating rate securities to assist us in our mission of borrowing at the lowest cost over time, as well as to manage the maturity profile of our marketable debt outstanding, expand the investor base, and provide a financing tool that gives debt managers additional flexibility. We plan to integrate floating rate securities into our ongoing efforts to extend the maturity profile of our marketable debt. We decided to establish a floating rate securities program after carefully considering the long-term supply and demand dynamics for floating rate securities and with significant consultation with market participants.[3]

We issued a Notice and Request for Information[4] on March 19, 2012, to solicit market input on a possible floating rate security, particularly concerning the demand for the product, how the security should be structured, its liquidity, the most appropriate index, and any operational issues that should be considered relating to the issuance of this type of debt. Based on the responses to that notice, Treasury announced in its August 2012 Quarterly Refunding Statement that it plans to develop a floating rate securities program to complement the existing suite of securities it issues and to support our broader debt management objectives. The first floating rate securities auction is estimated to be at least one year away. This timeframe reflects our best estimate for implementing required auction regulations and computer systems modifications.

Index Rate: No consensus exists among market participants on the ideal index for Treasury's floating rate securities program. Many believe, however, that the *Index Rate* should reference a liquid, traded rate with transparent pricing.

We are requesting comments on which *Index Rate* should result in Treasury attaining the lowest cost of financing over time. Specifically, we are considering (1) the 13-week Treasury bill auction High Rate (stop out rate) converted into a simple ACT/360 interest rate[5] (the "*Treasury Bill Yield*") and (2) a Treasury general collateral overnight repurchase agreement rate (the "*Treasury GC Rate*"). We also request comments on whether another index would better serve the desired purpose.

If Treasury's floating rate securities program were to be indexed to the *Treasury Bill Yield*, it would reference the converted auction stop out rate of 13-week Treasury bills, currently auctioned weekly. Under the current auction schedule, the *Index Rate* would change weekly, on Thursday, which is the settlement day for 13-week Treasury bills (non-Business Days excepted). Treasury requests comments on whether the conversion of the High Rate should be done on an ACT/360, ACT/365 or

[1] The Uniform Offering Circular is codified at 31 CFR part 356.

[2] All capitalized, italicized words are defined in the Appendices.

[3] In its February and May 2012 Quarterly Refunding Statements, Treasury requested input on the potential issuance of floating rate securities. In addition, Treasury has discussed the topic with the Treasury Borrowing Advisory Committee, which is a federal advisory committee sponsored by the Securities Industry and Financial Markets Association, and with the primary dealers. The primary dealers serve as trading counterparties of the Federal Reserve Bank of New York in its implementation of monetary policy. Primary dealers are also required to participate in all Treasury marketable securities auctions.

[4] 77 FR 16116 (March 19, 2012).

[5] An example of this conversion is provided in Appendix B.

some other basis. Treasury would also appreciate comments on whether the *Treasury Bill Yield* should reference a Treasury bill maturity other than the 13-week bill.

The other *Index Rate* we are considering for our floating rate securities program is a Treasury General Collateral (GC) Rate. Currently, approximately $650 billion[6] of Treasury securities are used as collateral in tri-party overnight loans each day. Money is lent to borrowers, collateralized by Treasury securities, at the overnight *Treasury GC Rate*. This rate represents transactions in a highly liquid market. While a *Treasury GC Rate* representing all tri-party repurchase agreement (repo) transactions currently is not published, the Depository Trust & Clearing Corporation (DTCC) publishes the Treasury General Collateral Finance (GCF) rate,[7] which represents a subset of tri-party Treasury GC repo transactions. Please comment on the relative merits of using a broader tri-party Treasury GC rate as compared to a narrower subset, such as DTCC's Treasury GCF index, as the *Index Rate*. Please note that we are not considering the use of an index that represents tri-party repo transactions in any collateral other than Treasury securities.

Reset Frequency: With either *Index Rate*, we would structure the floating rate security with daily resets. If we were to select a rate indexed to the 13-week Treasury bill, the rate would reset daily but, given the current auction schedule, the rate would actually change no more than once a week, generally on Thursday. We would want to allow the *Index Rate* to reset daily to maintain flexibility in our future auction schedule.

If we were to select a *Treasury GC Rate* as the *Index Rate*, the daily *Reset Frequency* would have a *Determination Date* of one *Business Day* prior. Given that most Treasury securities trade in the secondary market for settlement the next *Business Day*, referencing the previous *Business Day* would allow the accrued interest to be known at the time of the trade versus only on the settlement date.

Regardless of choice of index, any forward trades settling beyond one business day could have unknown accrued interest. Please comment on whether this would present problems for market participants.

Frequency of Interest Payments: Treasury would make *Interest* payments on its floating rate securities quarterly. This payment cycle is a departure from our semi-annual payment cycle. Most existing floating rate securities pay a quarterly interest payment and, given the non-compounding interest calculation currently being considered, a quarterly paying security seems to be the preferred structure. We welcome comments on a quarterly versus semi-annual, or other, payment structure.

Lock Out Periods: The current convention in the floating rate securities market is for interest payments to be set five business days in advance of the *Payment Dates*. This standard practice dates back to the late 1980s. Investors requested the five business-day notice for operational purposes. Given technological advancements, we believe one *Business Day* notice of interest payments should suffice. Please comment on the appropriate length of the lock out period.

Interest Rate: The *Interest Rate* on the floating rate securities would be the *Index Rate* plus the *Spread*.

Minimum Interest Rate: The floating rate securities would have a *Minimum Interest Rate* of zero. A negative *Interest Rate* could lead to an interest payment by the investor to Treasury, which could have operational and tax consequences. This *Minimum Interest Rate* feature could increase the value of these securities in certain interest rate environments. We could capture this value at auction by allowing floating rate securities to be issued at a premium.[8][9]

We would like commenters to address the potential need for a *Minimum Interest Rate* of zero percent (or some other level). Treasury would also appreciate comments on whether there is an alternative to the *Minimum Interest Rate* structure that would be preferable.

Minimum Spread: Treasury would set a *Minimum Spread* of zero on the floating rate securities to ensure that they are issued at a premium in certain interest rate environments. We would like comments on whether some other level is the appropriate *Minimum Spread*.

Interest Accrual: Interest will accrue on floating rate securities at the *Interest Rate*, with a daily *Reset Frequency*, during the *Accrual Period*. The interest rate for a non-*Business Day* will be based on the most recent interest rate observed for the prior *Business Day*.

Auction Technique: We would offer floating rate securities through a single-price auction. Competitive bids would be accepted in the form of a negative or positive *Spread*, expressed in one-tenth of one basis point,[10] to be added to the *Index Rate*. The securities would settle at par, provided that the auction clears above the *Minimum Spread*. If the auction clears below the *Minimum Spread* of zero, then the *Spread* on the floating rate security becomes zero and the auction clearing spread is used as the *Discount Margin* for determining the settlement price.[11]

Treasury bill competitive bids are expressed as a discount rate, in increments of one-half of a basis point. However, these securities have maturities of one year or shorter. Accepting bids in increments of one-tenth of a basis point would be more reflective of our fixed rate notes, bonds, and TIPS programs, which are similar to the expected maturities of floating rate securities. We are interested in input from potential auction participants, as well as others, on this subject.

All other auction rules for floating rate securities would be consistent with current rules. Please comment on any problems that could arise from using the same rules.

Auction Frequency and Settlement: We contemplate issuing floating rate securities on a regular quarterly cycle, with potentially two re-openings in subsequent months following the original quarterly auction. We would appreciate comments on whether the floating rate securities should settle mid-month (like the three-year and ten-year Treasury notes and the 30-year Treasury bond) or end-of-month (similar to the two-year, five-year, and seven-year Treasury notes). We believe that auctioning and settling floating rate securities in the same week as similar maturity fixed rate securities, such as the two-year note, may provide greater transparency for market participants seeking comparative pricing between floating rate and fixed rate securities. On the other hand, a mid-month settlement might be preferable to cash management investors as well as corporations with mid-month tax

[6] This amount is derived from publicly available tri-party repo statistics from the Federal Reserve Bank of New York. It is the approximated sum of volumes of U.S. Treasury securities collateral (including Strips) and Treasury GCF (adjusted for double-counting).

[7] For more information on the DTCC Treasury GCF rate please go to *http://www.dtcc.com/products/fi/gcfindex/*.

[8] An example of this premium calculation can be found in Appendix B.

[9] Treasury announced at the August 2012 Quarterly Refunding that it is in the process of building the operational capabilities to allow for negative rate bidding in Treasury bill auctions, should we make the determination to allow such bidding in the future. No such determination has yet been made.

[10] A basis point is equal to one hundredth of a percentage point.

[11] An example of this premium calculation can be found in Appendix B.

liabilities. Please comment on the relative merits of these settlement conventions or whether an alternative convention would be preferable.

Section 356.24(c) of the Uniform Offering Circular states that, no later than the day after the auction, Treasury will provide notice of the amount to be charged (in principal and accrued interest) on the issue date. If the auction date is more than one day before the issue date, the amount of accrued interest for reopenings may not be known. That could be problematic if the initial *Index Rate* is not known by the day after the auction. We are considering changing this rule to state that we will provide this notification no later than the day before the issue date. Please comment on any operational issues this rule change might cause.

Reopenings: As stated above, we may reopen floating rate securities, subject to the same Original Issue Discount tax rules that apply to existing Treasury securities. A reopening would also be accomplished by an auction. Because the *Spread* will have already been established, we anticipate bids in a reopening would be in terms of *Discount Margin*,[12] as defined in Appendix B, carried out to one-tenth of a basis point. Existing floating rate securities trade on a *Discount Margin* basis in the secondary market. Because reopenings would not settle on a quarterly interest *Payment Date*, successful bidders in reopening auctions would be required to pay accrued interest. Please comment on any objection to using a *Discount Margin* for auction reopenings or any issues with the proposed pricing formulas found in Appendix B.

[12] See Appendix B.

Also, we are requesting comments on whether the larger amount outstanding per issue that would result from having several reopenings is important for market liquidity, or whether it would be more important to issue a new floating rate security each month.

Maturities: We intend to start our floating rate securities program with a two-year maturity. We anticipate strong demand from money market investors with weighted average portfolio constraints. A two-year maturity might also offer an appealing investment alternative for cash portfolios. We anticipate eventually issuing longer maturity securities and seek comment on the most appropriate maturity for both the initial and future phases of the program.

Offering Amounts: We are requesting comments on the appropriate size of the initial floating rate security auctions and potential reopenings, and on whether it would be preferable for the initial auction size to be larger than reopening offering amounts.

Book-Entry Form and Systems: The floating rate securities would be offered only in book-entry form. They would be issued and maintained in the commercial book-entry system operated by the Federal Reserve System, acting as fiscal agent for Treasury. We also would make floating rate securities available to be purchased through and held in TreasuryDirect®, a system designed primarily to enable investors to hold their book-entry securities directly with Treasury.

Eligible amounts for holding and transferring would be in minimums and multiples of $100 of original par value for floating rate securities.

Eligible Collateral for Banks Holding Treasury Cash Deposits: We intend to make floating rate securities eligible as collateral for depository institutions that hold Treasury funds. Valuation for collateral purposes would depend on the precise structure of the security.

Stripping: Stripping[13] a floating rate security is different from stripping a nominal fixed rate security because the future interest payments are unknown. We do not currently plan to make floating rate securities *Strips Eligible*. However, we welcome comments on whether a floating rate interest strip would appeal to investors and how it would be priced.

Taxation: Interest payments on floating rate securities would be included in the owner's taxable income when received or as accrued, in accordance with the owner's method of accounting for tax purposes. In general, the tax treatment of floating rate securities would be determined under the tax rules applicable to variable rate debt instruments.[14] Relevant tax issues, if any, would be addressed before the first auction of these securities.

We invite comments on any other issues relevant to the sale and issuance of floating rate securities. After we consider the responses to this Advance Notice of Proposed Rulemaking, we intend to issue a final rule amending the Uniform Offering Circular. Because the rule would relate to public contracts and procedures for United States securities, the notice, public comment, and delayed effective date provisions of the Administrative Procedure Act are inapplicable under 5 U.S.C. 553(a)(2).

BILLING CODE 4810–39–P

[13] Stripping means separating a security's interest and principal components so they can be traded separately.

[14] *See* 26 CFR 1.1275–5.

Appendix A—HYPOTHETICAL TERM SHEET

I. ISSUER	U. S. Department of the Treasury
II. ISSUANCE	Floating Rate Securities
III. ISSUE DATE[15]	The last day of the month succeeding the Auction Date, subject to following Business Day convention.
IV. DATED DATE	The unadjusted Issue Date
V. MATURITY	2-year
VI. ORIGINAL ISSUE PRICE	Par (100 percent of face value)
VII. INTEREST:	
A. ACCRUAL PERIOD	From and including the Dated Date or last unadjusted Interest Payment Date to, but excluding, the next unadjusted Interest Payment Date.
B. COMPOUNDING	No
C. FREQUENCY OF INTEREST PAYMENTS	Quarterly
D. PAYMENT DATES	Principal will be paid on the maturity date as specified in the auction announcement. Interest will be paid on a quarterly basis. If any principal or interest payment date is a Saturday, Sunday, or other day on which the Federal Reserve Bank of New York is not open for business, we will make the payment (without additional interest) on the next Business Day.

[15] Please note that the *Issue Date* is synonymous with the settlement date.

E. INTEREST RATE	Index Rate plus the Spread, floored at 0.000 percent.
1. INDEX RATE	
a. INDEX RATE (Option 1)	Treasury Bill Yield, defined as the ACT/360 simple yield of the most recent auction that matches the Index Maturity with an issue date preceding the beginning of the Accrual Period or most recent reset.
i. INDEX MATURITY	13-weeks
ii. INDEX RATE DETERMINATION DATES	The preceding auction for the U.S. Treasury Bill with the Index Maturity.
b. INDEX RATE (Option 2)	Treasury GC Rate, defined as a Treasury general collateral overnight repurchase agreement rate.
i. INDEX MATURITY	Daily
ii. INDEX RATE DETERMINATION DATES	For a Business Day, the prior Business Day. For a non-Business Day, two Business Days prior.
2. SPREAD	Determined on the security's initial Auction Date; expressed in terms of one tenth of one basis point (subject to a Minimum Spread).
a. MINIMUM SPREAD	Zero
3. MINIMUM INTEREST RATE	0.000%
F. RESET FREQUENCY	Daily
G. DAY COUNT	ACT/360
H. LOCK OUT PERIOD	None

VIII. BUSINESS DAY	Any day other than a Saturday, Sunday or a day on which the Federal Reserve Bank of New York is closed.
IX. STRIPS ELIGIBLE	No
X. CALCULATION AGENT	U. S. Department of the Treasury
XI. AUCTION TECHNIQUE	A single price auction format in which a competitive bid must show a positive or negative Spread, expressed in one-tenth of one basis point, to be added to the Index Rate. Note that if the auction clearing spread is less than the Minimum Spread, then the spread on the floating rate security is set to the Minimum Spread and the auction clearing spread becomes the Discount Margin used to calculate the price. Treasury will first accept in full all noncompetitive bids up to $5 million per bid received by the closing time specified in the offering announcement. Then competitive bids will be accepted, starting with the lowest spread to the highest spread needed to fill the public offering. The usual Treasury proration rules will apply if the amount of bids at the highest accepted spread exceeds the amount of the public offering remaining. Reopenings will be auctioned in the same manner, but with bidding on the basis of Discount Margin rather than Spread.
XII. MINIMUM AND MULTIPLES TO BID, HOLD AND TRANSFER	The minimum to bid, hold, and transfer is $100 original principal value. Larger amounts must be in multiples of $100.
XIII. MAXIMUM NONCOMPETITIVE AWARD	$5 million

BILLING CODE 4810–39–C

Appendix B—PRICING FORMULAS AND EXAMPLES

The Discount Margin is the spread that would return a price of par if the existing floating rate security were being auctioned as a new issue. It is used to calculate the price (see formula in link below) of the floating rate security with an established *Spread.*

A link to formulas: *http://www.treasurydirect.gov/instit/statreg/auctreg/ANPRFRNformula.pdf.*

A link to examples: *http://www.treasurydirect.gov/instit/statreg/auctreg/DMCalc.xlsm.*

Please note: These examples are for illustrative purposes only and are not meant to convey any decision with respect to rounding and/or truncation.

Matthew S. Rutherford,

Assistant Secretary for Financial Markets.

[FR Doc. 2012–29307 Filed 12–4–12; 8:45 am]

BILLING CODE 4810–39–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2012–0814; FRL– 9757–9]

Approval and Promulgation of Implementation Plans; Region 4 States; Section 110(a)(2)(D)(i)(II) Infrastructure Requirement for the 1997 and 2006 Fine Particulate Matter National Ambient Air Quality Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve submissions from Alabama, Georgia, Mississippi and South Carolina for inclusion into each states' State Implementation Plans (SIP). This proposal pertains to the Clean Air Act (CAA) requirements regarding prevention of significant deterioration (PSD) for the 1997 annual and 2006 24-hour fine particulate matter ($PM_{2.5}$) National Ambient Air Quality Standards (NAAQS) infrastructure SIPs. The CAA requires that each state adopt and submit a SIP for the implementation, maintenance, and enforcement of each NAAQS promulgated by EPA, which is commonly referred to as an "infrastructure" SIP. EPA is proposing to approve the submissions for Alabama, Georgia, Mississippi, and South Carolina that relate to adequate provisions prohibiting emissions that interfere with any other state's required measures to prevent significant deterioration of its air quality. All other applicable infrastructure requirements for the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS associated with these States are being addressed in separate rulemakings.

DATES: Written comments must be received on or before January 4, 2013.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R04–OAR–2012–0814, 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–2012–0814," 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–2012–0814. 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: Sean Lakeman, 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) 562–9043. Mr. Lakeman can be reached via electronic mail at *lakeman.sean@epa.gov.*

Table of Contents

I. Background

On July 18, 1997 (62 FR 38652), EPA established an annual $PM_{2.5}$ NAAQS at 15.0 micrograms per cubic meter (μg/m³) based on a 3-year average of annual mean $PM_{2.5}$ concentrations. At that time, EPA also established a 24-hour NAAQS of 65 μg/m³. *See* 40 CFR 50.7. On October 17, 2006 (71 FR 61144), EPA retained the 1997 annual $PM_{2.5}$ NAAQS at 15.0 μg/m³ based on a 3-year average of annual mean $PM_{2.5}$ concentrations, and promulgated a new 24-hour NAAQS of 35 μg/m³ based on a 3-year average of the 98th percentile of 24-hour concentrations. By statute, SIPs meeting the requirements of sections 110(a)(1) and (2) are to be submitted by states within three years after promulgation of a new or revised NAAQS. Sections 110(a)(1) and (2) require states to address basic SIP requirements, including emissions inventories, monitoring, and modeling to assure attainment and maintenance of the NAAQS. States were required to submit such SIPs to EPA no later than July 2000 for the 1997 annual $PM_{2.5}$ NAAQS, and no later than October 2009 for the 2006 24-hour $PM_{2.5}$ NAAQS.

States were required to submit such SIPs to EPA no later than July 2000 for the 1997 annual $PM_{2.5}$ NAAQS, and no

later than Octoer 2009 for the 2006 24-hour $PM_{2.5}$ NAAQS.

On March 4, 2004, Earthjustice submitted a notice of intent to sue related to EPA's failure to issue findings of failure to submit related to the "infrastructure" requirements for the 1997 annual $PM_{2.5}$ NAAQS. On March 10, 2005, EPA entered into a consent decree with Earthjustice which required EPA, among other things, to complete a **Federal Register** notice announcing EPA's determinations pursuant to section 110(k)(1)(B) as to whether each state had made complete submissions to meet the requirements of section 110(a)(2) for the 1997 $PM_{2.5}$ NAAQS by October 5, 2008. In accordance with the consent decree, EPA made completeness findings for each state based upon what the Agency received from each state for the 1997 $PM_{2.5}$ NAAQS as of October 3, 2008.

On October 22, 2008, EPA published a final rulemaking entitled "Completeness Findings for Section 110(a) State Implementation Plans Pertaining to the Fine Particulate Matter ($PM_{2.5}$) NAAQS" making a finding that each state had submitted or failed to submit a complete SIP that provided the basic program elements of section 110(a)(2) necessary to implement the 1997 $PM_{2.5}$ NAAQS. *See* 73 FR 62902. For those states that did receive findings, the findings of failure to submit for all or a portion of a state's implementation plan established a 24-month deadline for EPA to promulgate a Federal Implementation Plan (FIP) to address the outstanding SIP elements unless, prior to that time, the affected states submitted, and EPA approved, the required SIPs.

The findings that all or portions of a state's submission are complete established a 12-month deadline for EPA to take action upon the complete SIP elements in accordance with section 110(k). Alabama, Georgia, Mississippi and South Carolina's infrastructure submissions were received by EPA on July 25, 2008, July 23, 2008, December 7, 2007, and March 14, 2008, respectively, for the 1997 annual $PM_{2.5}$ NAAQS and on September 23, 2009, October 21, 2009, October 6, 2009, and September 18, 2009, respectively, for the 2006 24-hour $PM_{2.5}$ NAAQS. Alabama, Georgia, Mississippi and South Carolina were among other states that did not receive findings of failure to submit because they had provided a complete submission to EPA to address the infrastructure elements for the 1997 $PM_{2.5}$ NAAQS by October 3, 2008.

On July 6, 2011, WildEarth Guardians and Sierra Club filed an amended complaint related to EPA's failure to take action on the SIP submittal related to the "infrastructure" requirements for the 2006 24-hour $PM_{2.5}$ NAAQS. On October 20, 2011, EPA entered into a consent decree with WildEarth Guardians and Sierra Club which required EPA, among other things, to complete a **Federal Register** notice of the Agency's final action either approving, disapproving, or approving in part and disapproving in part the Alabama, Georgia, Mississippi and South Carolina 2006 24-hour $PM_{2.5}$ NAAQS Infrastructure SIP submittals addressing the applicable requirements of sections 110(a)(2)(A)–(H), (J)–(M), except for section 110(a)(2)(C) nonattainment area requirements and section 110(a)(2)(D)(i) visibility requirements. The rulemaking proposed through today's action is consistent with the terms of this consent decree.

Today's action is proposing to approve Alabama, Georgia, Mississippi and South Carolina's infrastructure submissions for the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS addressing CAA section 110(a)(2)(D)(i)(II) related to adequate provisions prohibiting emissions that interfere with any other state's required measures to prevent significant deterioration of its air quality (referred to as "prong 3"). EPA has taken previous action on Alabama, Georgia, Mississippi and South Carolina's infrastructure submissions for the 1997 and 2006 $PM_{2.5}$ NAAQS for sections 110(a)(2)(A)-(F), (H), (J)-(M), including other portions of section 110(a)(2)(D)(i) in separate actions from today's rulemaking.

II. What are States required to address under Sections 110(a)(2)(D)?

Section 110(a)(2)(D) has two components, 110(a)(2)(D)(i) and 110(a)(2)(D)(ii). Specifically, section 110(a)(2)(D)(i) has four components that require SIPs to include provisions prohibiting any source or other type of emissions activity in one state from: 1) contributing significantly to nonattainment of the NAAQS in any other State, and 2) interfering with maintenance of the NAAQS by any other State (collectively referred to as 110(a)(2)(D)(i)(I)); or interfering with measures required to 3) prevent significant deterioration of air quality in any other State, or 4) protect visibility in any other State (collectively referred to as 110(a)(2)(D)(i)(II)). Section 110(a)(2)(D)(ii) requires SIPs to include provisions insuring compliance with sections 115 and 126 of the Act, relating to interstate and international pollution abatement.

In previous actions, EPA has already taken action to address Alabama, Georgia, Mississippi and South Carolina's SIP submissions related to sections 110(a)(2)(D)(i)(I) and 110(a)(2)(D)(ii) for the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS. Today's proposed rulemaking relates only to requirements related to prong 3 of section 110(a)(2)(D)(i), which as previously described, requires that the SIP contain adequate provisions prohibiting emissions that interfere with any other state's required measures to prevent significant deterioration of its air quality. More information on this requirement and EPA's rationale for today's proposal that each state is meeting this requirement for purposes of the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS is provided below.

III. What is EPA's analysis of how Region 4 States addressed element (D)(i)(II) related to PSD?

EPA's September 25, 2009, memorandum entitled "Guidance on SIP Elements Required Under Section 110(a)(1) and (2) for the 2006 24-Hour Fine Particle ($PM_{2.5}$) National Ambient Air Quality Standards" provided guidance on addressing the infrastructure requirements required under sections 110(a)(1) and 110(a)(2) of the CAA with respect to the 2006 24-hour $PM_{2.5}$ NAAQS. The 2009 Guidance describes that a state's PSD permitting program is the primary measure that such state must include in its SIP to prevent significant deterioration of air quality in accordance with prong 3 of section 110(a)(2)(D)(i). EPA believes that Alabama, Georgia, Mississippi and South Carolina's infrastructure submissions are consistent with the 2009 Guidance, when considered in conjunction with each State's PSD program.

At present, there are four regulations that are required to be adopted into the SIP to meet PSD-related infrastructure requirements. *See* Sections 110(a)(2)(C), 110(a)(2)(D)(i)(II), and 110(a)(2)(J) of the CAA. These regulations are: (1) "Final Rule To Implement the 8-Hour Ozone National Ambient Air Quality Standard—Phase 2; Final Rule" (November 29, 2005, 70 FR 71612) (hereafter referred to as the "Phase II Rule"); (2) "Implementation of the New Source Review Program for Particulate Matter Less Than 2.5 Micrometers; Final Rule" (May 16, 2008, 73 FR 28321) (hereafter referred to as the "NSR $PM_{2.5}$ Rule"); (3) "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule" (June 3, 2010, 75 FR 31514) (hereafter referred to as the "GHG Tailoring Rule"); and, (4) "Final Rule on the Prevention of Significant Deterioration (PSD) for

Particulate Matter Less Than 2.5 Micrometers ($PM_{2.5}$)—Increments, Significant Impact Levels (SILs) and Significant monitoring Concentration (SMC); Final Rule" (October 20, 2010, 75 FR 64864) (hereafter referred to as "$PM_{2.5}$ PSD Increment-SILs-SMC Rule (only as it relates to $PM_{2.5}$ Increments)"). Specific details on these PSD requirements can be found in the respective final rules cited above, however, a brief summary of each rule is provided below.

First, as part of the framework to implement the 1997 8-hour ozone NAAQS, EPA promulgated an implementation rule in two phases.[1] The Phase 2 Rule is relevant to today's action. Among other changes, the rule revised the PSD regulations to recognize nitrogen oxide (NOx) as an ozone precursor.

Second, the NSR $PM_{2.5}$ Rule revised the NSR program to establish the framework for implementing preconstruction permit review for the $PM_{2.5}$ NAAQS in both attainment areas and nonattainment areas. These PSD requirements included: (1) A provision that NSR permits address directly emitted $PM_{2.5}$ and precursor pollutants; (2) a requirement establishing significant emission rates for direct $PM_{2.5}$ and precursor pollutants (including sulfur dioxide (SO_2) and NOx); 3) exceptions to the grandfathering policy for permits being reviewed under the PM_{10} surrogate program; and, (4) a revision that states account for gases that condense to form particles (condensables) in $PM_{2.5}$ and PM_{10} emission limits in PSD permits.

Third, in the GHG Tailoring Rule, EPA tailored the applicability criteria that determine which GHG emission sources become subject to the PSD program of the CAA. *See* 75 FR 31514.

Lastly, the $PM_{2.5}$ PSD Increment-SILs-SMC Rule (only as it relates to $PM_{2.5}$ increments) provided additional regulatory requirements under the PSD program regarding the implementation of the $PM_{2.5}$ NAAQS for NSR by specifically establishing $PM_{2.5}$ increments pursuant to section 166(a) of the CAA to prevent significant deterioration of air quality in areas meeting the NAAQS.

The PSD requirements promulgated in the aforementioned regulations establish the framework for a comprehensive SIP PSD program which EPA has determined are necessary to comply with prong 3 of section 110(a)(2)(D)(i). The following table shows when EPA approved the incorporation of the aforementioned regulations in each of the States' implementation plan:

State	Phase II rule	GHG tailoring rule	NSR $PM_{2.5}$ rule	$PM_{2.5}$ PSD increment-SILs-SMC rule (as it relates to $PM_{2.5}$ increments)
Alabama	5/1/2008 73 FR 23957	12/29/2010 75 FR 81863	9/26/2012 77 FR 59100	9/26/2012. 77 FR 59100.
Georgia	11/22/2010 75 FR 71018	9/8/2011 76 FR 55572	9/8/2011 76 FR 55572	See Below.
Mississippi	12/20/2010 75 FR 79300	12/29/2010 75 FR 81858	9/26/2012 77 FR 59095	9/26/2012. 77 FR 59095.
South Carolina	6/23/2011 76 FR 36875	Refer to Footnote[2]	6/23/2011 76 FR 36875	See Below.

1. *Alabama:* As noted in the table above, Alabama has addressed, and EPA has approved, the underlying PSD regulations to support the State's program. In this action, EPA is proposing to approve Alabama's infrastructure submissions for the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS with regard to the PSD requirements for prong 3 of 110(a)(2)(D)(i).

2. *Georgia:* In this action, EPA is proposing to approve Georgia's infrastructure submissions for the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS with regard to the prong 3 requirement of section 110(a)(2)(D)(i). Today's proposed approval of Georgia's implementation plan respecting the prong 3 infrastructure element of 110(a)(2)(D)(i) is contingent upon EPA first taking final action to approve Georgia's July 26, 2012, SIP revision regarding $PM_{2.5}$ PSD Increment-SILs-SMC Rule (only as it relates to $PM_{2.5}$ Increments) revision into the State's implementation plan. EPA will consider action on Georgia's July 26, 2012, submission in a rulemaking separate from today's action.

3. *Mississippi:* As noted in the table above, Mississippi has addressed, and EPA has approved, the underlying PSD regulations to support the State's program. In this action, EPA is proposing to approve Mississippi's infrastructure submissions for the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS with regard to the PSD requirements for prong 3 of section 110(a)(2)(D)(i).

4. *South Carolina:* In this action, EPA is proposing to approve South Carolina's infrastructure submissions for the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS with regard to prong 3 of section 110(a)(2)(D)(i). Today's proposed approval of South Carolina's implementation plan respecting prong 3 of section 110(a)(2)(D)(i)(II) is contingent upon EPA first taking final action to approve South Carolina's May 1, 2012, SIP revision regarding the $PM_{2.5}$ PSD Increment-SILs-SMC Rule (only as it relates to $PM_{2.5}$ Increments) revision into the State's implementation plan. EPA will consider action on South Carolina's May 1, 2012, submission in a rulemaking separate from today's action.

Pending final approval of the above-described contingent SIP revisions,

[1] EPA promulgated the Phase I Rule on April 30, 2004 entitled "Final Rule To Implement the 8-Hour Ozone National Ambient Air Quality Standard—Phase 1." *See* 69 FR 23951.

[2] On June 11, 2010, the South Carolina Governor signed an Executive Order to confirm that the State had authority to implement appropriate emission thresholds for determining which new stationary sources and modification projects become subject to PSD permitting requirements for their GHG emissions at the state level. On December 30, 2010, EPA published a final rulemaking, "Action To Ensure Authority To Implement Title V Permitting Programs Under the Greenhouse Gas Tailoring Rule" (75 FR 82254) to narrow EPA's previous approval of State title V operating permit programs that apply (or may apply) to GHG-emitting sources; this rule hereafter is referred to as the "Narrowing Rule." EPA narrowed its previous approval of certain State permitting thresholds, for GHG emissions so that only sources that equal or exceed the GHG thresholds, as established in the final Tailoring Rule, would be covered as major sources by the Federally-approved programs in the affected States. South Carolina was included in this rulemaking. On March 4, 2011, South Carolina submitted a letter withdrawing from EPA's consideration the portion of South Carolina's SIP for which EPA withdrew its previous approval in the Narrowing Rule. These provisions are no longer intended for inclusion in the SIP, and are no longer before EPA for its approval or disapproval. A copy of South Carolina's letter can be accessed at www.regulations.gov using Docket ID No. EPA–R04–OAR–2010–0721.

Alabama, Georgia, Mississippi and South Carolina have demonstrated that major sources in each state are subject to PSD permitting programs to comply with prong 3 of section 110(a)(2)(D)(i) of the CAA for the $PM_{2.5}$ NAAQS. Therefore, EPA has made the preliminary determination that, pending these contingent revisions, Alabama, Georgia, Mississippi and South Carolina's SIP and practices will be adequate for insuring compliance with the applicable PSD requirements relating to interstate transport pollution for the 1997 and 2006 $PM_{2.5}$ NAAQS.

IV. Proposed Action

As described above, EPA is proposing to approve SIP revisions for Alabama, Georgia, Mississippi and South Carolina to incorporate provisions into the States' implementation plans to address prong 3 of section 110(a)(2)(D)(i) of the CAA for both the 1997 and 2006 $PM_{2.5}$ NAAQS. Specifically, EPA is proposing to approve the States' prong 3 of section 110(a)(2)(D)(i) submissions because they are consistent with section 110 of the CAA. As noted above, the proposed approval of Georgia's and South Carolina's implementation plan respecting prong 3 of section 110(a)(2)(D)(i) is contingent upon EPA first taking final action to approve the States' July 26, 2012, and May 1, 2012, SIP revisions, respectively, for the $PM_{2.5}$ PSD Increment-SILs-SMC Rule (only as it relates to $PM_{2.5}$ Increments).

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. *See* 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 proposed 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 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 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).

EPA has preliminarily determined that this proposed rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because there are no "substantial direct effects" on an Indian Tribe as a result of this action. EPA notes that the Catawba Indian Nation Reservation is located within the South Carolina. Pursuant to the Catawba Indian Claims Settlement Act, S.C. Code Ann. 27–16–120, "all state and local environmental laws and regulations apply to the Catawba Indian Nation and Reservation and are fully enforceable by all relevant state and local agencies and authorities." Thus, while the South Carolina SIP applies to the Catawba Reservation, because today's action is not proposing a substantive revision to the South Carolina SIP, and is instead proposing that the existing SIP will satisfy the prong 3 requirements of section 110(a)(2)(D)(i)(II), EPA has preliminarily determined that today's action will have no "substantial direct effects" on the Catawba Indian Nation. EPA has also preliminarily determined that these revisions will not impose any 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, Nitrogen dioxide, Particulate matter, Reporting and recordkeeping requirements, Volatile organic compounds.

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

Dated: November 21, 2012.

A. Stanley Meiburg,

Acting Regional Administrator, Region 4.

[FR Doc. 2012–29367 Filed 12–4–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2012–0814; FRL–9757–8]

Approval and Promulgation of Implementation Plans; Florida; 110(a)(2)(D)(i)(II) Infrastructure Requirement for the 1997 and 2006 Fine Particulate Matter National Ambient Air Quality Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve in part, and disapprove in part, the State Implementation Plan (SIP) submissions, submitted by the State of Florida, through the Florida Department of Environmental Protection (DEP) on April 18, 2008, and September 23, 2009. This proposal addresses the Clean Air Act (CAA) requirements pertaining to prevention of significant deterioration (PSD) for the 1997 annual and 2006 24 hour fine particulate matter ($PM_{2.5}$) National Ambient Air Quality Standards (NAAQS) infrastructure SIPs. The CAA requires that each state adopt and submit a SIP for the implementation, maintenance, and enforcement of each NAAQS promulgated by EPA, which is commonly referred to as an "infrastructure" SIP. EPA is proposing to approve in part, and disapprove in part the submission for Florida, that relates to adequate provisions prohibiting emissions that interfere with any other state's required measures to prevent significant deterioration of its air quality. All other applicable infrastructure requirements for the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS associated with Florida are being addressed in separate rulemakings.

DATES: Written comments must be received on or before January 4, 2013.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R04–OAR–2012–0814, 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–2012–0814," 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–2012–0814. 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: Sean Lakeman, 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) 562–9043. Mr. Lakeman can be reached via electronic mail at *lakeman.sean@epa.gov.*

Table of Contents

I. Background

On July 18, 1997 (62 FR 38652), EPA established an annual $PM_{2.5}$ NAAQS at 15.0 micrograms per cubic meter (μg/m³) based on a 3-year average of annual mean $PM_{2.5}$ concentrations. At that time, EPA also established a 24-hour NAAQS of 65 μg/m³. *See* 40 CFR 50.7. On October 17, 2006 (71 FR 61144), EPA retained the 1997 annual $PM_{2.5}$ NAAQS at 15.0 μg/m³ based on a 3-year average of annual mean $PM_{2.5}$ concentrations, and promulgated a new 24-hour NAAQS of 35 μg/m³ based on a 3-year average of the 98th percentile of 24-hour concentrations. By statute, SIPs meeting the requirements of sections 110(a)(1) and (2) are to be submitted by states within three years after promulgation of a new or revised NAAQS. Sections 110(a)(1) and (2) require states to address basic SIP requirements, including emissions inventories, monitoring, and modeling to assure attainment and maintenance of the NAAQS. States were required to submit such SIPs to EPA no later than July 2000 for the 1997 annual $PM_{2.5}$ NAAQS, and no later than October 2009 for the 2006 24-hour $PM_{2.5}$ NAAQS.

On March 4, 2004, Earthjustice submitted a notice of intent to sue related to EPA's failure to issue findings of failure to submit related to the "infrastructure" requirements for the 1997 annual $PM_{2.5}$ NAAQS. On March 10, 2005, EPA entered into a consent decree with Earthjustice which required EPA, among other things, to complete a **Federal Register** notice announcing EPA's determinations pursuant to section 110(k)(1)(B) as to whether each state had made complete submissions to meet the requirements of section 110(a)(2) for the 1997 $PM_{2.5}$ NAAQS by October 5, 2008. In accordance with the consent decree, EPA made completeness findings for each state based upon what the Agency received from each state for the 1997 $PM_{2.5}$ NAAQS as of October 3, 2008.

On October 22, 2008, EPA published a final rulemaking entitled "Completeness Findings for Section 110(a) State Implementation Plans Pertaining to the Fine Particulate Matter ($PM_{2.5}$) NAAQS" making a finding that each state had submitted or failed to submit a complete SIP that provided the basic program elements of section 110(a)(2) necessary to implement the 1997 $PM_{2.5}$ NAAQS. *See* 73 FR 62902. For those states that did receive findings, the findings of failure to submit for all or a portion of a state's implementation plan established a 24-month deadline for EPA to promulgate a Federal Implementation Plan (FIP) to address the outstanding SIP elements unless, prior to that time, the affected states submitted, and EPA approved, the required SIPs.

The findings that all or portions of a state's submission are complete established a 12-month deadline for EPA to take action upon the complete SIP elements in accordance with section 110(k). Florida's infrastructure submission was received by EPA on April 18, 2008, for the 1997 annual $PM_{2.5}$ NAAQS and on September 23, 2009, for the 2006 24-hour $PM_{2.5}$ NAAQS. Florida was among other states that did not receive findings of failure to submit because they had provided a complete submission to EPA to address the infrastructure elements for the 1997 $PM_{2.5}$ NAAQS by October 3, 2008.

On July 6, 2011, WildEarth Guardians and Sierra Club filed an amended complaint related to EPA's failure to take action on the SIP submittal related to the "infrastructure" requirements for the 2006 24-hour $PM_{2.5}$ NAAQS. On October 20, 2011, EPA entered into a

consent decree with WildEarth Guardians and Sierra Club which required EPA, among other things, to complete a **Federal Register** notice of the Agency's final action either approving, disapproving, or approving in part and disapproving in part the Florida 2006 24-hour $PM_{2.5}$ NAAQS Infrastructure SIP submittals addressing the applicable requirements of sections 110(a)(2)(A)–(H), (J)–(M), except for section 110(a)(2)(C) nonattainment area requirements and section 110(a)(2)(D)(i) visibility requirements. The rulemaking proposed through today's action is consistent with the terms of this consent decree.

Today's action is proposing to approve in part, and disapprove in part, Florida's infrastructure submission for the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS addressing CAA section 110(a)(2)(D(i) as it relates to adequate provisions prohibiting emissions that interfere with any other state's required measures to prevent significant deterioration of its air quality (referred to as "prong 3"). EPA has taken previous action on Florida's infrastructure submission for the 1997 and 2006 $PM_{2.5}$ NAAQS for sections 110(a)(2)(A)–(F), (H), (J)–(M), including other requirements of section 110(a)(2)(D)(i) in separate actions from today's rulemaking.

II. What are states required to address under sections 110(a)(2)(D)?

Section 110(a)(2)(D) has two components, 110(a)(2)(D)(i) and 110(a)(2)(D)(ii). Specifically, section 110(a)(2)(D)(i) has four components that require SIPs to include provisions prohibiting any source or other type of emissions activity in one state from: (1) Contributing significantly to nonattainment maintenance of the NAAQS in another state, and (2) interfering with maintenance of the NAAQS in another state (collectively referred to as 110(a)(2)(D)(i)(I)); or interfering with measures required to (3) prevent significant deterioration of air quality in another state (prong 3), or (4) protect visibility in another state (collectively referred to as 110(a)(2)(D)(i)(II)). Section 110(a)(2)(D)(ii) requires SIPs to include provisions insuring compliance with sections 115 and 126 of the Act, relating to interstate and international pollution abatement.

In previous actions, EPA has already taken action to address 110(a)(2)(D)(i)(I) and 110(a)(2)(D)(ii) for Florida's infrastructure submissions for the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS. Today's proposed rulemaking relates only to requirements related to prong 3 of 110(a)(2)(D)(i). More information on this requirement and EPA's rationale for today's proposal approving in part, and disapproving in part, this requirement for purposes of the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS is provided below.

III. What is EPA's analysis of how Florida addressed element (D)(i)(II) related to PSD?

EPA's September 25, 2009, memorandum entitled "Guidance on SIP Elements Required Under Section 110(a)(1) and (2) for the 2006 24-Hour Fine Particle ($PM_{2.5}$) National Ambient Air Quality Standards" provided guidance on addressing the infrastructure requirements required under sections 110(a)(1) and 110(a)(2) of the CAA with respect to the 2006 24-hour $PM_{2.5}$ NAAQS. The 2009 Guidance describes that a state's PSD permitting program is the primary measure that such state must include in its SIP to prevent significant deterioration of air quality in accordance with prong 3 of section 110(a)(2)(D)(i). As described below, EPA has preliminarily determined that portions of Florida's infrastructure submissions are consistent with the 2009 Guidance, when considered in conjunction with the State's PSD program, and that a portion of the submissions is not.

At present, there are four regulations that are required to be adopted into the SIP to meet PSD-related infrastructure requirements. *See* Sections 110(a)(2)(C), prong 3 of 110(a)(2)(D)(i), and 110(a)(2)(J) of the CAA. These regulations are: (1) "Final Rule To Implement the 8-Hour Ozone National Ambient Air Quality Standard—Phase 2; Final Rule" (November 29, 2005, 70 FR 71612) (hereafter referred to as the "Phase II Rule"); (2) "Implementation of the New Source Review Program for Particulate Matter Less Than 2.5 Micrometers; Final Rule" (May 16, 2008, 73 FR 28321) (hereafter referred to as the "NSR $PM_{2.5}$ Rule"); (3) "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule" (June 3, 2010, 75 FR 31514) (hereafter referred to as the "GHG Tailoring Rule"); and, (4) "Final Rule on the Prevention of Significant Deterioration (PSD) for Particulate Matter Less Than 2.5 Micrometers ($PM_{2.5}$)—Increments, Significant Impact Levels (SILs) and Significant monitoring Concentration (SMC); Final Rule" (October 20, 2010, 75 FR 64864) (hereafter referred to as "$PM_{2.5}$ PSD Increment-SILs-SMC Rule (only as it relates to $PM_{2.5}$ Increments)"). Specific details on the PSD requirements of these regulations can be found the respective final rules, however, a brief summary of each rule is provided below.

First, as part of the framework to implement the 1997 8-hour ozone NAAQS, EPA promulgated an implementation rule in two phases.[1] The Phase II Rule is relevant to today's action. This rule, among other changes, revised the PSD regulations to recognize nitrogen oxide (NO_X) as an ozone precursor.

Second, the NSR $PM_{2.5}$ Rule revised the NSR program to establish the framework for implementing preconstruction permit review for the $PM_{2.5}$ NAAQS in both attainment areas and nonattainment areas. The PSD requirements included: (1) A provision that NSR permits address directly emitted $PM_{2.5}$ and precursor pollutants; (2) a requirement establishing significant emission rates for direct $PM_{2.5}$ and precursor pollutants (including sulfur dioxide (SO_2) and NO_X); (3) exceptions to the grandfathering policy for permits being reviewed under the PM_{10} surrogate program; and, (4) a revision that states account for gases that condense to form particles (condensables) in $PM_{2.5}$ and PM_{10} emission limits in PSD permits.

Third, in the GHG Tailoring Rule, EPA tailored the applicability criteria that determine which GHG emission sources become subject to the PSD program of the CAA. *See* 75 FR 31514.

Lastly, the $PM_{2.5}$ PSD Increment-SILs-SMC Rule (only as it relates to $PM_{2.5}$ increments) provided additional regulatory requirements under the PSD program regarding the implementation of the $PM_{2.5}$ NAAQS for NSR by specifically establishing $PM_{2.5}$ increments pursuant to section 166(a) of the CAA to prevent significant deterioration of air quality in areas meeting the NAAQS.

The PSD requirements promulgated in the aforementioned regulations establish the framework for a comprehensive SIP PSD program which EPA has determined are necessary to comply with prong 3 of 110(a)(2)(D)(i). The following provides a listing of relevant EPA approvals for Florida SIP revisions to address PSD requirements.

1. EPA's approval of Florida's PSD/NSR regulations which address the Ozone Implementation NSR Update requirements was published in the **Federal Register** on June 15, 2012 (77 FR 35862).

2. EPA's approval of Florida's NSR $PM_{2.5}$ Rule was published in the **Federal**

[1] EPA promulgated the Phase I Rule on April 30, 2004 entitled "Final Rule To Implement the 8-Hour Ozone National Ambient Air Quality Standard—Phase 1." *See* 69 FR 23951.

Register on September 19, 2012 (77 FR 58027).

3. EPA's approval of Florida's PSD/$PM_{2.5}$ approving $PM_{2.5}$ increments was published in the **Federal Register** on September 19, 2012 (77 FR 58027).

These three approval actions demonstrate that Florida's SIP-approved PSD program meets three of the four required regulatory elements necessary to satisfy prong 3 of section 110(a)(2)(D)(i).

With respect to the fourth necessary regulatory element—the GHG Tailoring Rule—Florida did not submit a SIP revision to adopt the appropriate emission thresholds for determining which new stationary sources and modification projects become subject to PSD permitting requirements for their GHG emissions as promulgated in the GHG Tailoring Rule. Therefore, Florida's federally-approved SIP contained errors that resulted in its failure to address, or provide adequate legal authority for, the implementation of a GHG PSD program in Florida. In the GHG SIP Call,[2] EPA determined that the State of Florida's SIP was substantially inadequate to achieve CAA requirements because its existing PSD program does not apply to GHG-emitting sources. This rule finalized a SIP call for 15 state and local permitting authorities including Florida. EPA explained that if a state, identified in the SIP call, failed to submit the required corrective SIP revision by the applicable deadline, EPA would promulgate a FIP under CAA section 110(c)(1)(A) for that state to govern PSD permitting for GHG. On December 30, 2010, EPA promulgated a FIP[3] because Florida failed to submit, by its December 22, 2010, deadline, the corrective SIP revision to apply its PSD program to sources of GHG consistent with the thresholds described in the GHG Tailoring rule. The FIP ensured that a permitting authority (i.e., EPA) would be available to issue preconstruction PSD permits to GHG-emitting sources in the State of Florida. EPA took these actions through interim final rulemaking, effective upon publication, to ensure the availability of a permitting authority—EPA—in Florida for GHG-emitting sources when they became subject to PSD on January 2, 2011.

The Florida SIP currently does not provide adequate legal authority to address the GHG PSD permitting requirements at or above the levels of emissions set forth in the GHG Tailoring Rule, or at other appropriate levels. As a result, EPA has preliminarily determined that the Florida SIP does not satisfy a portions of section 110(a)(2)(D)(i) prong 3 for the 1997 and 2006 $PM_{2.5}$ infrastructure requirements. Therefore, EPA is proposing disapproval of FDEP's submission for prong 3 of section 110(a)(2)(D)(i) as it relates relate to GHG PSD permitting requirements. EPA's proposed disapproval of this element does not result in any further obligation on the part of Florida, because EPA has already promulgated a FIP for the Florida PSD program to address permitting GHG at or above the GHG Tailoring Rule thresholds (76 FR 25178). Thus, today's proposed action to approve in part, and disapprove in part, FDEP's submission for prong 3 of section 110(a)(2)(D)(i), once final, will not require any further action by either FDEP or EPA.

IV. Proposed Action

As described above, EPA is proposing to approve in part, and disapprove in part, the SIP revision for Florida to incorporate provisions into the State's implementation plan to address prong 3 of section 110(a)(2)(D)(i) of the CAA for both the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS. Specifically, EPA is proposing to approve the State's prong 3 of section 110(a)(2)(D)(i) submissions as they relate to the "Phase II Rule," the "NSR $PM_{2.5}$ Rule," and the "$PM_{2.5}$ PSD Increment-SILs-SMC Rule (only as it relates to $PM_{2.5}$ increments)" because they are consistent with section 110 of the CAA. EPA also is proposing to disapprove Florida's submissions for the portion of the section 110(a)(2)(D)(i) prong 3 requirements related to the regulation of GHG emissions.

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. *See* 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 proposed 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 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 CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country, 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, Nitrogen dioxide, Particulate matter, Reporting and recordkeeping requirements, Volatile organic compounds.

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

Dated: November 21, 2012.

A. Stanley Meiburg,

Acting Regional Administrator, Region 4.

[FR Doc. 2012–29400 Filed 12–4–12; 8:45 am]

BILLING CODE 6560–50–P

[2] 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 (December 13, 2010).

[3] Action to Ensure Authority to Issue Permits under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Federal Implementation Plan—Final Rule, 75 FR 82246 (December 30, 2010).

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2012–0814; FRL– 9757–7]

Approval and Promulgation of Implementation Plans; Region 4 States; Section 110(a)(2)(D)(i)(II) Infrastructure Requirement for the 1997 and 2006 Fine Particulate Matter National Ambient Air Quality Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to conditionally approve submissions from Kentucky, North Carolina and Tennessee for inclusion into each states' State Implementation Plan (SIP). This proposal addresses the Clean Air Act (CAA) requirements pertaining to prevention of significant deterioration (PSD) for the 1997 annual and 2006 24-hour fine particulate matter ($PM_{2.5}$) National Ambient Air Quality Standards (NAAQS) infrastructure SIPs. The CAA requires that each state adopt and submit a SIP for the implementation, maintenance, and enforcement of each NAAQS promulgated by EPA, which is commonly referred to as an "infrastructure" SIP. EPA is proposing to conditionally approve the submissions for Kentucky, North Carolina and Tennessee that relate to adequate provisions prohibiting emissions that interfere with any other state's required measures to prevent significant deterioration of its air quality. The subject of this notice is limited to infrastructure provisions prohibiting emissions that interfere with any other state's required measures to prevent significant deterioration of its air quality. All other applicable infrastructure elements for these states are being addressed in separate rulemakings.

DATES: Written comments must be received on or before January 4, 2013.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R04–OAR–2012–0814, 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–2012–0814," 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–2012–0814. 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: Sean Lakeman, 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) 562–9043. Mr. Lakeman can be reached via electronic mail at *lakeman.sean@epa.gov.*

Table of Contents

I. Background

On July 18, 1997 (62 FR 38652), EPA established an annual $PM_{2.5}$ NAAQS at 15.0 micrograms per cubic meter ($\mu g/m^3$) based on a 3-year average of annual mean $PM_{2.5}$ concentrations. At that time, EPA also established a 24-hour NAAQS of 65 $\mu g/m^3$. *See* 40 CFR 50.7. On October 17, 2006 (71 FR 61144), EPA retained the 1997 annual $PM_{2.5}$ NAAQS at 15.0 $\mu g/m^3$ based on a 3-year average of annual mean $PM_{2.5}$ concentrations, and promulgated a new 24-hour NAAQS of 35 $\mu g/m^3$ based on a 3-year average of the 98th percentile of 24-hour concentrations. By statute, SIPs meeting the requirements of sections 110(a)(1) and (2) are to be submitted by states within three years after promulgation of a new or revised NAAQS. Sections 110(a)(1) and (2) require states to address basic SIP requirements, including emissions inventories, monitoring, and modeling to assure attainment and maintenance of the NAAQS. States were required to submit such SIPs to EPA no later than July 2000 for the 1997 annual $PM_{2.5}$

NAAQS, and no later than October 2009 for the 2006 24-hour $PM_{2.5}$ NAAQS.

On March 4, 2004, Earthjustice submitted a notice of intent to sue related to EPA's failure to issue findings of failure to submit related to the "infrastructure" requirements for the 1997 annual $PM_{2.5}$ NAAQS. On March 10, 2005, EPA entered into a consent decree with Earthjustice which required EPA, among other things, to complete a **Federal Register** notice announcing EPA's determinations pursuant to section 110(k)(1)(B) as to whether each state had made complete submissions to meet the requirements of section 110(a)(2) for the 1997 $PM_{2.5}$ NAAQS by October 5, 2008. In accordance with the consent decree, EPA made completeness findings for each state based upon what the Agency received from each state for the 1997 $PM_{2.5}$ NAAQS as of October 3, 2008.

On October 22, 2008, EPA published a final rulemaking entitled "Completeness Findings for Section 110(a) State Implementation Plans Pertaining to the Fine Particulate Matter ($PM_{2.5}$) NAAQS" making a finding that each state had submitted or failed to submit a complete SIP that provided the basic program elements of section 110(a)(2) necessary to implement the 1997 $PM_{2.5}$ NAAQS. *See* 73 FR 62902. For those states that did receive findings, the findings of failure to submit for all or a portion of a state's implementation plan established a 24-month deadline for EPA to promulgate a Federal Implementation Plan (FIP) to address the outstanding SIP elements unless, prior to that time, the affected states submitted, and EPA approved, the required SIPs.

The findings that all or portions of a state's submission are complete established a 12-month deadline for EPA to take action upon the complete SIP elements in accordance with section 110(k). Kentucky, North Carolina and Tennessee's infrastructure submissions were received by EPA on August 26, 2008, April 1, 2008, and December 14, 2007, respectively, for the 1997 annual $PM_{2.5}$ NAAQS and on July 17, 2012,[1] September 21, 2009, and October 19, 2009, respectively, for the 2006 24-hour $PM_{2.5}$ NAAQS. Kentucky, North Carolina and Tennessee were among other states that did not receive findings of failure to submit because they had provided a complete submission to EPA to address the infrastructure elements for the 1997 $PM_{2.5}$ NAAQS by October 3, 2008.

On July 6, 2011, WildEarth Guardians and Sierra Club filed an amended complaint related to EPA's failure to take action on the SIP submittal related to the "infrastructure" requirements for the 2006 24-hour $PM_{2.5}$ NAAQS. On October 20, 2011, EPA entered into a consent decree with WildEarth Guardians and Sierra Club which required EPA, among other things, to complete a **Federal Register** notice of the Agency's final action either approving, disapproving, or approving in part and disapproving in part the Kentucky, North Carolina and Tennessee's 2006 24-hour $PM_{2.5}$ NAAQS Infrastructure SIP submittals addressing the applicable requirements of sections 110(a)(2)(A)–(H), (J)–(M), except for section 110(a)(2)(C) nonattainment area requirements and section 110(a)(2)(D)(i) visibility requirements. The rulemaking proposed through today's action is consistent with the terms of this consent decree.

Today's action is proposing to conditionally approve Kentucky, North Carolina and Tennessee's infrastructure submissions for the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS addressing CAA section 110(a)(2)(D)(i)(II), related to adequate provisions prohibiting emissions that interfere with any other state's required measures to prevent significant deterioration of its air quality (referred to as "prong 3"). EPA is taking action on Kentucky, North Carolina and Tennessee's infrastructure submissions for the 1997 and 2006 $PM_{2.5}$ NAAQS for sections 110(a)(2)(A)–(F), (H), (J)–(M), including other portions of section 110(a)(2)(D)(i) in separate actions from today's rulemaking.

II. What are states required to address under sections 110(a)(2)(D)?

Section 110(a)(2)(D) has two components, 110(a)(2)(D)(i) and 110(a)(2)(D)(ii). Section 110(a)(2)(D)(i) has four components that require SIPs to include provisions prohibiting any source or other type of emissions activity in one state from: (1) Contributing significantly to nonattainment maintenance of the NAAQS in another state, and (2) interfering with maintenance of the NAAQS in another state (collectively codified as 110(a)(2)(D)(i)(I)); and from interfering with measures required to (3) prevent significant deterioration of air quality in another state, or (4) protect visibility in another state (collectively codified as 110(a)(2)(D)(i)(II)). Section 110(a)(2)(D)(ii) requires SIPs to include provisions insuring compliance with sections 115 and 126 of the Act, relating to interstate and international pollution abatement.

In previous actions, EPA has already taken action to address Kentucky, North Carolina and Tennessee's SIP submissions related to sections 110(a)(2)(D)(i)(I) and 110(a)(2)(D)(ii) for the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS. Today's proposed rulemaking relates only to requirements related to prong 3 of section 110(a)(2)(D)(i), which as previously described, requires that the SIP contain adequate provisions prohibiting emissions that interfere with any other state's required measures to prevent significant deterioration of its air quality.[2] More information on this requirement and EPA's rationale for today's proposed conditional approvals for this requirement for purposes of the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS is provided below.

III. What is EPA's analysis of how region 4 states addressed element (D)(i)(II) related to PSD?

EPA's September 25, 2009, memorandum entitled "Guidance on SIP Elements Required Under Section 110(a)(1) and (2) for the 2006 24-Hour Fine Particle ($PM_{2.5}$) National Ambient Air Quality Standards" provided guidance on addressing the infrastructure requirements required under sections 110(a)(1) and 110(a)(2) of the CAA with respect to the 2006 24-hour $PM_{2.5}$ NAAQS. The 2009 Guidance describes that a state's PSD permitting program is the primary measure that such state must include in its SIP to prevent significant deterioration of air quality in accordance with prong of section 110(a)(2)(D)(i). EPA has preliminarily determined that Kentucky, North Carolina and Tennessee's prong 3 infrastructure submissions, with the exceptions noted below are consistent with the 2009 Guidance, when considered in conjunction with each State's PSD program.

At present, there are four regulations that are required to be adopted into the SIP to meet PSD-related infrastructure requirements. *See* Sections 110(a)(2)(C), prong 3 of 110(a)(2)(D)(i), and 110(a)(2)(J) of the CAA. These regulations are: (1) "Final Rule To Implement the 8-Hour Ozone National Ambient Air Quality Standard—Phase 2; Final Rule" (November 29, 2005, 70 FR 71612) (hereafter referred to as the "Phase II Rule"); (2) "Implementation of the New Source Review Program for Particulate Matter Less Than 2.5 Micrometers; Final Rule" (May 16, 2008, 73 FR 28321) (hereafter referred to

[1] On July 17, 2012, Kentucky withdrew its September 8, 2009, 110(a)(1)–(2) infrastructure submission addressing the 8-hour ozone, $PM_{2.5}$ and Lead NAAQS. Kentucky replaced its September 8, 2009, 110(a)(1)–(2) infrastructure submission with a submission provided on July 17, 2012.

[2] EPA's action today does not address the other requirements of section 110(a)(2)(D)(i).

as the "NSR $PM_{2.5}$ Rule"); (3) "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule" (June 3, 2010, 75 FR 31514) (hereafter referred to as the "GHG Tailoring Rule"); and, (4) "Final Rule on the Prevention of Significant Deterioration (PSD) for Particulate Matter Less Than 2.5 Micrometers ($PM_{2.5}$)—Increments, Significant Impact Levels (SILs) and Significant monitoring Concentration (SMC); Final Rule" (October 20, 2010, 75 FR 64864) (hereafter referred to as the"$PM_{2.5}$ PSD Increment-SILs-SMC Rule (only as it relates to $PM_{2.5}$ Increments)"). Specific details on these PSD requirements can be found in the respective final rules cited above, however, a brief summary of each rule is provided below.

First, as part of the framework to implement the 1997 8-hour ozone NAAQS, EPA promulgated an implementation rule in two phases.[3] The Phase 2 Rule is relevant to today's action. Among other changes, this rule revised the PSD regulations to recognize nitrogen oxide (NO_X) as an ozone precursor.

Second, the NSR $PM_{2.5}$ Rule revised the NSR program to establish the framework for implementing preconstruction permit review for the $PM_{2.5}$ NAAQS in both attainment areas and nonattainment areas. These PSD requirements included: (1) A provision that NSR permits address directly emitted $PM_{2.5}$ and precursor pollutants; (2) a requirement establishing significant emission rates for direct $PM_{2.5}$ and precursor pollutants (including sulfur dioxide (SO_2) and NO_X); (3) exceptions to the grandfathering policy for permits being reviewed under the PM_{10} surrogate program; and, (4) a revision that states account for gases that condense to form particles (condensables) in $PM_{2.5}$ and PM_{10} emission limits in PSD permits.

Third, in the GHG Tailoring Rule, EPA tailored the applicability criteria that determine which GHG emission sources become subject to the PSD program of the CAA. *See* 75 FR 31514.

Lastly, the $PM_{2.5}$ PSD Increment-SILs-SMC Rule (only as it relates to $PM_{2.5}$ increments) provided additional regulatory requirements under the PSD program regarding the implementation of the $PM_{2.5}$ NAAQS for NSR by specifically establishing $PM_{2.5}$ increments pursuant to section 166(a) of the CAA to prevent significant deterioration of air quality in areas meeting the NAAQS.

The PSD requirements promulgated in the aforementioned regulations establish the framework for a comprehensive SIP PSD program which EPA has determined are necessary to comply with prong 3 of section 110(a)(2)(D)(i). The following table shows when EPA approved the incorporation of the aforementioned regulations in each of the States' implementation plans:

State	Phase II Rule	GHG Tailoring Rule	NSR $PM_{2.5}$ Rule	$PM_{2.5}$ PSD Increment-SILs-SMC Rule (only as it relates to $PM_{2.5}$ increments)
Kentucky	9/15/20120, 75 FR 55988	12/29/2010, 75 FR 81868	See Below	See Below.
North Carolina	8/10/2011, 76 FR 36875	10/18/2011, 76 FR 64240	See Below	See Below.
Tennessee	2/7/2012, 77 FR 6016	2/28/2012, 77 FR 11744	7/30/2012, 77 FR 44481	See Below

Kentucky: On July 3, 2012, the Commonwealth submitted a commitment letter to EPA requesting conditional approval of outstanding requirements related to the NSR $PM_{2.5}$ Rule and $PM_{2.5}$ PSD Increment-SILs-SMC Rule. In this letter, Kentucky provided a schedule as to how the Commonwealth will address outstanding requirements related to the NSR $PM_{2.5}$ Rule and $PM_{2.5}$ PSD Increment-SILs-SMC Rule. EPA determined that this letter of commitment met the requirements of section 110(k)(4) of the CAA, and accordingly, EPA conditionally approved the Commonwealth's NSR $PM_{2.5}$ Rule and $PM_{2.5}$ PSD Increment-SILs-SMC Rule submission on October 3, 2012. *See* 77 FR 60307. EPA is relying upon this earlier commitment to address the NSR $PM_{2.5}$ Rule and the $PM_{2.5}$ PSD Increment-SILs-SMC Rule (only as it relates to $PM_{2.5}$ increments) as the basis for conditionally approving Kentucky's infrastructure SIP as it relates to prong 3 of section 110(a)(2)(D)(i). If the Commonwealth fails to submit these revisions by October 3, 2013, today's conditional approval will automatically become a disapproval on that date and EPA will issue a finding of disapproval. EPA is not required to propose the finding of disapproval. If the conditional approval is converted to a disapproval, the final disapproval triggers the Federal Implementation Plan requirement under section 110(c). However, if the State meets its commitment within the applicable timeframe, the conditionally approved submission will remain a part of the SIP until EPA takes final action approving or disapproving the new submittal.

North Carolina: On July 10, 2012, North Carolina submitted a commitment letter to EPA requesting conditional approval of outstanding requirements related to the NSR $PM_{2.5}$ Rule and the $PM_{2.5}$ PSD Increment-SILs-SMC Rule. In this letter, North Carolina provided a schedule for the State to address outstanding requirements related to the NSR $PM_{2.5}$ Rule and the $PM_{2.5}$ PSD Increment-SILs-SMC Rule. EPA determined that this letter of commitment met the requirements of section 110(k)(4) of the CAA, and accordingly, EPA conditionally approved North Carolina's NSR $PM_{2.5}$ Rule submission on October 16, 2012 (77 FR 63234). EPA is relying upon this earlier commitment to address the NSR $PM_{2.5}$ Rule and the $PM_{2.5}$ PSD Increment-SILs-SMC Rule (only as it relates to $PM_{2.5}$ increments) as the basis for conditionally approving North Carolina's infrastructure SIP as it relates to prong 3 of section 110(a)(2)(D)(i). If North Carolina fails to submit these revisions by October 16, 2013, today's conditional approval will automatically become a disapproval on that date and EPA will issue a finding of disapproval. EPA is not required to propose the finding of disapproval. If the conditional approval is converted to a disapproval, the final disapproval triggers the Federal Implementation Plan requirement under section 110(c). However, if the State meets its commitment within the applicable timeframe, the conditionally approved submission will remain a part of the SIP until EPA takes final action approving or disapproving the new submittal.

Tennessee: On October 4, 2012, Tennessee submitted a commitment letter to EPA requesting conditional approval of specific enforceable

[3] EPA promulgated the Phase I Rule on April 30, 2004 entitled "Final Rule To Implement the 8-Hour Ozone National Ambient Air Quality Standard—Phase 1." *See* 69 FR 23951.

measures related to prong 3 of section 110(a)(2)(D)(i); specifically, the $PM_{2.5}$ PSD Increment-SILs-SMC Rule (only as it relates to $PM_{2.5}$ increments). In this letter, Tennessee described how the State has already scheduled a public hearing/comment period and anticipates providing a final version as soon as possible after the public hearing to be scheduled on or before December 4, 2012. Consistent with section 110(k)(4) of the Act, EPA is relying upon this commitment by Tennessee to address the $PM_{2.5}$ PSD Increment-SILs-SMC Rule (only as it relates to $PM_{2.5}$ increments) as the basis for conditionally approving Tennessee's infrastructure SIP as it relates to prong 3 of section 110(a)(2)(D)(i). If Tennessee fails to submit these revisions within one year from the date of conditional approval, today's proposed conditional approval will automatically become a disapproval on that date and EPA will issue a finding of disapproval. EPA is not required to propose the finding of disapproval. If the conditional approval is converted to a disapproval, the final disapproval triggers the Federal Implementation Plan requirement under section 110(c). However, if the State meets its commitment within the applicable timeframe, the conditionally approved submission will remain a part of the SIP until EPA takes final action approving or disapproving the new submittal.

Kentucky, North Carolina and Tennessee have, or will have pending the commitments described above, demonstrated that major sources in each state are subject to PSD permitting program to comply with the prong 3 of section 110(a)(2)(D)(i) of the CAA for the $PM_{2.5}$ NAAQS. Therefore EPA has made the preliminary determination to conditionally approve that Kentucky, North Carolina and Tennessee's SIP and practices are adequate for insuring compliance with the applicable PSD requirements relating to interstate transport pollution for the 1997 and 2006 $PM_{2.5}$ NAAQS.

IV. Proposed Action

As described above, EPA is proposing to conditionally approve the Kentucky, North Carolina and Tennessee infrastructure SIP submissions as addressing prong 3 of section 110(a)(2)(D)(i) of the CAA for both the 1997 and 2006 $PM_{2.5}$ NAAQS. Specifically, EPA is proposing to conditionally approve the portion of the States' infrastructure SIP section 110(a)(2)(D)(i) submissions as they relate to provisions prohibiting emissions that interfere with any other state's required measures to prevent significant deterioration of its air quality because they are consistent with section 110 of the CAA.

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. *See* 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 proposed 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 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 CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country, 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, Nitrogen dioxide, Particulate matter, Reporting and recordkeeping requirements, Volatile organic compounds.

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

Dated: November 21, 2012.

A. Stanley Meiburg,

Acting Regional Administrator, Region 4.

[FR Doc. 2012–29370 Filed 12–4–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 60 and 63

[EPA–HQ–OAR–2009–0234; EPA–HQ–OAR–2011–0044; FRL–9733–2]

RIN 2060–AR62

Reconsideration of Certain New Source and Startup/Shutdown Issues: National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units

Correction

Proposed rule document 2012–28729, appearing on pages 71323–71344 in the issue of Friday, November 30, 2012, should have appeared in the Proposed Rules section of the issue.

[FR Doc. C1–2012–28729 Filed 12–4–12; 8:45 am]

BILLING CODE 1505–01–D

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 20

[WT Docket No. 10–254; DA 12–1898]

Comment Deadline Extended for Public Notice Seeking Updated Information and Comment on Review of Hearing Aid Compatibility Regulations

AGENCY: Federal Communications Commission.

ACTION: Proposed rule; extension of comment period.

SUMMARY: In this document, the Wireless Telecommunications Bureau

(Bureau) extends the time within which to file comments on the Public Notice seeking updated information and comment on review of hearing aid compatibility regulations.

DATES: Comments are due on or before January 7, 2013.

ADDRESSES: You may submit comments, identified by WT Docket No. 10–254, by any of the following methods:

- *Federal Communications Commission's Web Site: http://fjallfoss.fcc.gov/ecfs2/.* Follow the instructions for submitting comments.
- Mail.
- *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: Jennifer Flynn, Spectrum & Competition Policy Division, Wireless Telecommunications Bureau, (202) 418–0612 or by email *Jennifer.Flynn@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Public Notice in WT Docket No. 10–254, DA 12–1898, released November 27, 2012. The full text of the Public Notice is available for public inspection and copying during business hours in the FCC's Reference Information Center, Portals II, 445 12th Street SW., Room CY–A257, Washington, DC 20554. Copies may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc. (BCPI), 445 12th Street SW., Room CY–B402, Washington, DC 20554, 202–488–5300 or 800–378–3160 (voice), 202–488–5562 (TTY), 202–488–5563 (fax), or you may contact BCPI at its Web site: *http://www.BCPIWEB.com.* When ordering documents from BCPI, please provide the appropriate FCC document number, for example, DA 12–1745. The *Comment Deadline Extended for Updated Information and Comment Sought on Review of Hearing Aid Compatibility Regulations Public Notice* is available on the Internet at the Commission's Web site at *http://www.fcc.gov/document/hearing-aid-compatibility-review-additional-comments-sought* and related documents are also available by using the search function for WT Docket No. 10–254 on the Commission's Electronic Comment Filing System (ECFS) Web page at *http://apps.fcc.gov/ecfs/.* To request information in accessible formats (computer diskettes, large print, audio recording, and Braille), send an email to *fcc504@fcc.gov* or call the FCC's Consumer and Governmental Affairs Bureau at 202–418–0530 (voice) or 202–418–0432 (TTY).

Summary

1. On November 1, 2012, the Wireless Telecommunications Bureau released a Public Notice in which it sought updated comment in its ongoing review of the wireless hearing aid compatibility rules (WT Docket No. 10–254, DA 12–1745). The Public Notice set the deadline for filing comments at 30 days after its publication in the **Federal Register**, which occurred on November 26, 2012 (77 FR 70407). Accordingly, the deadline for filing comments was set at December 26, 2012.

2. On its own motion, the Wireless Telecommunications Bureau grants an extension of time within which to file comments. The Bureau notes that requests for extensions of time are not routinely granted. 47 CFR 1.46(a). Given the proximity of the filing deadline to a federal holiday, as well as the desire to encourage thoughtful consideration of the important issues raised in this proceeding, the Bureau believes that a grant of additional time within which to file comments will help to facilitate careful and deliberate consideration of these matters. Therefore, the Bureau grants to all parties an extension of the comment filing deadline until January 7, 2013.

Procedural Matters

3. Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 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 (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 four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving 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 at 236 Massachusetts Avenue NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street SW., Washington, DC 20554.

One copy of each pleading must be delivered electronically, by email or facsimile, or if delivered as paper copy, by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (according to the procedures set forth above for paper filings), to the Commission's duplicating contractor, Best Copy and Printing, Inc., at *FCC@BCPIWEB.COM* or (202) 488–5563 (facsimile).

Federal Communications Commission.

Jane E. Jackson,

Associate Chief, Wireless Telecommunications Bureau.

[FR Doc. 2012–29357 Filed 12–4–12; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[MB Docket No. 12–68; DA 12–1871]

Revision of the Commission's Program Access Rules

AGENCY: Federal Communications Commission.

ACTION: Proposed rule; extension of comment and reply comment period.

SUMMARY: The Media Bureau extends the deadline for filing comments and reply comments on the Further Notice of Proposed Rulemaking ("*FNPRM*") in this proceeding which was published in the **Federal Register** on October 31, 2012. The extension will provide commenters with sufficient time to prepare comments and reply comments in response to the *FNPRM.*

DATES: The comment and reply comment period for the proposed rule published October 31, 2012 (77 FR 66052) is extended. Submit comments on or before December 14, 2012 and reply comments on or before January 14, 2013.

ADDRESSES: You may submit comments, identified by MB Docket No. 12–68, by any of the following methods:

- *Federal Communications Commission's Web site: http://www.fcc.gov/cgb/ecfs/.* Follow the instructions for submitting comments.
- *Mail:* Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although the Commission continues to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
- *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 FURTHER INFORMATION CONTACT: For additional information on this proceeding, contact David Konczal, *David.Konczal@fcc.gov,* or Kathy Berthot, *Kathy.Berthot@fcc.gov,* of the Media Bureau, Policy Division, (202) 418–2120.

SUPPLEMENTARY INFORMATION: This is a summary of the Order in MB Docket No. 12–68, DA 12–1871, adopted and released on November 19, 2012, which extends the comment and reply comment deadlines established in the *FNPRM* published under FCC No. 12–123 at 77 FR 66052, October 31, 2012. The full text of this document is available for public inspection and copying during normal business hours in the FCC Reference Center, Portals II, 445 12th Street SW., Room CY–A257, Washington, DC 20554. The complete text may also be purchased from the Commission's copy contractor, Best Copy and Printing, Inc., 445 12th Street SW., Room CY–B402, Washington, DC 20554. The full text may also be downloaded at: *http://www.fcc.gov.* Alternative formats are available to persons with disabilities by sending an email to *FCC504@fcc.gov* or by calling the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice), 202–418–0432 (TTY).

Summary of the Order

1. On October 5, 2012, the Commission released a Further Notice of Proposed Rulemaking (*"FNPRM"*) on revisions to the program access rules. The *FNPRM* set deadlines for filing comments and reply comments at 30 and 45 days, respectively, after publication of the *FNPRM* in the **Federal Register**. A summary of the *FNPRM* was published in the **Federal Register** on October 31, 2012 (77 FR 66052). Accordingly, the filing dates were initially established as November 30, 2012 for comments and December 17, 2012 for reply comments.

2. On November 14, 2012, the National Cable & Telecommunications Association ("NCTA") filed a request to extend the comment and reply comment deadlines to December 14, 2012 and January 14, 2013, respectively. NCTA states that Hurricane Sandy has disrupted business operations along the northeast corridor, thereby hindering the ability of some of its members to gather information and prepare comments for this proceeding. Accordingly, NCTA requests a two-week extension of the comment deadline to December 14, 2012. Because an identical two-week extension of the reply comment deadline would require reply comments to be filed during the last week of December in the middle of the holiday season, NCTA requests a four-week extension of the reply comment deadline. We grant the requested extension. As set forth in Section 1.46 of the Commission's rules, the Commission's policy is that extensions of time for filing comments in rulemaking proceedings shall not be routinely granted. In this case, however, an extension of the comment periods is warranted to provide commenters with sufficient time to prepare comments and reply comments in response to the *FNPRM.*

3. Accordingly, *it is ordered* that, pursuant to section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), and §§ 0.61, 0.283, and 1.46 of the Commission's rules, 47 CFR 0.61, 0.283, and 1.46, the Motion for Extension of Time filed by NCTA *is granted,* and the deadlines to file comments and reply comments in this proceeding are extended to December 14, 2012 and January 14, 2013, respectively.

Federal Communications Commission.

Steven A. Broeckaert,

Senior Deputy Chief, Policy Division, Media Bureau.

[FR Doc. 2012–29426 Filed 12–4–12; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 571

[Docket No. NHTSA–2012–0175]

Public Meeting of the U.S.–Canada Regulatory Cooperation Council (RCC) Motor Vehicles Working Group

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Announcement of public meeting.

SUMMARY: The U.S.–Canada Regulatory Cooperation Council (RCC) was created on February 4, 2011. After private sector consultations and bilateral negotiations, the RCC released the Joint Action Plan on Regulatory Cooperation on December 7, 2011. The Joint Action Plan is a practical first step to increased regulatory cooperation between the United States and Canada. In order to implement the initiatives identified in the Joint Action Plan, bilateral working groups led by senior officials from regulatory agencies have developed work plans with concrete objectives, deliverables and milestones for tangible progress within the RCC's two-year mandate. On January 30 and 31, 2012, the RCC and its bi-national working groups facilitated stakeholder meetings in Washington, DC. This notice announces a public meeting of the RCC Motor Vehicles Working Group.

DATES: The public meeting will be held on January 15, 2013. The meeting will start at 9:30 a.m. and continue until 4:30 p.m., local time, or until all registered speakers have been heard.

ADDRESSES: The January 15, 2013 public meeting will be held at the Patrick V. McNamara Federal Building, 11th Floor, 477 Michigan Ave., Detroit, MI 48226. The meeting site is accessible to individuals with disabilities.

FOR FURTHER INFORMATION CONTACT: If you would like to attend the public meeting, please contact Mr. Christopher Morris, NHTSA Office of Rulemaking, by email at *christopher.morris@dot.gov,* by telephone at (202) 493–2218, or by fax at (202) 366–5930. Please contact Mr. Morris at least ten days before the meeting date of January 15, 2013. Please provide the following information: Name, affiliation, address, email address, and telephone number.

For other questions regarding the RCC Motor Vehicles Working Group, you may contact Mr. Ezana Wondimneh, Chief of the NHTSA International Harmonization Division in the U.S., by

email at *ezana.wondimneh@dot.gov,* by telephone at (202) 366–0846, or by fax at (202) 366–5930, or Mr. Merz Rustom, Director, Motor Vehicle Standards, Research and Development at Transport Canada, by email at *merz.rustom@tc.gc.ca,* by telephone at (613) 998–2268, or by fax at (613) 990–2913.

SUPPLEMENTARY INFORMATION: The U.S.–Canada Regulatory Cooperation Council was created on February 4, 2011. After private sector consultations and bilateral negotiations, the RCC released the Joint Action Plan on Regulatory Cooperation on December 7, 2011. For more information on the Joint Action Plan on Regulatory Cooperation, see *http://www.trade.gov/rcc/rcc-summary.asp.* The Joint Action Plan is a practical first step to increased regulatory cooperation between the United States and Canada. In order to implement the initiatives identified in the Joint Action Plan, bilateral working groups led by senior officials from regulatory agencies have developed work plans with concrete objectives, deliverables and milestones for tangible progress within the RCC's two-year mandate. On January 30 and 31, 2012, the RCC and its bi-national working groups facilitated stakeholder meetings in Washington, DC.

The January 15, 2013 public meeting is being held pursuant to the RCC Motor Vehicles Working Group Work Plan. For more information on the Work Plans, see *http://www.trade.gov/rcc/documents/Existing-Motor-Vehicle-Safety-Standards.pdf,* or *http://www.trade.gov/rcc/* for future Work Plans.

Public Meeting Procedures. The public meeting provides a forum for the public to speak about topics within the mandate of the RCC Motor Vehicles Working Group. In order to comply with the occupancy limits of the meeting space, attendance is limited to 100 persons, and pre-registration is required. For space reasons, it is asked that you consider limiting your company's or association's delegation to 3–5 persons. If you would like to attend the public meeting as a speaker or as an observer, please contact the person identified under **FOR FURTHER INFORMATION CONTACT** at least ten days before the hearing. Depending on the available space, registration for persons attending the public hearing as observers may be accepted after that date.

For planning purposes, each speaker should anticipate speaking for approximately ten minutes, although we may need to shorten that time if a large number of people wish to make presentations. Once we learn how many people have registered to speak at the meeting, we will allocate an appropriate amount of time to each participant, allowing time for necessary breaks. In addition, we will reserve a block of time for anyone else in the audience who wishes to give an oral presentation.

We request that you bring three copies of your statement or other material to the meeting. To accommodate as many speakers as possible, we prefer that speakers not use any audio-visual aids or computer slideshows; however, if you plan to use such aids, you must provide those materials in advance of the meeting and notify the contact person in the **FOR FURTHER INFORMATION CONTACT** section above.

NHTSA and Transport Canada will conduct the meeting informally. Presenters wishing to provide supplementary information should submit it to the contact person in the **FOR FURTHER INFORMATION CONTACT** section above.

For security purposes, government-issued photo identification is required to enter the Patrick V. McNamara Federal Building. Non-U.S. citizens may be required to show passports. To allow sufficient time to clear security and enter the building, NHTSA recommends that participants arrive 30 to 60 minutes prior to the start of the event, and that luggage, laptop computers, and personal effects be kept to a minimum.

Christopher J. Bonanti,

Associate Administrator for Rulemaking.

[FR Doc. 2012–29369 Filed 12–4–12; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 120813331–2562–01]

RIN 0648–XC164

Magnuson-Stevens Act Provisions; Fisheries of the Northeastern United States; Northeast Multispecies Fishery; Proposed Rule To Implement a Targeted Acadian Redfish Fishery for Sector Vessels; Reopening of Comment Period

Correction

Proposed rule document 2012–28820, appearing on pages 70939–70940 in the issue of Wednesday, November 28, 2012, should have appeared in the Proposed Rules section of the issue.

[FR Doc. C1–2012–28820 Filed 12–4–12; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 120918468–2468–01]

RIN 0648–XC254

Fisheries of the Exclusive Economic Zone Off Alaska; Gulf of Alaska; Proposed 2013 and 2014 Harvest Specifications for Groundfish

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes 2013 and 2014 harvest specifications, apportionments, and Pacific halibut prohibited species catch limits for the groundfish fishery of the Gulf of Alaska (GOA). This action is necessary to establish harvest limits for groundfish during the 2013 and 2014 fishing years and to accomplish the goals and objectives of the Fishery Management Plan for Groundfish of the Gulf of Alaska. The intended effect of this action is to conserve and manage the groundfish resources in the GOA in accordance with the Magnuson-Stevens Fishery Conservation and Management Act.

DATES: Comments must be received by January 4, 2013.

ADDRESSES: You may submit comments on this document, identified by NOAA–NMFS–2012–0180, by any one of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal e-Rulemaking Portal at *www.regulations.gov.* To submit comments via the e-Rulemaking Portal, first click the "submit a comment" icon, then enter NOAA–NMFS–2012–0180 in the keyword search. Locate the document you wish to comment on from the resulting list and click on the "Submit a Comment" icon on that line.
- *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.

Instructions: Comments must be submitted by one of the above methods to ensure that the comments are received, documented, and considered by NMFS. Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (e.g., name, address) 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 or Excel, WordPerfect, or Adobe PDF file formats only.

Electronic copies of the Alaska Groundfish Harvest Specifications Final Environmental Impact Statement (Final EIS), Supplementary Information Report (SIR) to the EIS, and the Initial Regulatory Flexibility Analysis (IRFA) prepared for this action may be obtained from *http://www.regulations.gov* or from the Alaska Region Web site at *http://alaskafisheries.noaa.gov*. The final 2011 Stock Assessment and Fishery Evaluation (SAFE) report for the groundfish resources of the GOA, dated November 2011, is available from the North Pacific Fishery Management Council (Council) at 605 West 4th Avenue, Suite 306, Anchorage, AK 99501, phone 907–271–2809, or from the Council's Web site at *http://alaskafisheries.noaa.gov/npfmc*. The draft 2012 SAFE report for the GOA is available from the same source.

FOR FURTHER INFORMATION CONTACT: Obren Davis, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the GOA groundfish fisheries in the exclusive economic zone (EEZ) of the GOA under the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP). The Council prepared the FMP under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), 16 U.S.C. 1801, *et seq.* Regulations governing U.S. fisheries and implementing the FMP appear at 50 CFR parts 600, 679, and 680.

The FMP and its implementing regulations require NMFS, after consultation with the Council, to specify the total allowable catch (TAC) limits for each target species, the sum of which must be within the optimum yield (OY) range of 116,000 to 800,000 metric tons (mt). Section 679.20(c)(1) further requires NMFS to publish and solicit public comment on proposed annual TACs, halibut prohibited species catch (PSC) limits, and seasonal allowances of pollock and Pacific cod. The proposed harvest specifications in Tables 1 through 20 of this document satisfy these requirements. For 2013 and 2014, the sum of the proposed TAC amounts is 447,752 mt.

Under § 679.20(c)(3), NMFS will publish the final 2013 and 2014 harvest specifications after (1) considering comments received within the comment period (see **DATES**), (2) consulting with the Council at its December 2012 meeting, and (3) considering information presented in the Final EIS (see **ADDRESSES**) and the final 2012 SAFE report prepared for the 2013 and 2014 groundfish fisheries.

Other Actions Potentially Affecting the 2013 and 2014 Harvest Specifications

Halibut Prohibited Species Catch Limits Revisions

At its June 2012 meeting, the Council took final action to reduce halibut PSC limits in the GOA trawl and hook-and-line groundfish fisheries. The Council's preferred alternative for Amendment 95 to the GOA FMP would change the process for setting halibut PSC limits. Halibut PSC limits would be established in Federal regulations and would remain in effect until changed by a subsequent Council action to amend those regulations.

If approved by the Secretary of Commerce, Amendment 95 would reduce the GOA halibut PSC limit for the groundfish trawl gear sector and groundfish catcher vessel (CV) hook-and-line gear sector by 15 percent. The Council's proposed reduction would be phased in over 3 years: 7 percent in year 1, 5 percent in year 2 (to 12 percent), and 3 percent in year 3 (for a total of 15 percent). The Council's proposed reduction for the catcher/processor (C/P) hook-and-line gear sector would be 7 percent, which would be implemented in one step in year 1. The Council used 1,973 mt as the baseline for the proposed trawl halibut PSC limit reductions. This is based on a deduction of 27 mt from the 2,000 mt trawl halibut PSC limit, per halibut PSC limit reductions made in conjunction with the implementation of the Central Gulf of Alaska Rockfish Program in 2011 (76 FR 81248, December 27, 2011). The Council recommended that the first year of implementation would occur in 2014 and that all reductions would occur by 2016.

Amendment 95 would result in a new trawl sector halibut PSC limit of 1,848 mt (in 2014), 1,759 mt (in 2015), and 1,705 mt (in 2016 and later years). The hook-and-line sector halibut PSC limits may vary annually, as these limits are based on how the Pacific cod TAC is annually apportioned between the Central and Western regulatory areas of the GOA. Based on 2012 Pacific cod TACs in the Western and Central GOA the hook-and-line C/P sector would receive a 109 mt halibut PSC limit. The hook-and-line CV sector PSC limit would be 161 mt (in 2014), 152 mt (in 2015), and 147 mt (in 2016 and later years).

Proposed Acceptable Biological Catch (ABC) and TAC Specifications

In October 2012, the Council, its Scientific and Statistical Committee (SSC), and its Advisory Panel (AP) reviewed the most recent biological and harvest information about the condition of groundfish stocks in the GOA. This information was compiled by the GOA Groundfish Plan Team and presented in the final 2011 SAFE report for the GOA groundfish fisheries, dated November 2011 (see **ADDRESSES**). The amounts proposed for the 2013 and 2014 ABCs are based on the 2011 SAFE report, as discussed below. The AP and Council recommended that the proposed 2013 and 2014 TACs be set equal to proposed ABCs for all species and species groups, with the exception of the species categories further discussed below. The proposed ABCs and TACs could be changed in the final harvest specifications depending on the most recent scientific information contained in the final 2012 SAFE report. The SAFE report contains a review of the latest scientific analyses and estimates of each species' biomass and other biological parameters, as well as summaries of the available information on the GOA ecosystem and the economic condition of the groundfish fisheries off Alaska. From these data and analyses, the Plan Team estimates an

OFL and ABC for each species or species group.

In November 2012, the Plan Team updated the 2011 SAFE report to include new information collected during 2012, such as NMFS stock surveys, revised stock assessments, and catch data. The Plan Team compiled this information and produced the draft 2012 SAFE report for presentation at the December 2012 Council meeting. At that meeting, the Council will consider information in the draft 2012 SAFE report, recommendations from the November 2012 Plan Team meeting and December 2012 SSC and AP meetings, public testimony, and relevant written public comments in making its recommendations for the final 2013 and 2014 harvest specifications. Pursuant to section 3.2.3.4.1 of the FMP, the Council could recommend adjusting the TACs if "warranted on the basis of bycatch considerations, management uncertainty, or socioeconomic considerations, or if required in order to cause the sum of the TACs to fall within the OY range."

In previous years, the largest changes from the proposed to the final harvest specifications have been for OFLs and ABCs based on the most recent NMFS stock surveys, which provide updated estimates of stock biomass and spatial distribution, and changes to the models used for making stock assessments. NMFS scientists presented updated and new survey results, changes to assessment models, and accompanying stock estimates at the September 2012 Plan Team meeting, and the SSC reviewed this information at the October 2012 Council meeting. The species with possible model changes are Pacific cod, rex sole, dover sole, rock sole, sharks, and octopus. In November 2012, the Plan Team considered updated stock assessments for groundfish, which were included in the draft 2012 SAFE report.

If the draft 2012 SAFE report indicates that the stock biomass trend is increasing for a species, then the final 2013 and 2014 harvest specifications for that species may reflect an increase from the proposed harvest specifications. The draft 2012 SAFE reports indicate that the biomass trend for octopuses may be increasing. Conversely, if the draft 2012 SAFE report indicates that the stock biomass trend is decreasing for a species, then the final 2013 and 2014 harvest specifications may reflect a decrease from the proposed harvest specifications. The draft 2012 SAFE reports indicate that the biomass trend for pollock, Pacific cod, sablefish, northern rockfish, other rockfish, and dusky rockfish may be decreasing. The biomass trends for the following species are relatively stable: shallow-water flatfish, deep-water flatfish, rex sole, arrowtooth flounder, flathead sole, Pacific ocean perch, shortraker rockfish, rougheye rockfish, rougheye rockfish, demersal shelf rockfish, thornyhead rockfish, Atka mackerel, big skate, longnose skates, other skates, squids, sharks, and sculpins.

The proposed ABCs and TACs are based on the best available biological and socioeconomic information, including projected biomass trends, information on assumed distribution of stock biomass, and revised methods used to calculate stock biomass. The FMP specifies the formulas, or tiers, to be used to compute ABCs and OFLs. The formulas applicable to a particular stock or stock complex are determined by the level of reliable information available to the fisheries scientists. This information is categorized into a successive series of six tiers to define OFL and ABC amounts, with tier one representing the highest level of information quality available and tier six representing the lowest level of information quality available.

The SSC adopted the proposed 2013 and 2014 OFLs and ABCs recommended by the Plan Team for all groundfish species. The Council adopted the SSC's OFL and ABC recommendations and the AP's TAC recommendations. These amounts are unchanged from the final 2013 harvest specifications published in the **Federal Register** on March 14, 2012 (77 FR 15194).

Specification and Apportionment of TAC Amounts

The Council recommended proposed 2013 and 2014 TACs that are equal to proposed ABCs for all species and species groups, with the exception of Pacific cod, shallow-water flatfish, arrowtooth flounder, flathead sole, other rockfish, and Atka mackerel. The Pacific cod TACs are set to accommodate the State of Alaska's (State) guideline harvest levels (GHL) for Pacific cod so that the ABCs are not exceeded. The flathead sole, shallow-water flatfish, and arrowtooth flounder TACs are set to conserve the halibut PSC limit for use in other fisheries. The other rockfish TAC is set to reduce the potential amount of discards in the Southeast Outside (SEO) District. The Atka mackerel TAC is set to accommodate incidental catch amounts of this species in other directed fisheries.

The ABC for the pollock stock in the combined Western, Central, and West Yakutat Regulatory Areas (W/C/WYK) has been adjusted to reflect the GHL established by the State for the Prince William Sound (PWS) pollock fishery since its inception in 1995. Genetic studies revealed that the pollock in PWS was not a separate stock from the combined W/C/WYK population. Accordingly, the Council recommended decreasing the W/C/WYK pollock ABC to account for the State's PWS GHL. For 2013 and 2014, the PWS GHL for pollock is 2,770 mt, per the recommendation of State of Alaska fisheries managers.

The apportionment of annual pollock TAC among the Western and Central Regulatory Areas of the GOA reflects the seasonal biomass distribution and is discussed in greater detail below. The annual pollock TAC in the Western and Central Regulatory Areas of the GOA is apportioned among Statistical Areas 610, 620, and 630, and divided equally among each of the following four seasons: the A season (January 20 through March 10), the B season (March 10 through May 31), the C season (August 25 through October 1), and the D season (October 1 through November 1) (§ 679.23(d)(2)(i) through (iv), and § 679.20(a)(5)(iv)(A) and (B)). Table 2 lists these amounts.

The AP, SSC, and Council recommended apportionment of the ABC for Pacific cod in the GOA among regulatory areas based on the three most recent NMFS summer trawl surveys. The proposed 2013 and 2014 Pacific cod TACs are affected by the State's GHL fishery for Pacific cod in State waters in the Western and Central Regulatory Areas, as well as in PWS. The Plan Team, SSC, AP, and Council recommended that the sum of all State and Federal water Pacific cod removals from the GOA not exceed ABC recommendations. Accordingly, the Council recommended reducing the proposed 2013 and 2014 Pacific cod TACs from the proposed ABCs for the Eastern, Central, and Western Regulatory Areas to account for State GHLs. Therefore, the proposed 2013 and 2014 Pacific cod TACs are less than the proposed ABCs by the following amounts: (1) Eastern GOA, 683 mt; (2) Central GOA, 14,788 mt; and (3) Western GOA, 7,280 mt. These amounts reflect the sum of the State's 2013 and 2014 GHLs in these areas, which are 25 percent of the Eastern, Central, and Western GOA proposed ABCs. These are the same percentage amounts used to apportion the Pacific cod ABCs to State waters GHLs that were used in 2012.

NMFS also is proposing seasonal apportionments of the annual Pacific cod TACs in the Western and Central Regulatory Areas. Sixty percent of the annual TAC is apportioned to the A season for hook-and-line, pot, or jig gear from January 1 through June 10, and for

trawl gear from January 20 through June 10. Forty percent of the annual TAC is apportioned to the B season for jig gear from June 10 through December 31, for hook-and-line or pot gear from September 1 through December 31, and for trawl gear from September 1 through November 1 (§§ 679.23(d)(3) and 679.20(a)(12)).

The Council's recommendation for sablefish area apportionments also takes into account the prohibition on the use of trawl gear in the SEO District of the Eastern Regulatory Area and makes available five percent of the combined Eastern Regulatory Area TACs to trawl gear for use as incidental catch in other directed groundfish fisheries in the WYK District (§ 679.20(a)(4)(i)). Tables 4 and 5 list these amounts.

The sum of the proposed TACs for all GOA groundfish is 447,752 mt for 2013 and 2014, which is within the OY range specified by the FMP. The sums of the proposed 2013 and 2014 TACs are higher than the final 2012 TACs currently specified for the GOA groundfish fisheries (77 FR 15194, March 14, 2012). The proposed 2013 and 2014 TACs for pollock, Pacific cod, flathead sole, and rougheye rockfish are higher than the final 2012 TACs for these species. The proposed 2013 and 2014 TACs for sablefish, shallow-water flatfish, rex sole, Pacific ocean perch, northern rockfish, and pelagic shelf rockfish are lower than the final 2012 TACs for these species. The proposed 2013 and 2014 TACs are equal to the final 2012 TACs for the remaining species.

For 2013 and 2014, the Council recommended and NMFS proposes the OFLs, ABCs and TACs listed in Table 1. The proposed ABCs reflect harvest amounts that are less than the specified overfishing levels. The sum of the proposed 2013 and 2014 ABCs for all assessed groundfish is 612,506 mt, which is higher than the final 2012 ABC total of 606,048 mt (77 FR 15194, March 14, 2012).

Table 1 lists the proposed 2013 and 2014 OFLs, ABCs, TACs, and area apportionments of groundfish in the GOA. These amounts are consistent with the biological condition of groundfish stocks as described in the 2011 SAFE report, and adjusted for other biological and socioeconomic considerations, including maintaining the total TAC within the required OY range. These proposed amounts and apportionments by area, season, and sector are subject to change pending consideration of the draft 2012 SAFE report and the Council's recommendations for the final 2013 and 2014 harvest specifications during its December 2012 meeting.

TABLE 1—PROPOSED 2013 AND 2014 ABCS, TACS, AND OFLS OF GROUNDFISH FOR THE WESTERN/CENTRAL/WEST YAKUTAT (W/C/WYK), WESTERN (W), CENTRAL (C), EASTERN (E) REGULATORY AREAS, AND IN THE WEST YAKUTAT (WYK), SOUTHEAST OUTSIDE (SEO), AND GULFWIDE (GW) DISTRICTS OF THE GULF OF ALASKA

[Values are rounded to the nearest metric ton]

Species	Area [1]	OFL	ABC	TAC
Pollock [2]	Shumagin (610)	n/a	32,816	32,816
	Chirikof (620)	n/a	49,662	49,662
	Kodiak (630)	n/a	28,565	28,565
	WYK (640)	n/a	3,517	3,517
	W/C/WYK (subtotal)	155,402	114,560	114,560
	SEO (650)	14,366	10,774	10,774
	Total	169,768	125,334	125,334
Pacific cod [3]	W	n/a	29,120	21,840
	C	n/a	59,150	44,363
	E	n/a	2,730	2,047
	Total	108,000	91,000	68,250
Sablefish [4]	W	n/a	1,757	1,757
	C	n/a	5,686	5,686
	WYK	n/a	2,219	2,219
	SEO	n/a	3,132	3,132
	E (WYK and SEO) (subtotal)	n/a	5,351	5,351
	Total	15,129	12,794	12,794
Shallow-water flatfish [6]	W	n/a	20,171	13,250
	C	n/a	21,012	18,000
	WYK	n/a	3,950	3,950
	SEO	n/a	1,350	1,350
	Total	56,781	46,483	36,550
Deep-water flatfish [5]	W	n/a	176	176
	C	n/a	2,308	2,308
	WYK	n/a	1,581	1,581
	SEO	n/a	1,061	1,061
	Total	6,834	5,126	5,126
Rex sole	W	n/a	1,283	1,283
	C	n/a	6,291	6,291
	WYK	n/a	821	821
	SEO	n/a	1,037	1,037
	Total	12,326	9,432	9,432
Arrowtooth flounder	W	n/a	27,386	14,500
	C	n/a	142,591	75,000
	WYK	n/a	21,074	6,900

TABLE 1—PROPOSED 2013 AND 2014 ABCS, TACS, AND OFLS OF GROUNDFISH FOR THE WESTERN/CENTRAL/WEST YAKUTAT (W/C/WYK), WESTERN (W), CENTRAL (C), EASTERN (E) REGULATORY AREAS, AND IN THE WEST YAKUTAT (WYK), SOUTHEAST OUTSIDE (SEO), AND GULFWIDE (GW) DISTRICTS OF THE GULF OF ALASKA—Continued

[Values are rounded to the nearest metric ton]

Species	Area [1]	OFL	ABC	TAC
	SEO	n/a	20,982	6,900
	Total	249,066	212,033	103,300
Flathead sole	W	n/a	15,518	8,650
	C	n/a	26,205	15,400
	WYK	n/a	4,623	4,623
	SEO	n/a	1,735	1,735
	Total	60,219	48,081	30,408
Pacific ocean perch [7]	W	2,364	2,050	2,050
	C	12,662	10,985	10,985
	WYK	n/a	1,650	1,650
	SEO	n/a	1,815	1,815
	E (WYK and SEO) (subtotal)	3,995	n/a	n/a
	Total	19,021	16,500	16,500
Northern rockfish [8 9]	W	n/a	2,017	2,017
	C	n/a	3,136	3,136
	E	n/a	n/a	n/a
	Total	6,152	5,153	5,153
Shortraker rockfish [11]	W	n/a	104	104
	C	n/a	452	452
	E	n/a	525	525
	Total	1,441	1,081	1,081
Other rockfish [9 12]	W	n/a	44	44
	C	n/a	606	606
	WYK	n/a	230	230
	SEO	n/a	3,165	200
	Total	5,305	4,045	1,080
Pelagic shelf rockfish [13]	W	n/a	381	381
	C	n/a	3,581	3,581
	WYK	n/a	504	504
	SEO	n/a	296	296
	Total	5,822	4,762	4,762
Rougheye rockfish [10]	W	n/a	82	82
	C	n/a	861	861
	E	n/a	297	297
	Total	1,492	1,240	1,240
Demersal shelf rockfish [14]	SEO	467	293	293
Thornyhead rockfish	W	n/a	150	150
	C	n/a	766	766
	E	n/a	749	749
	Total	2,220	1,665	1,665
Atka mackerel	GW	6,200	4,700	2,000
Big skates [15]	W	n/a	469	469
	C	n/a	1,793	1,793
	E	n/a	1,505	1,505
	Total	5,023	3,767	3,767
Longnose skates [16]	W	n/a	70	70
	C	n/a	1,879	1,879
	E	n/a	676	676
	Total	3,500	2,625	2,625
Other skates [17]	GW	2,706	2,030	2,030
Squids	GW	1,530	1,148	1,148
Sharks	GW	8,037	6,028	6,028
Octopus	GW	1,941	1,455	1,455
Sculpins	GW	7,641	5,731	5,731

TABLE 1—PROPOSED 2013 AND 2014 ABCS, TACS, AND OFLS OF GROUNDFISH FOR THE WESTERN/CENTRAL/WEST YAKUTAT (W/C/WYK), WESTERN (W), CENTRAL (C), EASTERN (E) REGULATORY AREAS, AND IN THE WEST YAKUTAT (WYK), SOUTHEAST OUTSIDE (SEO), AND GULFWIDE (GW) DISTRICTS OF THE GULF OF ALASKA—Continued

[Values are rounded to the nearest metric ton]

Species	Area [1]	OFL	ABC	TAC
Total		756,621	612,506	447,752

[1] Regulatory areas and districts are defined at § 679.2. (W=Western Gulf of Alaska; C=Central Gulf of Alaska; E=Eastern Gulf of Alaska; WYK=West Yakutat District; SEO=Southeast Outside District; GW=Gulf-wide).

[2] Pollock is apportioned in the Western/Central Regulatory Areas among three statistical areas. Table 2 lists the proposed 2013 and 2014 seasonal apportionments. In the West Yakutat and Southeast Outside Districts of the Eastern Regulatory Area, pollock is not divided into seasonal allowances.

[3] Section 679.20(a)(12)(i) requires the allocation of the Pacific cod TACs in the Western and Central Regulatory Areas of the GOA among gear and operational sectors. The annual Pacific cod TAC is apportioned among various sectors 60 percent to the A season and 40 percent to the B season in the Western and Central Regulatory Areas of the GOA. In the Eastern Regulatory Area of the GOA, Pacific cod is allocated 90 percent for processing by the inshore component and 10 percent for processing by the offshore component. Table 3 lists the proposed 2013 and 2014 Pacific cod seasonal apportionments.

[4] Sablefish is allocated to hook-and-line and trawl gear in 2013 and trawl gear in 2014. Tables 4 and 5 list the proposed 2013 and 2014 allocations of sablefish TACs.

[5] "Deep-water flatfish" means Dover sole, Greenland turbot, Kamchatka flounder, and deep-sea sole.

[6] "Shallow-water flatfish" means flatfish not including "deep-water flatfish," flathead sole, rex sole, or arrowtooth flounder.

[7] "Pacific ocean perch" means *Sebastes alutus*.

[8] "Northern rockfish" means *Sebastes polyspinous*. For management purposes the 3 mt apportionment of ABC to the WYK District of the Eastern Gulf of Alaska has been included in the slope rockfish species group.

[9] "Other rockfish" means *Sebastes aurora* (aurora), *S. melanostomus* (blackgill), *S. paucispinis* (bocaccio), *S. goodei* (chilipepper), *S. crameri* (darkblotch), *S. elongatus* (greenstriped), *S. variegatus* (harlequin), *S. wilsoni* (pygmy), *S. babcocki* (redbanded), *S. proriger* (redstripe), *S. zacentrus* (sharpchin), *S. jordani* (shortbelly), *S. brevispinis* (silvergray), *S. diploproa* (splitnose), *S. saxicola* (stripetail), *S. miniatus* (vermilion), *S. reedi* (yellowmouth), *S. entomelas* (widow), and *S. flavidus* (yellowtail). In the Eastern GOA only, other rockfish also includes northern rockfish, *S. polyspinous*.

[10] "Rougheye rockfish" means *Sebastes aleutianus* (rougheye) and *Sebastes melanostictus* (blackspotted).

[11] "Shortraker rockfish" means *Sebastes borealis*.

[12] "Other rockfish" in the Western and Central Regulatory Areas and in the West Yakutat District means slope rockfish and demersal shelf rockfish. The "other rockfish" species group in the SEO District means slope rockfish.

[13] "Pelagic shelf rockfish" means *Sebastes variabilis* (dusky).

[14] "Demersal shelf rockfish" means *Sebastes pinniger* (canary), *S. nebulosus* (china), *S. caurinus* (copper), *S. maliger* (quillback), *S. helvomaculatus* (rosethorn), *S. nigrocinctus* (tiger), and *S. ruberrimus* (yelloweye).

[15] "Big skate" means *Raja binoculata*.

[16] "Longnose skate" means *Raja rhina*.

[17] "Other skates" means *Bathyraja* spp.

Proposed Apportionment of Reserves

Section 679.20(b)(2) requires NMFS to set aside 20 percent of each TAC for pollock, Pacific cod, flatfish, skates, sharks, squids, sculpins, and octopuses in reserves for possible apportionment at a later date during the fishing year. In 2012, NMFS apportioned all of the reserves in the final harvest specifications. For 2013 and 2014, NMFS proposes reapportionment of all the reserves for pollock, Pacific cod, flatfish, skates, sharks, squids, sculpins, and octopuses in anticipation of the projected annual catch of these species. Table 1 reflects the apportionment of reserve amounts for these species and species groups. Each proposed TAC for the above mentioned species categories contains the full TAC recommended by the Council, since no reserve was created from the relevant species and species groups.

Proposed Apportionments of Pollock TAC Among Seasons and Regulatory Areas, and Allocations for Processing by Inshore and Offshore Components

In the GOA, pollock is apportioned by season and area, and is further allocated between inshore and offshore processing components. Pursuant to § 679.20(a)(5)(iv)(B), the annual pollock TAC specified for the Western and Central Regulatory Areas of the GOA is apportioned into four equal seasonal allowances of 25 percent. As established by § 679.23(d)(2)(i) through (iv), the A, B, C, and D season allowances are available from January 20 through March 10, March 10 through May 31, August 25 through October 1, and October 1 through November 1, respectively.

Pollock TACs in the Western and Central Regulatory Areas of the GOA are apportioned among Statistical Areas 610, 620, and 630, pursuant to § 679.20(a)(5)(iv)(A). In the A and B seasons, the apportionments are in proportion to the distribution of pollock biomass based on the four most recent NMFS winter surveys. In the C and D seasons, the apportionments are in proportion to the distribution of pollock biomass based on the four most recent NMFS summer surveys. For 2013 and 2014, the Council recommends, and NMFS proposes, averaging the winter and summer distribution of pollock in the Central Regulatory Area for the A season and instead of using the distribution based on only the winter surveys. The average is intended to reflect the migration patterns, distribution of pollock, and the performance of the fishery in the area during the A season for 2013 and 2014. During the A season, the apportionment is based on an adjusted estimate of the relative distribution of pollock biomass of approximately 23 percent, 55 percent, and 23 percent in Statistical Areas 610, 620, and 630, respectively. During the B season, the apportionment is based on the relative distribution of pollock biomass of approximately 23 percent, 67 percent, and 10 percent in Statistical Areas 610, 620, and 630, respectively. During the C and D seasons, the apportionment is based on the relative distribution of pollock biomass of approximately 36 percent, 28 percent, and 35 percent in Statistical Areas 610, 620, and 630, respectively.

Within any fishing year, the amount by which a seasonal allowance is underharvested or overharvested may be added to, or subtracted from, subsequent seasonal allowances in a manner to be determined by the Regional Administrator (§ 679.20(a)(5)(iv)(B)). The rollover

amount is limited to 20 percent of the unharvested seasonal apportionment for the statistical area. Any unharvested pollock above the 20 percent limit could be further distributed to the other statistical areas, in proportion to the estimated biomass in the subsequent season in those statistical areas (§ 679.20(a)(5)(iv)(B)). The proposed 2013 and 2014 pollock TACs in the WYK District of 3,517 mt and SEO District of 10,774 mt are not allocated by season.

Section 679.20(a)(6)(i) requires the allocation of 100 percent of the pollock TAC in all regulatory areas and all seasonal allowances to vessels catching pollock for processing by the inshore component after subtraction of pollock amounts that are projected by the Regional Administrator to be caught incidentally by, or delivered to, the offshore component engaged in directed fishing for other groundfish species. Thus, the amount of pollock available for harvest by vessels harvesting pollock for processing by the offshore component is that amount that will be taken as incidental catch during directed fishing for groundfish species other than pollock, up to the maximum retainable amounts allowed under § 679.20(e) and (f). At this time, these incidental catch amounts of pollock are unknown and will be determined during the fishing year as NMFS monitors the fishing activities in the offshore component.

Table 2 lists the proposed 2013 and 2014 seasonal biomass distribution of pollock in the Western and Central Regulatory Areas, area apportionments, and seasonal allowances. The amounts of pollock for processing by the inshore and offshore components are not shown.

TABLE 2—PROPOSED 2013 AND 2014 DISTRIBUTION OF POLLOCK IN THE CENTRAL AND WESTERN REGULATORY AREAS OF THE GULF OF ALASKA; SEASONAL BIOMASS DISTRIBUTION, AREA APPORTIONMENTS, AND SEASONAL ALLOWANCES OF ANNUAL TAC [1]

[Values are rounded to the nearest metric ton]

Season [2]	Shumagin (Area 610)		Chirikof (Area 620)		Kodiak (Area 630)		Total
A (Jan 20–Mar 10)	6,285	(22.64%)	15,202	(54.76%)	6,274	(21.15%)	27,761
B (Mar 10–May 31)	6,285	(22.64%)	18,668	(67.25%)	2,806	(10.11%)	27,760
C (Aug 25–Oct 1)	10,123	(36.47%)	7,896	(28.44%)	9,743	(32.19%)	27,761
D (Oct 1–Nov 1)	10,123	(36.47%)	7,896	(28.44%)	9,743	(32.19%)	27,761
Annual Total [3]	34,816		49,662		28,565		111,043

[1] Area apportionments and seasonal allowances may not total precisely due to rounding.

[2] As established by § 679.23(d)(2)(i) through (iv), the A, B, C, and D season allowances are available from January 20 to March 10, March 10 to May 31, August 25 to October 1, and October 1 to November 1, respectively. The amounts of pollock for processing by the inshore and offshore components are not shown in this table.

[3] The WYK and SEO District pollock TACs are not allocated by season and are not included in the total pollock TACs shown in this table.

Proposed Annual and Seasonal Apportionments of Pacific Cod

Section 679.20(a)(12)(i) requires the allocation among gear and operational sectors of the Pacific cod TACs in the Western and Central Regulatory Areas of the GOA. Section 679.20(a)(6)(ii) requires the allocation between the inshore and offshore components of the Pacific cod TACs in the Eastern Regulatory Area of the GOA. NMFS allocates the proposed 2013 and 2014 Pacific cod TAC based on these sector allocations annually between the inshore and offshore components in the Eastern GOA; seasonally between vessels using jig gear, CVs less than 50 feet in length overall using hook-and-line gear, CVs equal to or greater than 50 in length overall using hook-and-line gear, C/Ps using hook-and-line gear, CVs using trawl gear, C/Ps using trawl gear, and vessels using pot gear in the Central GOA; and seasonally between vessels using jig gear, CVs using hook-and-line gear, C/Ps using hook-and-line gear, CVs using trawl gear, and vessels using pot gear in the Western GOA. The overall seasonal apportionments in the Western and Central GOA are 60 percent of the annual TAC to the A season and 40 percent of the annual TAC to the B season.

Under § 679.20(a)(12)(ii), any overage or underage of the Pacific cod allowance from the A season will be subtracted from, or added to, the subsequent B season allowance. In addition, any portion of the hook-and-line, trawl, pot, or jig sector allocations that are determined by NMFS as likely to go unharvested by a sector may be reapportioned to other sectors for harvest during the remainder of the fishery year.

Pursuant to § 679.20(a)(12)(i) NMFS proposes the allocations of the proposed 2013 and 2014 Pacific cod TACs in the Western and Central Regulatory Areas of the GOA. In accordance with the FMP, the annual jig sector allocations may increase to up to 6 percent of the annual Western and Central GOA Pacific cod TACs depending on the annual performance of the jig sector (See Table 1 of Amendment 83 to the FMP for a detailed discussion of the jig sector allocation process (76 FR 74670, December 1, 2011)). NMFS proposes that the jig sector would receive 2.5 percent of the annual Pacific cod TAC in the Western GOA. This includes a base allocation of 1.5 percent and an additional 1.0 percent because this sector harvested greater than 90 percent of its initial 2012 allocation in the Western GOA. NMFS also proposes that the jig sector would receive 2.0 percent of the annual Pacific cod TAC in the Central GOA. This also is because this sector harvested greater than 90 percent of its initial 2012 allocation in the Central GOA. The jig sector allocations are further apportioned between the A (60 percent) and B (40 percent) season. The sector allocations based on gear type, operation type, and vessel length overall are allocated the remainder of the annual Pacific cod TAC in the Western and Central GOA. These amounts are slightly less than the 2013 sector and seasonal amounts established in the final 2012 and 2013 harvest specifications (77 FR 15195, March 14, 2012), due to the proposed increase in the jig apportionments in the Western and Central GOA. Table 3 lists the seasonal apportionments and allocations of the proposed 2013 and 2014 Pacific cod TACs.

TABLE 3—PROPOSED 2013 AND 2014 SEASONAL APPORTIONMENTS AND ALLOCATIONS OF PACIFIC COD TAC AMOUNTS TO GEAR TYPES, OPERATIONAL TYPES, AND VESSEL LENGTH OVERALL IN THE WESTERN AND CENTRAL GULF OF ALASKA AND ALLOCATIONS FOR PROCESSING BY THE INSHORE AND OFFSHORE COMPONENTS IN THE EASTERN GULF OF ALASKA

[Values are rounded to the nearest metric ton]

Regulatory area and sector	Annual allocation (mt)	A Season		B Season	
		Sector % of annual non-jig TAC	Seasonal allowances (mt)	Sector % of annual non-jig TAC	Seasonal allowances (mt)
Western GOA:					
Jig (2.5% of TAC)	546	N/A	328	N/A	218
Hook-and-line CV	298	0.70	149	0.70	149
Hook-and-line C/P	4,216	10.90	2,321	8.90	1,895
Trawl CV	8,177	27.70	5,898	10.70	2,278
Trawl C/P	511	0.90	192	1.50	319
Pot CV and Pot C/P	8,092	19.80	4,216	18.20	3,876
Total	21,840	60.00	13,104	40.00	8,736
Central GOA:					
Jig (2.0% of TAC)	887	N/A	532	N/A	355
Hook-and-line < 50 CV	6,348	9.32	4,050	5.29	2,298
Hook-and-line ≥ 50 CV	2,916	5.61	2,439	1.10	477
Hook-and-line C/P	2,219	4.11	1,785	1.00	434
Trawl CV	18,079	21.13	9,189	20.45	8,890
Trawl C/P	1,825	2.00	871	2.19	954
Pot CV and Pot C/P	12,088	17.83	7,752	9.97	4,337
Total	44,363	60.00	26,168	40.00	17,745
Eastern GOA		Inshore (90% of Annual TAC)		Offshore (10% of Annual TAC)	
	2,047		1,842		205

Proposed Allocations of the Sablefish TAC Amounts to Vessels Using Hook-and-Line and Trawl Gear

Section 679.20(a)(4)(i) and (ii) require allocations of sablefish TACs for each of the regulatory areas and districts to hook-and-line and trawl gear. In the Western and Central Regulatory Areas, 80 percent of each TAC is allocated to hook-and-line gear, and 20 percent of each TAC is allocated to trawl gear. In the Eastern Regulatory Area, 95 percent of the TAC is allocated to hook-and-line gear and 5 percent is allocated to trawl gear. The trawl gear allocation in the Eastern GOA may only be used to support incidental catch of sablefish in directed fisheries for other target species (§ 679.20(a)(4)(i)).

In recognition of the prohibition against trawl gear in the SEO District of the Eastern Regulatory Area, the Council recommended and NMFS proposes the allocation of 5 percent of the combined Eastern Regulatory Area sablefish TAC to trawl gear in the WYK District making the remainder of the WYK sablefish TAC available to vessels using hook-and-line gear. As a result, NMFS proposes to allocate 100 percent of the sablefish TAC in the SEO District to vessels using hook-and-line gear. This recommendation results in a proposed 2013 allocation of 268 mt to trawl gear and 5,083 mt to hook-and-line gear in the Eastern GOA. Table 4 lists the allocations of the proposed 2013 sablefish TACs to hook-and-line and trawl gear. Table 5 lists the allocations of the proposed 2014 sablefish TACs to trawl gear.

The Council recommended that the hook-and-line sablefish TAC be established annually to ensure that the Individual Fishery Quota (IFQ) fishery is conducted concurrent with the halibut IFQ fishery and is based on the most recent survey information. The Council also recommended that only the trawl sablefish TAC be established for two years so that retention of incidental catch of sablefish by trawl gear could commence in January in the second year of the groundfish harvest specifications. Since there is an annual NMFS survey and assessment for sablefish and the final harvest specifications are expected to be published before the IFQ season begins (typically, in early March), the Council recommended that the sablefish TAC be set on an annual basis so that the best and most recent scientific information could be considered in recommending the ABCs and TACs. With the exception of the trawl allocations that were provided to the Rockfish Program cooperatives, directed fishing for sablefish is closed for trawl gear for the fishing year. Also, fishing for groundfish with trawl gear is prohibited prior to January 20. Therefore, it is not likely that the sablefish allocation to trawl gear would be reached before the effective date of the final harvest specifications.

TABLE 4—PROPOSED 2013 SABLEFISH TAC AMOUNTS IN THE GULF OF ALASKA AND ALLOCATIONS TO HOOK-AND-LINE AND TRAWL GEAR

[Values are rounded to the nearest metric ton]

Area/district	TAC	Hook-and-line allocation	Trawl allocation
Western	1,757	1,406	351
Central	5,686	4,549	1,137
West Yakutat [1]	2,219	1,951	268

TABLE 4—PROPOSED 2013 SABLEFISH TAC AMOUNTS IN THE GULF OF ALASKA AND ALLOCATIONS TO HOOK-AND-LINE AND TRAWL GEAR—Continued

[Values are rounded to the nearest metric ton]

Area/district	TAC	Hook-and-line allocation	Trawl allocation
Southeast Outside	3,132	3,132	0
Total	12,794	11,038	1,756

[1] The proposed trawl allocation is based on allocating 5 percent of the combined Eastern Regulatory Area (West Yakutat and Southeast Outside districts combined) sablefish TAC to trawl gear in the West Yakutat district.

TABLE 5—PROPOSED 2014 SABLEFISH TAC AMOUNTS IN THE GULF OF ALASKA AND ALLOCATION TO TRAWL GEAR [1]

[Values are rounded to the nearest metric ton]

Area/district	TAC	Hook-and-line allocation	Trawl allocation
Western	1,757	n/a	351
Central	5,686	n/a	1,137
West Yakutat [2]	2,219	n/a	268
Southeast Outside	3,132	n/a	0
Total	12,794	n/a	1,756

[1] The Council recommended that harvest specifications for the hook-and-line gear sablefish Individual Fishing Quota fisheries be limited to 1 year.

[2] The proposed trawl allocation is based on allocating 5 percent of the combined Eastern Regulatory Area (West Yakutat and Southeast Outside districts combined) sablefish TAC to trawl gear in the West Yakutat district.

Proposed Apportionments to the Central GOA Rockfish Program

These proposed 2013 and 2014 groundfish harvest specifications for the GOA include the various fishery cooperative allocations and sideboard limitations established by the Central GOA Rockfish Program. Under the Rockfish Program, the rockfish primary species (Pacific ocean perch, northern rockfish, and pelagic shelf rockfish) are allocated to participants after deducting for incidental catch needs in other directed groundfish fisheries.

The Rockfish Program assigns quota share and cooperative quota to participants for primary and secondary species, allows a participant holding a license limitation program (LLP) license with rockfish quota share to form a rockfish cooperative with other persons, and allows holders of C/P LLP licenses to opt-out of the fishery. The Rockfish Program also has an entry level fishery for rockfish primary species for vessels using longline gear. Additionally, the Rockfish Program continues to establish sideboard limits to limit the ability of harvesters operating under the Rockfish Program from increasing their participation in other, non-Rockfish Program fisheries. Besides groundfish species, the Rockfish Program allocates a portion of the halibut PSC limit from the third season deep-water species fishery allowance for the GOA trawl fisheries to Rockfish Program participants (§ 679.81(d)). This includes 117 mt to the CV sector and 74 mt to the C/P sector.

Section 679.81(a)(2)(ii) requires allocations of 5 mt of Pacific ocean perch, 5 mt of northern rockfish, and 30 mt of pelagic shelf rockfish to the entry level longline fishery in 2013 and 2014. The allocation for the entry level longline fishery would increase incrementally each year if the catch exceeds 90 percent of the allocation of a species. The incremental increase in the allocation would continue each year until it the maximum percent of the TAC for that species. In 2012, the catch did not exceed 90 percent of any allocated rockfish species. Therefore, NMFS is not proposing an increase to the entry level longline fishery 2013 and 2014 allocations in the Central GOA. Longline gear includes hook-and-line, jig, troll, and handline gear. The remainder of the TACs for the rockfish primary species would be allocated to the CV and C/P cooperatives. Table 6 lists the allocations of the proposed 2013 and 2014 TACs for each rockfish primary species to the entry level longline fishery, the incremental increase for future years, and the maximum percent of the TAC for the entry level longline fishery.

TABLE 6—PROPOSED 2013 AND 2014 ALLOCATIONS OF ROCKFISH PRIMARY SPECIES TO THE ENTRY LEVEL LONGLINE FISHERY IN THE CENTRAL GULF OF ALASKA

Rockfish primary species	Allocations of the proposed 2013 and 2014 TAC	Incremental increase per season if catch exceeds 90 percent of the allocation	Up to maximum percent of TAC
Pacific ocean perch	5 metric tons	5 metric tons	1
Northern rockfish	5 metric tons	5 metric tons	2
Pelagic shelf rockfish	30 metric tons	20 metric tons	5

NMFS proposes allocations of rockfish primary species among various components of the Rockfish Program. Table 7 lists the proposed 2013 and 2014 allocations of rockfish in the Central GOA to the entry level longline fishery and other participants in the Rockfish Program, which include CV and C/P cooperatives. NMFS also proposes setting aside incidental catch amounts (ICAs) for other directed fisheries in the Central GOA of 900 mt of Pacific ocean perch, 125 mt of northern rockfish, and 125 mt of pelagic shelf rockfish. These amounts are based on recent average incidental catches in the Central GOA by other groundfish fisheries.

Allocations between vessels belonging to CV or C/P cooperatives are not included in these proposed harvest specifications. Rockfish Program applications for CV cooperatives, C/P cooperatives, and C/Ps electing to opt-out of the program are not due to NMFS until March 1 of each calendar year, thereby preventing NMFS from calculating 2013 and 2014 allocations in conjunction with these proposed harvest specifications. NMFS will post these allocations on the Alaska Region Web site at (*http://alaskafisheries.noaa.gov/sustainablefisheries/goarat/default.htm*) when they become available after March 1.

TABLE 7—PROPOSED 2013 AND 2014 ALLOCATIONS OF ROCKFISH PRIMARY SPECIES IN THE CENTRAL GULF OF ALASKA TO THE ENTRY LEVEL LONGLINE FISHERY AND OTHER PARTICIPANTS IN THE ROCKFISH PROGRAM

[Values are rounded to the nearest metric ton]

Rockfish primary species	TAC	Incidental catch allowance	TAC minus ICA	Initial allocation to the entry level longline[1] fishery	Other rockfish program participants[2] allocation
Pacific ocean perch	10,985	900	10,085	5	10,080
Northern rockfish	3,136	125	3,011	5	3,006
Pelagic shelf rockfish	3,581	125	3,456	30	3,426
Total	17,702	1,150	16,552	40	16,512

[1] Longline gear includes hook-and-line, jig, troll, and handline gear (see 679.2 Definitions: Longline gear).
[2] Other Rockfish Program participants include vessels in CV and C/P cooperatives.

Section 679.81(c) requires allocations of rockfish secondary species to program participants in the Central GOA. CV cooperatives receive allocations of Pacific cod, sablefish from the trawl gear allocation, and thornyhead rockfish. C/P cooperatives receive allocations of sablefish from the trawl allocation, rougheye rockfish, shortraker rockfish, and thornyhead rockfish. Table 8 lists the apportionments of the proposed 2013 and 2014 TACs of rockfish secondary species in the Central GOA to CV and C/P cooperatives.

TABLE 8—PROPOSED 2013 AND 2014 APPORTIONMENTS OF ROCKFISH SECONDARY SPECIES IN THE CENTRAL GOA TO CV AND C/P COOPERATIVES

[Values are in metric tons]

Rockfish secondary species	Central GOA annual TAC	CV cooperatives		C/P cooperatives	
		Percentage of TAC	Apportionment (mt)	Percentage of TAC	Apportionment (mt)
Pacific cod	44,363	3.81	1,690	N/A	N/A
Sablefish	5,686	6.78	386	3.51	200
Shortraker rockfish	452	N/A	N/A	40.00	181
Rougheye rockfish	861	N/A	N/A	58.87	507
Thornyhead rockfish	766	7.84	60	26.50	203

Proposed Halibut Prohibited Species Catch (PSC) Limits

Section 679.21(d) establishes annual halibut PSC limit apportionments to trawl and hook-and-line gear, and authorizes the establishment of apportionments for pot gear. In October 2012, the Council recommended proposed halibut PSC limits of 1,973 mt for trawl gear and 300 mt for hook-and-line gear for the 2013 and 2014 groundfish fisheries. This is a result of a 27 mt reduction to the halibut PSC apportionment to trawl gear fisheries incorporated in the Rockfish Program (76 FR 81248, December 27, 2011) and specified in Table 28d to 50 CFR part 679. As discussed previously in this preamble, at its June 2012 meeting the Council took action to further reduce the GOA halibut PSC limits. Implementation of those reductions may lead to adjustments or reductions to the 2014 halibut PSC limits proposed in this action at the beginning of 2014.

Ten mt of the 300 mt hook-and-line halibut PSC limit is further allocated to the demersal shelf rockfish (DSR) fishery in the SEO District. The DSR fishery is defined at § 679.21(d)(4)(iii)(A). This fishery has been apportioned 10 mt of the halibut PSC limit in recognition of its small-scale harvests of groundfish. Most vessels in the DSR fishery are less than 60 ft (18.3 m) length overall and have been exempt from observer coverage. Therefore, observer data are not available to verify actual halibut bycatch amounts. NMFS estimates low halibut bycatch in the DSR fishery because (1) the duration of the DSR fisheries and the gear soak times are short, (2) the DSR fishery occurs in the winter when less overlap occurs in the distribution of DSR and halibut, and (3) the directed commercial DSR fishery has a low DSR

TAC. The Alaska Department of Fish and Game sets the GHL for the DSR fishery after estimates of DSR incidental catch in all fisheries (including halibut and subsistence) and allocation to the DSR sport fish fishery have been deducted. Of the 293 mt TAC for DSR in 2012, 128 mt were available for the DSR commercial directed fishery, of which 105 mt were harvested.

The FMP authorizes the Council to exempt specific gear from the halibut PSC limit. NMFS, after consultation with the Council, proposes to exempt pot gear, jig gear, and the sablefish IFQ hook-and-line gear fishery categories from the non-trawl halibut PSC limit for 2013 and 2014. The Council recommended and NMFS is proposing these exemptions because: (1) Pot gear fisheries have low annual halibut bycatch mortality (averaging 19 mt annually from 2001 through 2010), (2) IFQ program regulations prohibit discard of halibut if any halibut IFQ permit holder on board a CV holds unused halibut IFQ (§ 679.7(f)(11)), (3) sablefish IFQ fishermen typically hold halibut IFQ permits and are therefore required to retain the halibut they catch while fishing sablefish IFQ, and (4) NMFS estimates negligible halibut mortality for the jig gear fisheries. NMFS estimates halibut mortality is negligible in the jig gear fisheries given the small amount of groundfish harvested by jig gear (averaging 297 mt annually from 2003 through 2011), the selective nature of jig gear, and the high survival rates of halibut caught and released with jig gear.

Section 679.21(d)(5) authorizes NMFS to seasonally apportion the halibut PSC limits after consultation with the Council. The FMP and regulations require that the Council and NMFS consider the following information in seasonally apportioning halibut PSC limits: (1) Seasonal distribution of halibut, (2) seasonal distribution of target groundfish species relative to halibut distribution, (3) expected halibut bycatch needs on a seasonal basis relative to changes in halibut biomass and expected catch of target groundfish species, (4) expected bycatch rates on a seasonal basis, (5) expected changes in directed groundfish fishing seasons, (6) expected actual start of fishing effort, and (7) economic effects of establishing seasonal halibut allocations on segments of the target groundfish industry.

The final 2012 and 2013 harvest specifications (77 FR 15194, March 14, 2012) summarized the Council's and NMFS' findings with respect to halibut PSC for each of these FMP considerations. The Council's and NMFS' findings for 2013 and 2014 are unchanged from 2012, with one exception. As previously mentioned, the total trawl gear PSC limit has been adjusted to 1,973 mt from 2,000 mt. Table 9 lists the proposed 2013 and 2014 Pacific halibut PSC limits, allowances, and apportionments. Section 679.21(d)(5)(iii) and (iv) specify that any underages or overages of a seasonal apportionment of a PSC limit will be deducted from or added to the next respective seasonal apportionment within the fishing year.

Table 9. Proposed 2013 and 2014 Pacific Halibut PSC Limits, Allowances, and Apportionments
(Values are in metric tons)

Trawl gear			Hook-and-line gear[1]				
			Other than DSR			DSR	
Season	Percent	Amount	Season	Percent	Amount	Season	Amount
January 20 - April 1	27.5	543	January 1 - June 10	86	250	January 1 - December 31	10
April 1 - July 1	20	395	June 10 - September 1	2	5		
July 1 - September 1	30	592	September 1 - December 31	12	35		
September 1 - October 1	7.5	148					
October 1 - December 31	15	296					
Total		1,973			290		10

[1]The Pacific halibut PSC limit for hook-and-line gear is allocated to the demersal shelf rockfish (DSR) fishery and fisheries other than DSR. The hook-and-line IFQ sablefish fishery is exempt from halibut PSC limits, as are pot and jig gear for all groundfish fisheries.

Section 679.21(d)(3)(ii) authorizes further apportionment of the trawl halibut PSC limit to trawl fishery categories. The annual apportionments are based on each category's proportional share of the anticipated halibut bycatch mortality during a fishing year and optimization of the total amount of groundfish harvest under the halibut PSC limit. The fishery categories for the trawl halibut PSC limits are (1) a deep-water species category, composed of sablefish, rockfish, deep-water flatfish, rex sole, and arrowtooth flounder; and (2) a shallow-water species category, composed of pollock, Pacific cod, shallow-water flatfish, flathead sole, Atka mackerel, and "other species" (skates, sharks, squids, sculpins, and octopuses) (§ 679.21(d)(3)(iii)). Table 10 lists the proposed 2013 and 2014 seasonal apportionments of trawl halibut PSC limits between the deep-water and the shallow-water species categories. Based on public comment and information presented in the final 2012 SAFE report, the Council may recommend or NMFS may make changes to the seasonal, gear-type, or fishery category apportionments of halibut PSC limits for the final 2013 and 2014 harvest specifications.

Table 10. Proposed 2013 and 2014 Seasonal Apportionments of the Pacific Halibut PSC Limit Apportioned Between the Trawl Gear Shallow-Water Species and Deep-Water Species Fisheries
(Values are in metric tons)

Season	Shallow-water	Deep-water[1]	Total
January 20 - April 1	444	99	543
April 1 - July 1	99	296	395
July 1 - September 1	197	395	592
September 1 - October 1	148	Any remainder	148
Subtotal, January 20 - October 1	888	789	1,677
October 1 - December 31[2]			296
Total			1,973

[1] Vessels participating in cooperatives in the Central GOA Rockfish Program will receive 191 mt of the third season (July 1 through September 1) deep-water species fishery halibut PSC apportionment.

[2] There is no apportionment between trawl shallow-water and deep-water species fisheries during the fifth season (October 1 through December 31).

Section 679.21(d)(4) requires the "other than DSR" halibut PSC apportionment to vessels using hook-and-line gear must be apportioned between CVs and C/Ps. NMFS must calculate the halibut PSC limit apportionments for the entire GOA to hook-and-line CVs and C/Ps in accordance with § 679.21(d)(4)(iii)(B)(*1*) and (*2*) in conjunction with these harvest specifications. A comprehensive description and example of the calculations necessary to apportion the "other than DSR" hook-and-line halibut PSC limit between the hook-and-line CV and C/P sectors were included in the proposed rule to implement Amendment 83 (76 FR 44700, July 26, 2011) and is not repeated here.

For 2013 and 2014, NMFS proposes that hook-and-line CV and hook-and-line C/P sectors receive annual halibut PSC limits of 173 mt and 117 mt, respectively. In addition, these annual limits are divided between three seasonal apportionments, using seasonal percentages of 86 percent, 2 percent, and 12 percent. Table 11 lists the proposed annual limits and seasonal apportionments.

No later than November 1 of each year, NMFS would calculate the projected unused amount of halibut PSC limit by either of the hook-and-line sectors for the remainder of the year. The projected unused amount of halibut PSC limit would be made available to the other hook-and-line sector for the remainder of that fishing year.

TABLE 11—PROPOSED 2013 AND 2014 APPORTIONMENTS OF THE "OTHER HOOK-AND-LINE FISHERIES" HALIBUT PSC ALLOWANCE BETWEEN THE HOOK-AND-LINE GEAR CATCHER VESSEL AND CATCHER/PROCESSOR SECTORS

[Values are in metric tons]

"Other than DSR" allowance	Hook-and-line sector	Percent of annual allowance	Sector annual amount	Season	Seasonal percentage	Sector seasonal amount
290	Catcher Vessel	59.69	173	January 1–June 10	86	149
				June 10–September 1	2	3
				September 1–December 31.	12	21
	Catcher/Processor	40.31	117	January 1–June 10	86	101
				June 10–September 1	2	2
				September 1–December 31.	12	14

Estimated Halibut Bycatch in Prior Years

The best available information on estimated halibut bycatch is data collected by fisheries observers during 2012. The calculated halibut bycatch mortality through October 20, 2012, is 1,573 mt for trawl gear, 152 mt for hook-and-line gear, and 38 mt for pot gear for a total halibut mortality of 1,763 mt. This halibut mortality was calculated using groundfish and halibut catch data from the NMFS Alaska Region's catch accounting system. This system contains historical and recent catch information compiled from each Alaska groundfish fishery.

Halibut bycatch restrictions seasonally constrained trawl gear fisheries during the 2012 fishing year. Table 12 displays the closure dates for fisheries that resulted from the attainment of seasonal or annual halibut PSC limits. NMFS does not know the amount of groundfish that trawl gear might have harvested if halibut PSC

limits had not restricted some 2012 GOA groundfish fisheries.

TABLE 12—2012 FISHERY CLOSURES DUE TO ATTAINMENT OF PACIFIC HALIBUT PSC LIMITS

Fishery category	Opening date	Closure date	Federal Register citation
Trawl Shallow-water, Amendment 80 vessels, season 1.	January 20, 2012	February 24, 2012	77 FR 12213, February 29, 2012.
Trawl Shallow-water,[1] season 1.	January 20, 2012	March 26, 2012	77 FR 19146, March 30, 2012.
Trawl Deep-water,[1] season 2.	April 1, 2012	April 19, 2012	77 FR 24154, April 23, 2012.
Trawl Shallow-water, season 2.	April 1, 2012	May 31, 2012	77 FR 33103, June 5, 2012.
Trawl Shallow-water, season 3.	July 1, 2012	July 14, 2012	77 FR 42193, July 18, 2012.
Trawl Shallow-water,[1] season 4.	September 1, 2012	September 2, 2012	77 FR 54837, September 6, 2012.
Hook-and-line gear, all sectors and targets[2].	January 1, 2012	Remains open.	

[1] With the exception of vessels participating in the Central GOA Rockfish Program and vessels fishing for pollock using pelagic trawl gear.
[2] With the exception of the IFQ sablefish fishery, which is open March 17, 2012, through November 7, 2012.

Current Estimates of Halibut Biomass and Stock Condition

The International Pacific Halibut Commission (IPHC) annually assesses the abundance and potential yield of the Pacific halibut using all available data from the commercial and sport fisheries, other removals, and scientific surveys. Additional information on the Pacific halibut stock assessment may be found in the IPHC's 2011 Pacific halibut stock assessment (December 2011), available on the IPHC Web site at *www.iphc.int*. The IPHC considered the 2011 Pacific halibut stock assessment for 2012 at its January 2012 annual meeting when it set the 2012 commercial halibut fishery catch limits. The IPHC will consider the 2012 Pacific halibut stock assessment for 2013 at its January 2013 annual meeting when it set the 2013 commercial halibut fishery catch limits.

The halibut resource is fully utilized. Recent catches in the commercial halibut fisheries in Alaska over the last 18 years (1994 through 2011) have averaged 31,535 mt round weight per year. In January 2012, the IPHC recommended Alaska commercial catch limits totaling 15,430 mt round weight for 2012, a 21.5 percent decrease from 19,662 mt in 2011. Through December 31, 2011, commercial hook-and-line harvests of halibut off Alaska totaled 19,140 mt round weight. The IPHC staff recommendations for commercial catch limits continue to be based on applying the Slow Up—Full Down policy of a 33 percent increase from the previous year's catch limits when stock yields are projected to increase, but uses a 100 percent decrease in recommended catch when stock yields are projected to decrease, as was done for the 2011 fishery.

The 2012 commercial halibut catch limits were lower in all Alaska regions except Area 2C. The largest decreases in the 2012 catch limit recommendations for Alaska were for Area 3A, from 8,685 mt round weight in 2011 to 7,208 mt round weight in 2012; for Area 3B, from 4,542 mt in 2011 to 3,066 mt in 2012; for Area 4A, from 1,458 mt in 2011 to 948 mt in 2012; for Area 4B, from 1,318 mt in 2011 to 1,130 mt in 2012; and for combined Areas CDE, from 2,250 mt in 2011 to 1,491 mt in 2012. The only increase in catch limit recommendations in Alaska was for Area 2C, from 1,409 mt round weight in 2011 to 1,587 mt round weight in 2012.

Additional information on the Pacific halibut stock assessment may be found in the IPHC's 2011 Pacific halibut stock assessment (December 2011), available on the IPHC Web site at *http://www.iphc.int*. The IPHC will consider the 2012 Pacific halibut stock assessment at its January 2013 annual meeting when it will set the 2013 commercial halibut fishery catch limits.

Other Considerations Associated With Halibut PSC

The IPHC determines the allowable directed commercial catch by first accounting for recreational and subsistence catch, waste, and bycatch mortality, and then provides the remainder to the directed fishery. Accordingly, the IPHC will adjust the allowable 2013 commercial catch of halibut to account for the overall halibut PSC limit established for groundfish fisheries. NMFS expects the 2013 GOA groundfish fisheries to use the entire proposed annual halibut PSC limit of 2,273 mt. Methods available for reducing halibut bycatch include (1) consistent monitoring through publication of vessel specific bycatch rates on the NMFS Alaska Region Web site at *http://alaskafisheries.noaa.gov*, (2) modifications to gear, (3) changes in groundfish fishing seasons, (4) individual transferable quota programs, and (5) time/area closures.

With respect to fishing gear modifications, NMFS has implemented various regulations to address halibut bycatch concerns that are associated with different gear types. The definitions of the various gear types defined at § 679.2 under "Authorized fishing gear" delineate a variety of different requirements and restrictions by gear type. Many of these requirements are intended to decrease or minimize halibut bycatch by pot, trawl, and hook-and-line gear.

For example, groundfish pots must be constructed with biodegradable panels and tunnel openings to reduce halibut bycatch, thereby reducing halibut mortality in the groundfish pot fisheries. Further, the definition of "pelagic trawl gear" includes specific construction parameters and performance characteristics that distinguish it from nonpelagic trawl gear, which is designed for use in proximity to the seafloor. Because halibut bycatch by pelagic trawl gear is minimal, directed fishing for pollock with pelagic trawl gear may continue even when the halibut PSC limit for the shallow-water species fishery is reached (see § 679.21(d)(7)(i)). Finally, all hook-and-line vessel operators are required to employ careful release measures when

handling halibut bycatch (§ 679.7(a)(13)). These measures are intended to reduce handling mortality, thereby lowering overall halibut bycatch mortality in the groundfish fisheries, and to increase the amount of groundfish harvested under the available halibut mortality bycatch limits.

The FMP requires that the Council review recent halibut bycatch data and recommend proposed halibut PSC limits in conjunction with developing proposed groundfish harvest levels. NMFS and the Council will review the methods listed here that are available for reducing halibut bycatch to determine their effectiveness and will initiate changes to these PSC limits, as necessary, in response to this review or to public testimony and comment.

Halibut Discard Mortality Rates

To monitor halibut bycatch mortality allowances and apportionments, the Regional Administrator uses observed halibut bycatch rates, discard mortality rates (DMRs), and estimates of groundfish catch to project when a fishery's halibut bycatch mortality allowance or seasonal apportionment is reached. The DMRs are based on the best information available, including information contained in the annual SAFE report.

NMFS proposes that the halibut DMRs developed and recommended by the IPHC and the Council for the 2013–2015 GOA groundfish fisheries be used to monitor the proposed 2013 and 2014 halibut bycatch mortality allowances (see Tables 9–11). The IPHC developed the DMRs for the GOA groundfish fisheries using the 10-year mean DMRs for those fisheries. Long-term average DMRs were not available for some fisheries, so rates from the most recent years were used. For the squid, shark, sculpin, octopus, and skate fisheries, where insufficient mortality data are available, the mortality rate of halibut caught in the Pacific cod fishery for that gear type was recommended as a default rate. The IPHC will analyze observer data annually and recommend changes to the DMRs when a fishery DMR shows large variation from the mean. A discussion of the DMRs and how the IPHC establishes them is available from the Council (see **ADDRESSES**). Table 13 lists the proposed 2013 and 2014 DMRs.

TABLE 13—PROPOSED 2013 AND 2014 HALIBUT DISCARD MORTALITY RATES FOR VESSELS FISHING IN THE GULF OF ALASKA

[Values are percent of halibut assumed to be dead]

Gear	Target fishery	Mortality rate (%)
Hook-and-line	Other fisheries [1]	11
	Skates	11
	Pacific cod	11
	Rockfish	9
Trawl	Arrowtooth flounder	73
	Deep-water flatfish	43
	Flathead sole	65
	Non-pelagic pollock	60
	Other fisheries	62
	Pacific cod	62
	Pelagic pollock	71
	Rex sole	69
	Rockfish	66
	Sablefish	71
	Shallow-water flatfish	67
Pot	Other fisheries	17
	Pacific cod	17

[1] Other fisheries includes all gear types for Atka mackerel, sculpins, sharks, skates, squids, octopuses, and hook-and-line sablefish.

Chinook Salmon Prohibited Species Catch Limits

In 2012, NMFS issued a final rule to implement Amendment 93 to the GOA FMP (77 FR 42629, July 20, 2012). Amendment 93 established separate Chinook salmon PSC limits in the Western and Central GOA in the directed pollock fishery. These limits require NMFS to close the pollock directed fishery in the Western and Central regulatory areas of the GOA if the applicable limit is reached (§ 679.21(h)(6)). The annual Chinook salmon PSC limits in the pollock directed fishery of 6,684 salmon in the Western GOA and 18,316 salmon in the Central GOA are set in regulation at § 679.21(h)(2)(i) and (ii). In addition, all salmon (regardless of species), taken in the pollock directed fisheries in the Western and Central GOA must be retained until an observer at the processing facility that takes delivery of the catch is provided an opportunity to count the number of salmon and to collect any scientific data or biological samples from the salmon (§ 679.21(h)(4)).

American Fisheries Act (AFA) Catcher/Processor and Catcher Vessel Groundfish Sideboard Limits

Section 679.64 establishes groundfish harvesting and processing sideboard limits on AFA C/Ps and CVs in the GOA. These sideboard limits are necessary to protect the interests of fishermen and processors who do not directly benefit from the AFA from those fishermen and processors who receive exclusive harvesting and processing privileges under the AFA. Section 679.7(k)(1)(ii) prohibits listed AFA C/Ps from harvesting any species of fish in the GOA. Additionally, § 679.7(k)(1)(iv) prohibits listed AFA C/Ps from processing any pollock harvested in a directed pollock fishery in the GOA and any groundfish harvested in Statistical Area 630 of the GOA.

AFA CVs that are less than 125 ft (38.1 meters) length overall, have annual landings of pollock in the Bering Sea and Aleutian Islands of less than 5,100 mt, and have made at least 40 landings of GOA groundfish from 1995 through 1997 are exempt from GOA sideboard limits under § 679.64(b)(2)(ii). Sideboard limits for non-exempt AFA CVs operating in the GOA are based on their traditional harvest levels of TAC in

groundfish fisheries covered by the FMP. Section 679.64(b)(3)(iii) establishes the groundfish sideboard limitations in the GOA based on the retained catch of non-exempt AFA CVs of each sideboard species from 1995 through 1997 divided by the TAC for that species over the same period.

Table 14 lists the proposed 2013 and 2014 groundfish sideboard limits for non-exempt AFA CVs. NMFS will deduct all targeted or incidental catch of sideboard species made by non-exempt AFA CVs from the sideboard limits listed in Table 14.

TABLE 14—PROPOSED 2013 AND 2014 GOA NON-EXEMPT AMERICAN FISHERIES ACT CATCHER VESSEL (CV) GROUNDFISH HARVEST SIDEBOARD LIMITS

[Values are rounded to the nearest metric ton]

Species	Apportionments by season/gear	Area/component	Ratio of 1995–1997 non-exempt AFA CV catch to 1995–1997 TAC	Proposed 2013 and 2014 TACs	Proposed 2013 and 2014 non-exempt AFA CV sideboard limit
Pollock	A Season—January 20–March 10.	Shumagin (610)	0.6047	6,285	3,801
		Chirikof (620)	0.1167	15,202	1,774
		Kodiak (630)	0.2028	6,274	1,272
	B Season—March 10–May 31.	Shumagin (610)	0.6047	6,285	3,801
		Chirikof (620)	0.1167	18,668	2,179
		Kodiak (630)	0.2028	2,806	569
	C Season—August 25–October 1.	Shumagin (610)	0.6047	10,123	6,121
		Chirikof (620)	0.1167	7,896	921
		Kodiak (630)	0.2028	9,743	1,976
	D Season—October 1–November 1.	Shumagin (610)	0.6047	10,123	6,121
		Chirikof (620)	0.1167	7,896	921
		Kodiak (630)	0.2028	9,743	1,976
	Annual	WYK (640)	0.3495	3,517	1,229
		SEO (650)	0.3495	10,774	3,766
Pacific cod	A Season [1]—January 1–June 10.	W	0.1331	13,104	1,744
		C	0.0692	26,618	1,842
	B Season) [2]—September 1–December 31.	W	0.1331	8,736	1,163
		C	0.0692	17,745	1,228
	Annual	E inshore	0.0079	1,842	15
		E offshore	0.0078	205	2
Sablefish	Annual, trawl gear	W	0.0000	351	0
		C	0.0642	1,137	73
		E	0.0433	268	12
Flatfish, shallow-water	Annual	W	0.0156	13,250	207
		C	0.0587	18,000	1,057
		E	0.0126	5,300	67
Flatfish, deep-water	Annual	W	0.0000	176	0
		C	0.0647	2,308	149
		E	0.0128	2,642	34
Rex sole	Annual	W	0.0007	1,283	1
		C	0.0384	6,291	242
		E	0.0029	1,858	5
Arrowtooth flounder	Annual	W	0.0021	14,500	30
		C	0.0280	75,000	2,100
		E	0.0002	13,800	3
Flathead sole	Annual	W	0.0036	8,650	31
		C	0.0213	15,400	328
		E	0.0009	6,358	6
Pacific ocean perch	Annual	W	0.0023	2,050	5
		C	0.0748	10,985	822
		E	0.0466	3,465	161
Northern rockfish	Annual	W	0.0003	2,017	1
		C	0.0277	3,136	87
Shortraker rockfish	Annual	W	0.0000	104	0
		C	0.0218	452	10
		E	0.0110	525	6
Other rockfish	Annual	W	0.0034	44	0
		C	0.1699	606	103
		E	0.0000	430	0
Pelagic shelf rockfish	Annual	W	0.0001	381	0
		C	0.0000	3,581	0
		E	0.0067	800	5
Rougheye rockfish	Annual	W	0.0000	82	0
		C	0.0237	861	20
		E	0.0124	297	4

TABLE 14—PROPOSED 2013 AND 2014 GOA NON-EXEMPT AMERICAN FISHERIES ACT CATCHER VESSEL (CV) GROUNDFISH HARVEST SIDEBOARD LIMITS—Continued

[Values are rounded to the nearest metric ton]

Species	Apportionments by season/ gear	Area/component	Ratio of 1995–1997 non-exempt AFA CV catch to 1995–1997 TAC	Proposed 2013 and 2014 TACs	Proposed 2013 and 2014 non-exempt AFA CV sideboard limit
Demersal shelf rockfish	Annual	SEO	0.0020	293	1
Thornyhead rockfish	Annual	W	0.0280	150	4
		C	0.0280	766	21
		E	0.0280	749	21
Atka mackerel	Annual	Gulfwide	0.0309	2,000	62
Big skates	Annual	W	0.0063	469	3
		C	0.0063	1,793	11
		E	0.0063	1,505	9
Longnose skates	Annual	W	0.0063	70	0
		C	0.0063	1,879	12
		E	0.0063	676	4
Other skates	Annual	Gulfwide	0.0063	2,030	13
Squids	Annual	Gulfwide	0.0063	1,148	7
Sharks	Annual	Gulfwide	0.0063	6,028	38
Octopuses	Annual	Gulfwide	0.0063	1,455	9
Sculpins	Annual	Gulfwide	0.0063	5,731	36

[1] The Pacific cod A season for trawl gear does not open until January 20.
[2] The Pacific cod B season for trawl gear closes November 1.

Non-Exempt AFA Catcher Vessel Halibut PSC Limits

The halibut PSC sideboard limits for non-exempt AFA CVs in the GOA are based on the aggregate retained groundfish catch by non-exempt AFA CVs in each PSC target category from 1995 through 1997 divided by the retained catch of all vessels in that fishery from 1995 through 1997 (§ 679.64(b)(4)). Table 15 lists the proposed 2013 and 2014 non-exempt AFA CV halibut PSC limits for vessels using trawl gear in the GOA.

TABLE 15—PROPOSED 2013 AND 2014 NON-EXEMPT AMERICAN FISHERIES ACT CATCHER VESSEL HALIBUT PROHIBITED SPECIES CATCH (PSC) LIMITS FOR VESSELS USING TRAWL GEAR IN THE GOA

[PSC limits are rounded to the nearest whole metric ton]

Season	Season dates	Target fishery	Ratio of 1995–1997 non-exempt AFA CV retained catch to total retained catch	Proposed 2013 and 2014 PSC limit	Proposed 2013 and 2014 non-exempt AFA CV PSC limit
1	January 20–April 1	shallow-water	0.340	444	151
		deep-water	0.070	99	7
2	April 1–July 1	shallow-water	0.340	99	34
		deep-water	0.070	296	21
3	July 1–September 1	shallow-water	0.340	197	67
		deep-water	0.070	395	28
4	September 1–October 1	shallow-water	0.340	148	50
		deep-water	0.070	0	0
5	October 1–December 31	all targets	0.205	296	61

Non-AFA Crab Vessel Groundfish Sideboard Limits

Section 680.22 establishes groundfish catch limits for vessels with a history of participation in the Bering Sea snow crab fishery to prevent these vessels from using the increased flexibility provided by the Crab Rationalization Program to expand their level of participation in the GOA groundfish fisheries. Sideboard limits restrict these vessels' catch to their collective historical landings in all GOA groundfish fisheries (except the fixed-gear sablefish fishery). Sideboard limits also apply to landings made using an LLP license derived from the history of a vessel with sideboard limits, even if that license is used on another vessel.

The basis for these sideboard limits is described in detail in the final rules implementing the major provisions of the Allocation of Bering Sea and Aleutian Islands King and Tanner Crab Fishery Resources (707 FR 10174, March 2, 2005), Amendment 34 to the Fishery Management Plan for Bering Sea/Aleutian Island King and Tanner Crabs, and Amendment 83 (76 FR 74670, December 1, 2011).

Table 16 lists these proposed 2013 and 2014 groundfish sideboard limitations for non-AFA crab vessels. All targeted or incidental catch of sideboard species made by non-AFA crab vessels or associated LLP licenses

will be deducted from these sideboard limits.

TABLE 16—PROPOSED 2013 AND 2014 GOA NON-AMERICAN FISHERIES ACT CRAB VESSEL GROUNDFISH HARVEST SIDEBOARD LIMITS

[Values are rounded to the nearest metric ton]

Species	Season/gear	Area/component/gear	Ratio of 1996–2000 non-AFA crab vessel catch to 1996–2000 total harvest	Proposed 2013 and 2014 TACs	Proposed 2013 and 2014 non-AFA crab vessel sideboard limit
Pollock	A Season—January 20–March 10.	Shumagin (610)	0.0098	6,285	62
		Chirikof (620)	0.0031	15,202	47
		Kodiak (630)	0.0002	6,274	1
	B Season—March 10–May 31.	Shumagin (610)	0.0098	6,285	62
		Chirikof (620)	0.0031	18,668	58
		Kodiak (630)	0.0002	2,806	1
	C Season—August 25–October 1.	Shumagin (610)	0.0098	10,123	99
		Chirikof (620)	0.0031	7,896	24
		Kodiak (630)	0.0002	9,743	2
	D Season—October 1–November 1.	Shumagin (610)	0.0098	10,123	99
		Chirikof (620)	0.0031	7,896	24
		Kodiak (630)	0.0002	9,743	2
	Annual	WYK (640)	0.0000	3,517	0
		SEO (650)	0.0000	10,774	0
Pacific cod	A Season [1]—January 1–June 10.	W Jig CV	0.0000	13,104	0
		W Hook-and-line CV	0.0004	13,104	5
	January 1–June 10	W Hook-and-line C/P	0.0018	13,104	24
		W Pot CV	0.0997	13,104	1,306
		W Pot C/P	0.0078	13,104	102
		W Trawl CV	0.0007	13,104	9
		C Jig CV	0.0000	26,618	0
		C Hook-and-line CV	0.0001	26,618	3
		C Hook-and-line C/P	0.0012	26,618	32
		C Pot CV	0.0474	26,618	1,262
		C Pot C/P	0.0136	26,618	362
		C Trawl CV	0.0012	26,618	32
	B Season [2]—September 1–December 31.	W Jig CV	0.0000	8,736	0
		W Hook-and-line CV	0.0004	8,736	3
		W Hook-and-line C/P	0.0018	8,736	16
		W Pot CV	0.0997	8,736	871
		W Pot C/P	0.0078	8,736	68
		W Trawl CV	0.0007	8,736	6
		C Jig CV	0.0000	17,745	0
		C Hook-and-line CV	0.0001	17,745	2
		C Hook-and-line C/P	0.0012	17,745	21
		C Pot CV	0.0474	17,745	841
		C Pot C/P	0.0136	17,745	241
		C Trawl CV	0.0012	17,745	21
	Annual	E inshore	0.0110	1,842	20
		E offshore	0.0000	205	0
Sablefish	Annual, trawl gear	W	0.0000	351	0
		C	0.0000	1,137	0
		E	0.0000	268	0
Flatfish, shallow-water	Annual	W	0.0059	13,250	78
		C	0.0001	18,000	2
		E	0.0000	5,300	0
Flatfish, deep-water	Annual	W	0.0035	176	1
		C	0.0000	2,308	0
		E	0.0000	2,642	0
Rex sole	Annual	W	0.0000	1,283	0
		C	0.0000	6,291	0
		E	0.0000	1,858	0
Arrowtooth flounder	Annual	W	0.0004	14,500	6
		C	0.0001	75,000	8
		E	0.0000	13,800	0
Flathead sole	Annual	W	0.0002	8,650	2

TABLE 16—PROPOSED 2013 AND 2014 GOA NON-AMERICAN FISHERIES ACT CRAB VESSEL GROUNDFISH HARVEST SIDEBOARD LIMITS—Continued

[Values are rounded to the nearest metric ton]

Species	Season/gear	Area/component/gear	Ratio of 1996–2000 non-AFA crab vessel catch to 1996–2000 total harvest	Proposed 2013 and 2014 TACs	Proposed 2013 and 2014 non-AFA crab vessel sideboard limit
		C	0.0004	15,400	6
		E	0.0000	6,358	0
Pacific ocean perch	Annual	W	0.0000	2,050	0
		C	0.0000	10,985	0
		E	0.0000	3,465	0
Northern rockfish	Annual	W	0.0005	2,017	1
		C	0.0000	3,136	0
Shortraker rockfish	Annual	W	0.0013	104	0
		C	0.0012	452	1
		E	0.0009	525	0
Other rockfish	Annual	W	0.0035	44	0
		C	0.0033	606	2
		E	0.0000	430	0
Pelagic shelf rockfish	Annual	W	0.0017	381	1
		C	0.0000	3,581	0
		E	0.0000	800	0
Rougheye rockfish	Annual	W	0.0067	82	1
		C	0.0047	861	4
		E	0.0008	297	0
Demersal shelf rockfish	Annual	SEO	0.0000	293	0
Thornyhead rockfish	Annual	W	0.0047	150	1
		C	0.0066	766	5
		E	0.0045	749	3
Atka mackerel	Annual	Gulfwide	0.0000	2,000	0
Big skate	Annual	W	0.0392	469	18
		C	0.0159	1,793	29
		E	0.0000	1,505	0
Longnose skate	Annual	W	0.0392	70	3
		C	0.0159	1,879	30
		E	0.0000	676	0
Other skates	Annual	Gulfwide	0.0176	2,030	36
Sharks	Annual	Gulfwide	0.0176	1,148	20
Squids	Annual	Gulfwide	0.0176	6,028	106
Octopuses	Annual	Gulfwide	0.0176	1,455	26
Sculpins	Annual	Gulfwide	0.0176	5,731	101

[1] The Pacific cod A season for trawl gear does not open until January 20.
[2] The Pacific cod B season for trawl gear closes November 1.

Rockfish Program Groundfish Sideboard and Halibut PSC Limitations

The Rockfish Program establishes three classes of sideboard provisions: CV groundfish sideboard restrictions, C/P rockfish sideboard restrictions, and C/P opt-out vessel sideboard restrictions. These sideboards are intended to limit the ability of rockfish harvesters to expand into other fisheries.

CVs participating in the Rockfish Program may not participate in directed fishing for northern rockfish, Pacific ocean perch, and pelagic shelf rockfish (dusky rockfish) in the Western GOA and West Yakutat Districts from July 1 through July 31. Also, CVs may not participate in directed fishing for arrowtooth flounder, deep-water flatfish, and rex sole in the GOA from July 1 through July 31 (§ 679.82(d)).

C/Ps participating in Rockfish Program cooperatives are restricted by rockfish and halibut PSC sideboard limitations. These C/Ps are prohibited from directed fishing for northern rockfish, Pacific ocean perch, and pelagic shelf rockfish (dusky rockfish) in the Western GOA and West Yakutat District from July 1 through July 31. Holders of C/P-designated LLP licenses that opt-out of participating in a rockfish cooperative will receive the portion of each sideboard limit that is not assigned to rockfish cooperatives. Table 17 lists the proposed 2013 and 2014 Rockfish Program C/P sideboard limits in the Western GOA and West Yakutat District. Due to confidentiality requirements associated with fisheries data, the sideboard limits for the West Yakutat District are not displayed.

TABLE 17—PROPOSED 2013 AND 2014 ROCKFISH PROGRAM HARVEST LIMITS FOR THE WEST YAKUTAT DISTRICT AND WESTERN GOA BY FISHERY FOR THE CATCHER/PROCESSOR SECTOR

[Values are rounded to the nearest metric ton]

Area	Fishery	C/P sector (% of TAC)	Proposed 2013 and 2014 TACs	Proposed 2013 and 2014 C/P limit
Western GOA	Pelagic shelf rockfish	72.3	381	275
	Pacific ocean perch	50.6	2,050	1,037
	Northern rockfish	74.3	2,017	1,499
West Yakutat District	Pelagic shelf rockfish	Confid.[1]	504	N/A
	Pacific ocean perch	Confid.[1]	1,650	N/A

[1] Not released due to confidentiality requirements associated with fish ticket data established by NMFS and the State of Alaska.

The C/P sector is subject to halibut PSC sideboard limits for the trawl deep-water and shallow-water species fisheries from July 1 through July 31. No halibut PSC sideboard limits apply to the CV sector. C/Ps that opt-out of the Rockfish Program would be able to access that portion of the deep-water and shallow-water halibut PSC sideboard limit not assigned to C/P rockfish cooperatives. The sideboard provisions for C/Ps that elect to opt-out of participating in a rockfish cooperative are described in § 679.82(c), (e), and (f). Sideboards are linked to the catch history of specific vessels that may choose to opt-out. The applications for C/Ps electing to opt-out are due to NMFS on March 1 of each calendar year, thereby preventing NMFS from calculating proposed 2013 and 2014 allocations. Once opt-out applications (if any) are received in 2013, the ratios and amounts used to calculate opt-out sideboard ratios will be known. NMFS will then calculate any applicable opt-out sideboards and post these allocations on the Alaska Region Web site at *http://alaskafisheries.noaa.gov/sustainablefisheries/goarat/default.htm)* when they have been prepared.

Table 18 lists the 2013 and 2014 proposed Rockfish Program halibut PSC limits for the C/P sector.

TABLE 18—PROPOSED 2013 AND 2014 ROCKFISH PROGRAM HALIBUT MORTALITY LIMITS FOR THE CATCHER/PROCESSOR SECTOR

[Values are rounded to the nearest metric ton]

Sector	Shallow-water species fishery halibut PSC sideboard ratio (percent)	Deep-water species fishery halibut PSC sideboard ratio (percent)	Annual halibut mortality limit (mt)	Annual shallow-water species fishery halibut PSC sideboard limit (mt)	Annual deep-water species fishery halibut PSC sideboard limit (mt)
Catcher/processor	0.10	2.50	1,973	2	49

Amendment 80 Vessel Program Groundfish Sideboard and PSC Limits

Amendment 80 to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (Amendment 80 Program) established a limited access privilege program for the non-AFA trawl C/P sector. To limit the ability of participants eligible for the Amendment 80 Program to expand their harvest efforts in the GOA, the Amendment 80 Program established groundfish and halibut PSC limits for Amendment 80 Program participants.

Section 679.92 establishes groundfish harvesting sideboard limits on all Amendment 80 Program vessels, other than the F/V *Golden Fleece,* to amounts no greater than the limits shown in Table 37 to part 679. Under regulations at § 679.92(d), the F/V *Golden Fleece* is prohibited from directed fishing for pollock, Pacific cod, Pacific ocean perch, pelagic shelf rockfish, and northern rockfish in the GOA.

Groundfish sideboard limits for Amendment 80 Program vessels operating in the GOA are based on their average aggregate harvests from 1998 to 2004. Table 19 lists the proposed 2013 and 2014 sideboard limits for Amendment 80 Program vessels. All targeted or incidental catch of sideboard species made by Amendment 80 Program vessels will be deducted from the sideboard limits in Table 19.

TABLE 19—PROPOSED 2013 AND 2014 GOA GROUNDFISH SIDEBOARD LIMITS FOR AMENDMENT 80 PROGRAM VESSELS

[Values are rounded to the nearest metric ton]

Species	Season	Area	Ratio of Amendment 80 sector vessels 1998–2004 catch to TAC	Proposed 2013 and 2014 TAC (mt)	Proposed 2013 and 2014 Amendment 80 vessel sideboards (mt)
Pollock	A Season—January 20–February 25.	Shumagin (610)	0.003	6,285	19
		Chirikof (620)	0.002	15,202	30
		Kodiak (630)	0.002	6,274	13

TABLE 19—PROPOSED 2013 AND 2014 GOA GROUNDFISH SIDEBOARD LIMITS FOR AMENDMENT 80 PROGRAM VESSELS—Continued

[Values are rounded to the nearest metric ton]

Species	Season	Area	Ratio of Amendment 80 sector vessels 1998–2004 catch to TAC	Proposed 2013 and 2014 TAC (mt)	Proposed 2013 and 2014 Amendment 80 vessel sideboards (mt)
	B Season—March 20–May 31.	Shumagin (610)	0.003	6,285	19
		Chirikof (620)	0.002	18,668	37
		Kodiak (630)	0.002	2,806	6
	C Season—August 25–September 15.	Shumagin (610)	0.003	10,123	30
		Chirikof (620)	0.002	7,896	16
		Kodiak (630)	0.002	9,743	19
	D Season—October 1–November 1.	Shumagin (610)	0.003	10,123	30
		Chirikof (620)	0.002	7,896	16
		Kodiak (630)	0.002	9,743	19
	Annual	WYK (640)	0.002	3,517	7
Pacific cod	A Season [1]—January 1–June 10.	W	0.020	13,104	262
		C	0.044	26,618	1,171
	B Season [2]—September 1–December 31.	W	0.020	8,736	175
		C	0.044	17,745	781
	Annual	WYK	0.034	2,047	70
Pacific ocean perch	Annual	W	0.994	2,050	2,038
		WYK	0.961	1,650	1,586
Northern rockfish	Annual	W	1.000	2,017	2,017
Pelagic shelf rockfish	Annual	W	0.764	381	291
		WYK	0.896	504	452

[1] The Pacific cod A season for trawl gear does not open until January 20.
[2] The Pacific cod B season for trawl gear closes November 1.

The PSC sideboard limits for Amendment 80 Program vessels in the GOA are based on the historic use of halibut PSC by Amendment 80 Program vessels in each PSC target category from 1998 through 2004. These values are slightly lower than the average historic use to accommodate two factors: allocation of halibut PSC cooperative quota under the Central GOA Rockfish Program and the exemption of the F/V *Golden Fleece* from this restriction.

Table 20 lists the proposed 2013 and 2014 halibut PSC limits for Amendment 80 Program vessels, as contained in Table 38 to 50 CFR part 679.

TABLE 20—PROPOSED 2013 AND 2014 HALIBUT PSC SIDEBOARD LIMITS FOR AMENDMENT 80 PROGRAM VESSELS IN THE GOA

[Values are rounded to the nearest metric ton]

Season	Season dates	Fishery category	Historic Amendment 80 use of the annual halibut PSC limit (ratio)	Proposed 2013 and 2014 annual PSC limit (mt)	Proposed 2013 and 2014 Amendment 80 vessel PSC sideboard limit (mt)
1	January 20–April 1	shallow-water	0.0048	1,973	9
		deep-water	0.0115	1,973	23
2	April 1–July 1	shallow-water	0.0189	1,973	37
		deep-water	0.1072	1,973	212
3	July 1–September 1	shallow-water	0.0146	1,973	29
		deep-water	0.0521	1,973	103
4	September 1–October 1	shallow-water	0.0074	1,973	15
		deep-water	0.0014	1,973	3
5	October 1–December 31	shallow-water	0.0227	1,973	45
		deep-water	0.0371	1,973	73

Classification

NMFS has determined that the proposed harvest specifications are consistent with the FMP and preliminarily determined that the proposed harvest specifications are consistent with the Magnuson-Stevens Act and other applicable laws.

This action is authorized under 50 CFR 679.20 and is exempt from review under Executive Order 12866.

NMFS prepared an EIS for this action (see **ADDRESSES**) and made it available to the public on January 12, 2007 (72 FR 1512). On February 13, 2007, NMFS issued the Record of Decision (ROD) for the EIS. Copies of the EIS and ROD for this action are available from NMFS. The EIS analyzes the environmental consequences of the proposed groundfish harvest specifications and its alternatives on resources in the action area. The EIS found no significant environmental consequences from the proposed action or its alternatives.

NMFS prepared an Initial Regulatory Flexibility Analysis (IRFA) as required by section 603 of the Regulatory Flexibility Act, analyzing the methodology for establishing the relevant TACs. The IRFA evaluated the impacts on small entities of alternative harvest strategies for the groundfish fisheries in the EEZ off Alaska. As set forth in the methodology, TACs are set to a level that fall within the range of ABCs recommended by the SSC; the sum of the TACs must achieve the OY specified in the FMP. While the specific numbers that the methodology may produce vary from year to year, the methodology itself remains constant.

A description of the proposed action, why it is being considered, and the legal basis for this proposed action are contained in the preamble above. A copy of the analysis is available from NMFS (see **ADDRESSES**). A summary of the IRFA follows.

The action under consideration is a harvest strategy to govern the catch of groundfish in the GOA. The preferred alternative is the existing harvest strategy in which TACs fall within the range of ABCs recommended by the SSC. This action is taken in accordance with the FMP prepared by the Council pursuant to the Magnuson-Stevens Act.

The directly regulated small entities include approximately 1,002 CVs and approximately 6 C/Ps in the GOA. The entities directly regulated by this action are those that harvest groundfish in the EEZ of the GOA and in parallel fisheries within State waters. These include entities operating CVs and C/Ps within the action area and entities receiving direct allocations of groundfish. CVs and C/Ps are considered to be small entities if they have annual gross receipts of $4 million per year or less from all economic activities, including the revenue of their affiliated operations (see Table 37 to the Economic Status of the Groundfish off Alaska, 2011, in the 2011 SAFE report, dated November 2011, available from the Council (see **ADDRESSES**)). Because the 1,002 CVs and 6 C/Ps meet this size standard, they are considered to be small entities for the purposes of this analysis.

The preferred alternative (Alternative 2) was compared to four other alternatives. Alternative 1 would have set TACs to generate fishing rates equal to the maximum permissible ABC (if the full TAC were harvested), unless the sum of TACs exceeded the GOA OY, in which case harvests would be limited to the OY. Alternative 3 would have set TACs to produce fishing rates equal to the most recent 5-year average fishing rate. Alternative 4 would have set TACs to equal the lower limit of the GOA OY range. Alternative 5, the "no action alternative," would have set TACs equal to zero.

The TACs associated with the preferred harvest strategy are those adopted by the Council in October 2012, as per Alternative 2. OFLs and ABCs for the species were based on recommendations prepared by the Council's GOA Plan Team in September 2012, and reviewed and modified by the Council's SSC in October 2012. The Council based its TAC recommendations on those of its AP, which were consistent with the SSC's OFL and ABC recommendations.

Alternative 1 selects harvest rates that would allow fishermen to harvest stocks at the level of ABCs, unless total harvests were constrained by the upper bound of the GOA OY of 800,000 mt. As shown in Table 1 of the preamble, the sum of ABCs in 2013 and 2014 would be about 612,506 mt, which falls below the upper bound of the OY range. The sum of TACs is 447,752 mt, which is less than the sum of ABCs. In this instance, Alternative 1 is consistent with the preferred alternative (Alternative 2), meets the objectives of that action, and has small entity impacts that are equivalent to the preferred alternative. In some instances, the selection of Alternative 1 would not reflect the practical implications that increased TACs (where the sum of TACs equals the sum of ABCs) for some species probably would not be fully harvested. This could be due to a lack of commercial or market interest in such species. Additionally, an underharvest of some TACs could result due to constraints such as the fixed, and therefore constraining, PSC limits associated with the harvest of the GOA groundfish species.

Alternative 3 selects harvest rates based on the most recent 5 years of harvest rates (for species in Tiers 1 through 3) or for the most recent 5 years of harvests (for species in Tiers 4 through 6). This alternative is inconsistent with the objectives of this action, the Council's preferred harvest strategy, because it does not take account of the most recent biological information for this fishery. Harvest rates are listed for each species category for each year in the SAFE report (see **ADDRESSES**).

Alternative 4 reduces the TACs from the upper end of the OY range in the GOA, to its lower end of 116,000 mt, which would lead to significantly lower harvests of all species. Overall, this would reduce 2013 TACs by about 74 percent. This would lead to significant reductions in harvests of species harvested by small entities. While reductions of this size would be associated with offsetting price increases, the size of these increases is very uncertain. There are close substitutes for GOA groundfish species available in significant quantities from the Bering Sea and Aleutian Islands management area. While production declines in the GOA would undoubtedly be associated with significant price increases in the GOA, these increases would still be constrained by production of substitutes, and are very unlikely to offset revenue declines from smaller production. Thus, this alternative would have a detrimental impact on small entities.

Alternative 5, which sets all harvests equal to zero, would have a significant adverse economic impact on small entities and would be contrary to obligations to achieve OY on a continuing basis, as mandated by the Magnuson-Stevens Act.

The IRFA shows that, in 2011, there were 1,049 individual catcher vessels with gross revenues less than or equal to $4 million. Some of these vessels are members of AFA inshore pollock cooperatives, GOA rockfish cooperatives, or BSAI crab rationalization cooperatives. Therefore, under the RFA, it is the aggregate gross receipts of all participating members of the cooperative that must meet the "under $4 million" threshold. Vessels that participate in these cooperatives are considered to be large entities within the meaning of the RFA. After accounting for membership in these cooperatives, there are an estimated 1,002 small catcher vessel entities remaining in the GOA groundfish sector. This latter group of small vessels had average gross revenues of about $485,000, and median gross revenues of $230,000. The 25th percentile of gross revenues was about $79,000, and the 75th percentile was about $661,000. Under Alternative 5, all 1,049 individual catcher vessels impacted by

this rule would have gross revenues of $0.

Data presented in the IRFA indicates that in 2011, 9 catcher/processors grossed less than $4 million. Three vessels in this group were estimated to be large entities because of their affiliations with other vessels through an Amendment 80 cooperative and the Freezer Longline Conservation Cooperative. After taking account of these affiliations, NMFS estimates that six of these vessels are small entities. The average gross revenue for these 6 small catcher/processor entities was $1.17 million, and the median gross revenue was $960,000. Under Alternative 5, the 6 small catcher/processor impacted by this rule would have gross revenues of $0.

The proposed harvest specifications extend the current 2013 OFLs, ABCs, and TACs to 2013 and 2014. As noted in the IRFA, the Council may modify these OFLs, ABCs, and TACs in December 2012, when it reviews the November 2012 SAFE reports from its groundfish plan teams, and the December 2012 Council meeting reports of its SSC and AP. Because TACs in the proposed 2013 and 2014 harvest specifications are unchanged from the 2013 TACs, NMFS does not expect adverse impacts on small entities. Also, NMFS does not expect any changes made by the Council in December 2012 to have significant adverse impacts on small entities.

This action does not modify recordkeeping or reporting requirements, or duplicate, overlap, or conflict with any Federal rules.

Adverse impacts on marine mammals or endangered species resulting from fishing activities conducted under this rule are discussed in the EIS and its accompanying annual SIRs (see **ADDRESSES**).

Authority: 16 U.S.C. 773 *et seq.;* 16 U.S.C. 1540(f); 16 U.S.C. 1801 *et seq.;* 16 U.S.C. 3631 *et seq.;* Pub. L. 105–277; Pub. L. 106–31; Pub. L. 106–554; Pub. L. 108–199; Pub. L. 108–447; Pub. L. 109–241; Pub. L. 109–479.

Dated: November 28, 2012.

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.

[FR Doc. 2012–29137 Filed 12–4–12; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register
Vol. 77, No. 234
Wednesday, December 5, 2012

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

AGENCY FOR INTERNATIONAL DEVELOPMENT

Privacy Act of 1974; System of Records

AGENCY: United States Agency for International Development.

ACTION: Privacy Act System of Records Notice—Altered

SUMMARY: Pursuant to the provisions of the Privacy Act of 1974 (5 U.S.C. 552a), the United States Agency for International Development (USAID) is giving notice that it proposes to alter a system of records, the Partner Vetting System (PVS). This system supports the vetting of individuals, officers, or other officials of nongovernmental organizations who apply for USAID contracts, grants, cooperative agreements, or other funding, or who apply for registration with USAID as Private and Voluntary Organizations (PVOs), ensuring that neither USAID funds nor USAID-funded activities inadvertently or otherwise provide support to entities or individuals associated with terrorism.

DATES: Public comments must be received on or before January 10, 2013. Unless comments are received that would require a further revision, this altered system of records will become effective on January 10, 2013.

ADDRESSES: You may submit comments to:

Paper Comments

- *Fax:* (703) 666–5670.
- *Mail:* Chief Privacy Officer, United States Agency for International Development, 2733 Crystal Drive, 11th Floor, Arlington, Va. 22202.

Electronic Comments

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions on the Web site for submitting comments.
- *Email: privacy@usaid.gov.*

FOR FURTHER INFORMATION CONTACT: For general questions, please contact, USAID Privacy Office, United States Agency for International Development, 2733 Crystal Drive, 11th Floor, Arlington, Va. 22202. Email: *privacy@usaid.gov.*

SUPPLEMENTARY INFORMATION: USAID has established a system of records pursuant to the Privacy Act (5 U.S.C. 552a), entitled the Partner Vetting System (PVS) which includes the PVS Portal . Partner Vetting System supports the vetting of directors, officers, or other employees of non-governmental organizations who apply for USAID contract, grants, cooperative agreements or other funding, or who apply for registration with USAID as Private and Voluntary Organizations. The information collected from individuals is specifically used to conduct screening to ensure that USAID funds and USAID-funded activities are not purposefully or inadvertently used to provide support to entities or individuals deemed to be a risk to national security.

The PVS Portal provides these organizations with secure, web-based functionality for the completion, submission and tracking of Partner Information Forms (PIF's). This information is used to conduct screening to ensure that USAID funds as well as funded activities are not purposely or inadvertently used to provide support to entities or individuals deemed to be a risk to national security.

Dated: November 22, 2012.

William Morgan,

Chief Information Security Officer—Chief Privacy Officer.

USAID–027

SYSTEM NAME:

Partner Vetting System Portal.

SECURITY CLASSIFICATION:

Classified and Sensitive but Unclassified.

SYSTEM LOCATION:

Terremark; 50 NE 9th Street; Miami, FL 33132.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

a. Individuals who are directors, officers, or are otherwise employed by either for-profit or non-profit nongovernmental organizations who apply for USAID contracts, grants, cooperative agreements or other types of instruments;

b. Individuals who apply for personal services contracts or for other contracts, grants, or cooperative agreements;

c. Individuals or organizations who attempt to obtain other USAID assistance or benefits;

d. Individuals who are officers or other officials of non-profit, nongovernmental organizations who apply for registration with USAID as Private and Voluntary Organizations (PVOs).

CATEGORIES OF RECORDS IN THE SYSTEM:

Sensitive but Unclassified and nonexempt identifying information in this system includes, but is not limited to:

- Full name (including any aliases or variations of spelling),
- Date and place of birth,
- Government-issued identification information (including, but not limited to, social security number, passport number, or other numbers originated by a government that specifically identifies an individual),
- Current mailing address,
- Telephone and fax numbers,
- Email addresses,
- Country of origin and/or nationality,
- Citizenship,
- Gender, and
- Profession or other employment data.

Classified and exempt information in this system includes, but is not limited to:

- Results generated from the screening of individuals covered by this notice;
- Intelligence and law enforcement information related to national security; and
- National security vetting and terrorism screening information, provided to USAID by other agencies.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

18 U.S.C. 2339A, 2339B, 2339C; 22 U.S.C. 2151 *et seq.;* Section 559 of FY06 Foreign Operations Appropriations Act; Executive Orders 13224, 13099 and 12947; and HSPD–6.

PURPOSE(S):

To support the vetting of directors, officers, or other employees of nongovernmental organizations who apply for USAID contracts, grants, cooperative agreements or other funding or who apply for registration with USAID as Private and Voluntary Organizations. The information collected from these individuals is specifically used to conduct screening to ensure that USAID funds and USAID-funded activities are not purposefully or inadvertently used to provide support to entities or individuals deemed to be a risk to national security.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

USAID may disclose relevant system records in accordance with any current and future blanket routine uses established for its record systems. See the Statement of General Routine Uses (and amendments), 42 FR 47371 (September 20, 1977); 59 FR 52954 (October 20, 1994); 59 FR 62747 (December 6, 1994). Routine uses are not meant to be mutually exclusive and may overlap in some cases.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, PROTECTING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records in this system are stored in both paper and electronic format. Paper records are maintained by the USAID regional offices when the information cannot be collected electronically. Electronic storage is on servers (hard disk media) and magnetic tapes (or other backup media).

RETRIEVABILITY:

Records in this system are retrieved by individual name, date of birth, place of birth, social security numbers, passport numbers or other identifying data specified under Categories of Records in the System.

SAFEGUARDS:

USAID maintains all classified records in an authorized security container with access limited to authorized government personnel and authorized contractors. Physical security protections include guards and locked facilities requiring badges. Only authorized government personnel and authorized contractors can access records within the system. USAID mandates and certifies that physical and technological safeguards appropriate for classified and Sensitive but Unclassified systems are used to protect the records against unauthorized access. All authorized government personnel and authorized contractors with access to the system must hold appropriate security clearance, sign a non-disclosure agreement, and undergo both privacy and security training.

For paper records: Classified and Sensitive but Unclassified records are kept in an approved security container at the USAID Washington headquarters, and at the relevant location(s) where USAID has a program. Access to these records is limited to those authorized government personnel and authorized contractors who have a need for the records in the performance of their official duties.

For electronic records: Records are kept in a secure database in the USAID Washington headquarters. Access to the records is restricted to those authorized government personnel and authorized contractors with a specific role in the vetting process as part of the performance of their official duties. The PVS database is housed on and accessed from a Sensitive but Unclassified computer network. Vetting requests, analyses, and results will be stored separately on a classified computer network. Both computer networks and the PVS database require a user identification name and password and approval from the Office of Security. An audit trail is maintained and periodically reviewed to monitor access to the system. Authorized government personnel and authorized contractors assigned roles in the vetting process are provided role-specific training to ensure that they are knowledgeable in how to protect personally identifiable information.

RETENTION AND DISPOSAL:

Records in this system will be retained and disposed of in accordance with a records schedule approved by the National Archives and Records Administration.

SYSTEM MANAGER(S) AND ADDRESS:

Chief, Counterterrorism and Information Security Division, Office of Security, United States Agency for International Development, Ronald Reagan Building, 1300 Pennsylvania Avenue NW., Washington, DC 20523.

NOTIFICATION PROCEDURE:

Individuals requesting notification of the existence of records on them must send the request in writing to the Chief Privacy Officer, USAID, 2733 Crystal Drive, 11th Floor, Arlington, Va. 22202. The request must include the requestor's full name, his/her current address and a return address for transmitting the information. The request shall be signed by either notarized signature or by signature under penalty of perjury and reasonably specify the record contents being sought.

This system contains classified information related to the government's national security programs, records in this system may be exempt from notification, access, and amendment as permitted by subsection (j) and (k) of the Privacy Act.

RECORD ACCESS PROCEDURES:

Requests from individuals should be addressed or presented in person to the same addresses as stated in the Notification Section above. Requests should be accompanied by information sufficient to identify the individual pursuant to Sec. 215.4(c) or (d) of the Agency's Regulations as published in this issue of the **Federal Register**.

CONTESTING RECORD PROCEDURES:

An individual requesting amendment of a record maintained on himself or herself must identify the information to be changed and the corrective action sought. Requests must follow the "Notification Procedures" above.

RECORD SOURCE CATEGORIES:

Information in this system is obtained from the non-governmental organization's official who is responsible for completing the application package required to compete for USAID funds or who apply for registration with USAID as a Private and Voluntary Organization. In the case of applications by an individual in his/her own capacity, the information will be collected directly from the individual applicant. Information in this system may also be obtained from public sources, agencies conducting national security screening, law enforcement and intelligence agency record systems, and other government databases.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

22 CFR Part 215, Section 215.13 General Exemptions:

(c) The systems of records to be exempted under section (j)(2) of the Act, the provisions of the Act from which they are being exempted, and the justification for the exemptions, are set forth below:

(2) Partner Vetting System. This system is exempt from sections (c)(3) and (4); (d); (e)(1), (2), and (3); (e)(4)(G), (H), and (I); (e)(5) and (8); (f), (g), and (h) of *5 U.S.C. 552a*. These exemptions

are necessary to insure the proper functioning of the law enforcement activity, to protect confidential sources of information, to fulfill promises of confidentiality, to maintain the integrity of law enforcement procedures, to avoid premature disclosure of the knowledge of criminal activity and the evidentiary basis of possible enforcement actions, to prevent interference with law enforcement proceeding, to avoid the disclosure of investigative techniques, to avoid endangering law enforcement personnel, to maintain the ability to obtain candid and necessary information, to fulfill commitments made to sources to protect the confidentiality of information, to avoid endangering these sources, and to facilitate proper selection or continuance of the best applicants or persons for a given position or contract. Although the primary functions of USAID are not of a law enforcement nature, the mandate to ensure USAID funding is not purposefully or inadvertently used to provide support to entities or individuals deemed to be a risk to national security necessarily requires coordination with law enforcement and intelligence agencies as well as use of their information. Use of these agencies' information necessitates the conveyance of these other systems exemptions to protect the information as stated. [57 FR 38277, Aug. 24, 1992, as amended at 74 FR 16, Jan. 2, 2009]

22 CFR 215.14—Specific Exemptions.

(c) The systems of records to be exempted under section (k) of the Act, the provisions of the Act from which they are being exempted, and the justification for the exemptions, are set forth below:

(6) Partner Vetting System. This system is exempt under *5 U.S.C. 552a* (k)(1), (k)(2), and (k)(5) from the provision of *5 U.S.C. 552a* (c)(3); (d); (e)(1); (e)(4)(G), (H), (I); and (f). These exemptions are claimed to protect the materials required by executive order to be kept secret in the interest of national defense or foreign policy, to prevent subjects of investigation from frustrating the investigatory process, to insure the proper functioning and integrity of law enforcement activities, to prevent disclosure of investigative techniques, to maintain the ability to obtain candid and necessary information, to fulfill commitments made to sources to protect the confidentiality of information, to avoid endangering these sources; and to facilitate proper selection or continuance of the best applicants or persons for a given position or contract. [57 FR 38277, Aug. 24, 1992, as amended at 74 FR 17, Jan. 2, 2009]

Meredith Snee,

Privacy Analyst.

[FR Doc. 2012–29388 Filed 12–4–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

Agency Information Collection Activities: Proposed Collection; Comment Request; Supplemental Form for Collecting Taxpayer Identifying Numbers

AGENCY: Food and Nutrition Service, USDA.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice invites the general public and other public agencies to comment on the Agency's proposed information collection of taxpayer identifying numbers from all persons and organizations with which the Agency has a direct payment relationship. This collection is an extension of a currently approved information collection.

DATES: Written comments must be received on or before February 4, 2013.

ADDRESSES: Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (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 those who are to respond, including use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments may be sent to Mark Porter, Director, Office of Internal Controls, Audits and Investigations, Food and Nutrition Service, U.S. Department of Agriculture, 3101 Park Center Drive, Room 733, Alexandria, VA 22302. Comments may also be submitted via fax to the attention of Mark Porter at 703–605–0901 or via email to Mark.Porter@fns.usda.gov. Comments will also be accepted through the Federal eRulemaking Portal. Go to *http://www.regulations.gov,* and follow the online instructions for submitting comments electronically.

All responses to this notice will be summarized and included in the request for Office of Management and Budget (OMB) approval. All comments will be a matter of public record.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of this information collection should be directed to Mark Porter at (703) 305–0901.

SUPPLEMENTARY INFORMATION:

Title: Supplemental Form for Collecting Taxpayer Identifying Numbers, FNS–711.

OMB Number: 0584–0501.

Form Number: FNS–711.

Expiration Date: January 31, 2013.

Type of Request: Extension of a currently approved information collection.

Abstract: Section 31001(y) of the Debt Collection Improvement Act of 1996 (Pub. L. 104–134), codified at 31 U.S.C. 3325(d), requires Federal agencies to include the taxpayer identifying number (TIN) of all persons or organizations they pay whenever a request for payment is submitted to Federal payment officials. Departmental Regulation 2100–2 reflects the statutory provision at 31 U.S.C. 7701(c) which requires all individuals and entities doing business with USDA to furnish a TIN. The purpose of the Supplemental Form for Collecting Taxpayer Identifying Numbers is to comply with Federal law by enabling the Agency to legally obtain a TIN from all persons and organizations who are entered into a direct payment relationship with FNS.

Affected Public: Individuals and entities who enter into a direct payment agreement with FNS under any of the various nutrition and nutrition education programs administered by FNS.

Estimated Number of Respondents: 800.

Number of Responses per Respondent: 1.

Estimated Number of Annual Responses: 800.

Estimated Time per Response: 0.0833 hours.

Estimated Total Annual Burden on Respondents: 67 hours.

Dated: November 20, 2012.

Audrey Rowe,

Administrator, Food and Nutrition Service.

[FR Doc. 2012–29386 Filed 12–4–12; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF COMMERCE

Economic Development Administration

The National Advisory Council on Innovation and Entrepreneurship Meeting of the National Advisory Council on Innovation and Entrepreneurship

AGENCY: U.S. Department of Commerce.

ACTION: Notice of an open meeting.

SUMMARY: The National Advisory Council on Innovation and Entrepreneurship will hold a meeting on Tuesday, December 11, 2012. The open meeting will be held from 10:00 a.m.–12:00 p.m. and will be open to the public via conference call. The meeting will take place at the U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington DC 20230. The Council was chartered on November 10, 2009 to advise the Secretary of Commerce on matter related to innovation and entrepreneurship in the United States.

DATE: December 11, 2012.

Time: 10:00 a.m.–12:00 p.m. (EST).

ADDRESSES: U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230. Please specify if any specific requests for participation two business days in advance. Last minute requests will be accepted, but may be impossible to complete.

SUPPLEMENTARY INFORMATION: The purpose of the meeting is to discuss the latest initiatives by the Administration and the Secretary of Commerce on the issues of innovation, entrepreneurship and commercialization. The meeting will also discuss efforts by the U.S. Department of Commerce around manufacturing, exports and investment. Specific topics for discussion include manufacturing, investment, exports, innovation commercialization, entrepreneurship, federal programs for commercialization and technology transfer and a second term agenda supporting innovation, entrepreneurship and commercialization with senior Administration officials. Any member of the public may submit pertinent questions and comments concerning the Council's affairs at any time before or after the meeting. Comments may be submitted to the Office of Innovation and Entrepreneurship at the contact information below. Copies of the meeting minutes will be available within 90 days.

FOR FURTHER INFORMATION CONTACT: Nish Acharya, Office of Innovation and Entrepreneurship, Room 7019, 1401 Constitution Avenue, Washington, DC 20230; telephone: 202–482–4068; fax: 202–273–4781. Please reference "NACIE December 11, 2012" in the subject line of your fax.

Dated: November 11, 2012.

Nish Acharya,

Director, Office of Innovation & Entrepreneurship, U.S. Department of Commerce.

[FR Doc. 2012–28600 Filed 12–4–12; 8:45 am]

BILLING CODE 3510–03–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Order Denying Export Privileges

In the Matter of: Kue Sang Chun, currently incarcerated at: Register Number 56727–060, FCI Loretto, Federal Correctional Institution, P.O. Box 1,000, Loretto, PA 15940, and with an address at: 578 Treeside Lane, Avon Lake, OH 44012.

On November 10, 2011, in the U.S. District Court, Northern District of Ohio, Kue Sang Chun ("Chun") was convicted of violating Section 38 of the Arms Export Control Act (22 U.S.C. 2778 (2000)) ("AECA"). Specifically, Chun was convicted of knowingly exporting and causing the export from the United States to South Korea of Infra Red Focal Plane Array detectors and Infra Red camera engines which are designated as defense articles on the United States Munitions List, without having first obtained from the Department of State a license for such export or written authorization for such export. Chun was sentenced to 14 months in prison followed by two years of supervised release. Chun is also listed on the U.S. Department of State Debarred List.

Section 766.25 of the Export Administration Regulations ("EAR" or "Regulations")[1] provides, in pertinent part, that "[t]he Director of the Office of Exporter Services, in consultation with the Director of the Office of Export Enforcement, may deny the export privileges of any person who has been convicted of a violation of the [Export Administration Act ("EAA")], the EAR, or any order, license or authorization issued thereunder; any regulation, license, or order issued under the International Emergency Economic Powers Act (50 U.S.C. 1701–1706); 18 U.S.C. 793, 794 or 798; section 4(b) of the Internal Security Act of 1950 (50 U.S.C. 783(b)), or section 38 of the Arms Export Control Act (22 U.S.C. 2778)." 15 CFR 766.25(a); see also Section 11(h) of the EAA, 50 U.S.C. app. 2410(h). The denial of export privileges under this provision may be for a period of up to 10 years from the date of the conviction. 15 CFR 766.25(d); see also 50 U.S.C. app. 2410(h). In addition, Section 750.8 of the Regulations states that the Bureau of Industry and Security's Office of Exporter Services may revoke any Bureau of Industry and Security ("BIS") licenses previously issued in which the person had an interest in at the time of his conviction.

I have received notice of Chun's conviction for violating AECA, and have provided notice and an opportunity for Chun to make a written submission to BIS, as provided in Section 766.25 of the Regulations. I have received a submission from Chun. Based upon my review and consultations with BIS's Office of Export Enforcement, including its Director, and the facts available to BIS, I have decided to deny Chun's export privileges under the Regulations for a period of five years from the date of Chun's conviction. I have also decided to revoke all licenses issued pursuant to the Act or Regulations in which Chun had an interest at the time of his conviction.

Accordingly, it is hereby ordered

I. Until November 10, 2016, Kue Sang Chun, with last known addresses at: currently incarcerated at: Register Number 56727–060, FCI Loretto, Federal Correctional Institution, P.O. Box 1,000, Loretto, PA 15940, and with an address at: 578 Treeside Lane, Avon Lake, OH 44012, and when acting for or on behalf of Chun, his representatives, assigns, agents or employees (the "Denied Person"), may not, directly or indirectly, participate in any way in any transaction involving any commodity, software or technology (hereinafter collectively referred to as "item") exported or to be exported from the United States that is subject to the Regulations, including, but not limited to:

A. Applying for, obtaining, or using any license, License Exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise

[1] The Regulations are currently codified in the Code of Federal Regulations at 15 CFR Parts 730–774 (2012). The Regulations issued pursuant to the Export Administration Act (50 U.S.C. app. 2401–2420 (2000)) ("EAA"). Since August 21, 2001, the EAA has been in lapse and the President, through Executive Order 13222 of August 17, 2001 (3 CFR, 2001 Comp. 783 (2002)), which has been extended by successive Presidential Notices, the most recent being that of August 15, 2012 (77 FR 49699 (Aug. 16, 2012)), has continued the Regulations in effect under the International Emergency Economic Powers Act (50 U.S.C. 1701, *et seq.* (2000)).

servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations; or

C. Benefitting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations.

II. No person may, directly or indirectly, do any of the following:

A. Export or reexport to or on behalf of the Denied Person any item subject to the Regulations;

B. Take any action that facilitates the acquisition or attempted acquisition by the Denied Person of the ownership, possession, or control of any item subject to the Regulations that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby the Denied Person acquires or attempts to acquire such ownership, possession or control;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from the Denied Person of any item subject to the Regulations that has been exported from the United States;

D. Obtain from the Denied Person in the United States any item subject to the Regulations with knowledge or reason to know that the item will be, or is intended to be, exported from the United States; or

E. Engage in any transaction to service any item subject to the Regulations that has been or will be exported from the United States and which is owned, possessed or controlled by the Denied Person, or service any item, of whatever origin, that is owned, possessed or controlled by the Denied Person if such service involves the use of any item subject to the Regulations that has been or will be exported from the United States. For purposes of this paragraph, servicing means installation, maintenance, repair, modification or testing.

III. After notice and opportunity for comment as provided in Section 766.23 of the Regulations, any other person, firm, corporation, or business organization related to Chun by affiliation, ownership, control or position of responsibility in the conduct of trade or related services may also be subject to the provisions of this Order if necessary to prevent evasion of the Order.

IV. This Order does not prohibit any export, reexport, or other transaction subject to the Regulations where the only items involved that are subject to the Regulations are the foreign-produced direct product of U.S.-origin technology.

V. This Order is effective immediately and shall remain in effect until November 10, 2016.

VI. In accordance with Part 756 of the Regulations, Chun may file an appeal of this Order with the Under Secretary of Commerce for Industry and Security. The appeal must be filed within 45 days from the date of this Order and must comply with the provisions of Part 756 of the Regulations.

VII. A copy of this Order shall be delivered to the Chun. This Order shall be published in the **Federal Register**.

Issued this _28th day of November, 2012.

Bernard Kritzer,

Director, Office of Exporter Services.

[FR Doc. 2012–29374 Filed 12–4–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–938]

Citric Acid and Certain Citrate Salts From the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2010

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (the Department) has completed its administrative review of the countervailing duty (CVD) order on citric acid and certain citrate salts from the People's Republic of China for the period January 1, 2010, through December 31, 2010. On June 5, 2012, we published the preliminary results of this review.[1]

We provided interested parties with an opportunity to comment on the *Preliminary Results*. Our analysis of the comments submitted has not resulted in a change to the net subsidy rate for RZBC Co., Ltd., RZBC Juxian Co., Ltd., RZBC Imp. & Exp. Co., Ltd., and RZBC Group Shareholding Co., Ltd. (collectively, the RZBC Companies or RZBC). The final net subsidy rate for the RZBC Companies is listed below in the section entitled "Final Results of Review."

DATES: *Effective Date:* December 5, 2012.

FOR FURTHER INFORMATION CONTACT: Kristen Johnson or Patricia Tran, AD/CVD Operations, Office 3, Import Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone (202) 482–4793 and (202) 482–1503, respectively.

SUPPLEMENTARY INFORMATION:

Background

Following the *Preliminary Results*, we received a case brief from the Government of the People's Republic of China (GOC) and the RZBC Companies on July 12, 2012, and a rebuttal brief from Petitioners[2] on July 23, 2012. We did not hold a hearing in this review, as one was not requested.

Scope of the Order

The merchandise subject to the order is citric acid and certain citrate salts. The product is currently classified under the Harmonized Tariff Schedule of the United States (HTSUS) item numbers 2918.14.0000, 2918.15.1000, 2918.15.5000, 3824.90.9290, and 3824.90.9290. Although the HTSUS numbers are provided for convenience and customs purposes, the written product description, available in *Citric Acid and Certain Citrate Salts from the People's Republic of China: Notice of Countervailing Duty Order*, 74 FR 25705 (May 29, 2009), remains dispositive.

Analysis of Comments Received

All issues raised in the case briefs filed by the GOC and the RZBC Companies and the rebuttal brief filed by Petitioners are addressed in the Memorandum from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Ronald K. Lorentzen, Acting Assistant Secretary for Import Administration, entitled "Issues and Decision Memorandum for the Final Results of the Countervailing Duty Administrative Review of Citric Acid and Certain Citrate Salts from the People's Republic of China," signed concurrently with this notice (Issues and Decision Memorandum), which is hereby adopted by this notice. A list of the issues raised is attached to this notice as Appendix I. The Issues and Decision Memorandum is a public document and is on file electronically via Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System (IA ACCESS). IA ACCESS is available to registered users at *http://iaaccess.trade.gov* and in the Central Records Unit, room 7046 of the main

[1] *See Citric Acid and Certain Citrate Salts from the People's Republic of China: Preliminary Results of Countervailing Duty Administrative Review*, 77 FR 33167 (June 5, 2012) (*Preliminary Results*).

[2] Petitioners are Archer Daniels Midland Company, Cargill, Incorporated, and Tate & Lyle Ingredients Americas LLC.

Department of Commerce building. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly on the internet at *http://www.trade.gov/ia/*. The signed Issues and Decision Memorandum and the electronic versions of the Issues and Decision Memorandum are identical in content.

Final Results of Review

In accordance with 19 CFR 351.221(b)(5), we calculated a subsidy rate for the mandatory respondent, the RZBC Companies.

Producer/Exporter	Net subsidy rate
RZBC Co., Ltd., RZBC Juxian Co., Ltd., RZBC Imp. & Exp. Co., Ltd., and RZBC Group Shareholding Co., Ltd	5.27%

Assessment Rates

The Department intends to issue appropriate assessment instructions directly to U.S. Customs and Border Protection (CBP) 15 days after the date of publication of these final results, to liquidate shipments of subject merchandise by the RZBC Companies entered, or withdrawn from warehouse, for consumption on or after January 1, 2010, through December 31, 2010.

Cash Deposit Instructions

The Department also intends to instruct CBP to collect cash deposits of estimated countervailing duties in the amounts shown above on shipments of subject merchandise by the RZBC Companies entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this review. For all non-reviewed companies, we will instruct CBP to continue to collect cash deposits at the most recent company-specific or country-wide rate applicable to the company. Accordingly, the cash deposit rates that will be applied to companies covered by this order, but not examined in this review, are those established in the most recently completed segment of the proceeding for each company. These cash deposit requirements, when imposed, shall remain in effect until further notice.

Administrative Protective Order

This notice serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

We are issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Tariff Act of 1930, as amended.

Dated: November 29, 2012.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

Appendix—Issues in Decision Memorandum

Comment 1: Authority to Apply CVD to the PRC
Comment 2: Double-Counting
Comment 3: Countervailability of Shandong Province Policy Loans
Comment 4: Specificity Findings for Sulfuric Acid and Steam Coal
Comment 5: Use of Tier One Benchmark for Sulfuric Acid and Steam Coal
Comment 6: Whether Certain Input Suppliers Are Government Authorities
Comment 7: Rejection of RZBC's Submission
Comment 8: Export Prices for Sulfuric Acid from India and Thailand

[FR Doc. 2012–29429 Filed 12–4–12; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–942]

Certain Kitchen Appliance Shelving and Racks from the People's Republic of China: Countervailing Duty Administrative Review, 2010; Correction

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On October 9, 2012, the Department of Commerce (Department) published in the **Federal Register** a notice of preliminary results and partial rescission of administrative review concerning the countervailing duty order on certain kitchen appliance shelving and racks from the People's Republic of China. *See Certain Kitchen Appliance Shelving and Racks From the People's Republic of China: Countervailing Duty Administrative Review; 2010,* 77 FR 61396 (October 9, 2012) (*Preliminary Results*). The *Preliminary Results* inadvertently omitted the assessment instructions that pertain to the rescission of review for six producers/exporters.

DATES: *Effective Date:* December 5, 2012.

FOR FURTHER INFORMATION CONTACT: Jennifer Meek or Mary Kolberg, Office of AD/CVD Operations, Office 1, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–2778 and (202) 482–1785, respectively.

Background

In the *Preliminary Results,* the Department partially rescinded this administrative review with respect to the following companies: Asia Pacific CIS (Wuxi) Co., Ltd.; Guangdong Wireking Co., Ltd. (formerly known as Foshun Shunde Wireking Housewares & Hardware); Hangzhou Dunli Import & Export Co., Ltd. and Hangzhou Dunli Industry Co., Ltd.; Hengtong Hardware Manufacturing (Huizhou) Co., Ltd.; Jiangsu Weixi Group Co.; and Leader Metal Industry Co., Ltd. (aka Marmon Retail Services Asia).

Assessment

The Department will instruct U.S. Customs and Border Protection (CBP) to assess countervailing duties on all appropriate entries. For the companies for which this review is rescinded, countervailing duties shall be assessed at rates equal to the cash deposit of estimated countervailing duties required at the time of entry, or withdrawal from warehouse, for consumption, during the period January 1, 2010, through December 31, 2010, in accordance with 19 CFR 351.212(c)(1)(i).

The Department intends to issue appropriate assessment instructions directly to CBP 15 days after publication of this notice.

Dated: November 28, 2012

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

[FR Doc. 2012–29427 Filed 12–4–12; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[Application No. 85–17A18]

Export Trade Certificate of Review

ACTION: Notice of Application to Amend the Export Trade Certificate of Review Issued to U.S. Shippers Association No. 85–17A18.

SUMMARY: The Office of Competition and Economic Analysis ("OCEA") of the International Trade Administration, Department of Commerce, has received an application to amend an Export

Trade Certificate of Review ("Certificate"). This notice summarizes the proposed amendment and requests comments relevant to whether the amended Certificate should be issued.

FOR FURTHER INFORMATION CONTACT: Joseph Flynn, Director, Office of Competition and Economic Analysis, International Trade Administration, (202) 482–5131 (this is not a toll-free number) or *email at etca@trade.gov.*

SUPPLEMENTARY INFORMATION: Title III of the Export Trading Company Act of 1982 (15 U.S.C. 4001–21) authorizes the Secretary of Commerce to issue Export Trade Certificates of Review. An Export Trade Certificate of Review protects the holder and the members identified in the Certificate from State and Federal government antitrust actions and from private treble damage antitrust actions for the export conduct specified in the Certificate and carried out in compliance with its terms and conditions. Section 302(b)(1) of the Export Trading Company Act of 1982 and 15 CFR 325.6(a) require the Secretary to publish a notice in the **Federal Register** identifying the applicant and summarizing its proposed export conduct.

Request for Public Comments

Interested parties may submit written comments relevant to the determination whether an amended Certificate should be issued. If the comments include any privileged or confidential business information, it must be clearly marked and a nonconfidential version of the comments (identified as such) should be included. Any comments not marked as privileged or confidential business information will be deemed to be nonconfidential.

An original and five (5) copies, plus two (2) copies of the nonconfidential version, should be submitted no later than 20 days after the date of this notice to: Export Trading Company Affairs, International Trade Administration, U.S. Department of Commerce, Room 7025, Washington, DC 20230.

Information submitted by any person is exempt from disclosure under the Freedom of Information Act (5 U.S.C. 552). However, nonconfidential versions of the comments will be made available to the applicant if necessary for determining whether or not to issue the Certificate. Comments should refer to this application as "Export Trade Certificate of Review, application number 85–17A18."

The U.S. Shippers Association's original Certificate was issued on June 3, 1986 (51 FR 20873, June 9, 1986), and last amended on April 6, 2006 (71 FR 18721, April 12, 2006). A summary of the current application for an amendment follows.

Summary of the Application

Applicant: U.S. Shippers Association ("USSA"), 3715 East Valley Drive, Missouri City, Texas 77459.

Contact: Antonio F De Santis, Project Director. Telephone: (281) 437–1616.

Application No.: 85–17A18.

Date Deemed Submitted: November 21, 2012.

Proposed Amendment: USSA seeks to amend its Certificate to: Add each of the following companies and persons as a new "Member" of the Certificate within the meaning of section 325.2(1) of the Regulations (15 CFR 325.2(1)):

(a) Phibro Animal Health Corporation, 300 Frank W. Burr Boulevard, Teaneck, NJ 07666, and

(b) Altimore Consultants, LLC, 17202 Pleasant Road, Needville, TX 77461.

In addition, the following member has been subject to a purchase:

Rhodia, Inc., Cranbury, NJ 08512–7500 has been purchased by Solvay America, Inc., Houston, TX 77098, which also owns member Solvay Chemicals, Inc. of the same address.

The following companies are deleted as members:

Hexion Specialty Chemicals, Houston, TX;

KRATON Polymers U.S. LLC, Houston, TX;

Sartomer USA, LLC, Exton, PA;

Shell Chemical and Oil Products Companies, Houston, TX;

Taminco, Inc., Taminco Higher Amines, Inc., and Taminco Methylamines, Inc., Allentown, PA .

Dated: November 30, 2012.

Joseph E. Flynn,

Director, Office of Competition and Economic Analysis.

[FR Doc. 2012–29408 Filed 12–4–12; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

International Trade Administration

North American Free Trade Agreement (NAFTA), Article 1904 Binational Panel Reviews

AGENCY: NAFTA Secretariat, United States Section, International Trade Administration, Department of Commerce.

ACTION: Notice of Completion of Panel Review of the Department of Commerce's final determination of Stainless Steel Sheet and Strip in Coils from Mexico (Secretariat File No. USA–MEX–2007–1904–01).

SUMMARY: Pursuant to the Order of the Binational Panel dated October 16, 2012, the panel review was completed on November 29, 2012.

FOR FURTHER INFORMATION CONTACT: Ellen Bohon, United States Secretary, NAFTA Secretariat, Suite 2061, 14th and Constitution Avenue, Washington, DC 20230, (202) 482–5438.

SUPPLEMENTARY INFORMATION: On October 16, 2012, the Binational Panel issued an Order granting a joint motion filed by the Investigating Authority (U.S. Department of Commerce) and the Complainant (ThyssenKrupp Mexinox S.A. de C.V. and Mexinox USA, Inc.) to dismiss the panel review concerning the Department of Commerce's final determination concerning Stainless Steel Sheet and Strip in Coils from Mexico. The Secretariat was instructed to issue a Notice of Completion of Panel Review on the 31st day following the issuance of the Notice of Final Panel Action, if no request for an Extraordinary Challenge Committee was filed. No such request was filed. Therefore, on the basis of the Panel Order and Rule 80 of the *Article 1904 Panel Rules,* the Panel Review was completed and the panelists were discharged from their duties effective November 29, 2012.

Dated: November 29, 2012.

Ellen M. Bohon,

United States Secretary, NAFTA Secretariat.

[FR Doc. 2012–29396 Filed 12–4–12; 8:45 am]

BILLING CODE 3510–GT–P

DEPARTMENT OF COMMERCE

International Trade Administration

North American Free-Trade Agreement, Article 1904 NAFTA Panel Reviews; Request for Panel Review

AGENCY: NAFTA Secretariat, United States Section, International Trade Administration, Department of Commerce.

ACTION: Notice of First Request for Panel Review.

SUMMARY: On September 3, 2012, Sanderson Farms. Inc., filed a First Request for Panel Review with the Mexican Section of the NAFTA Secretariat pursuant to Article 1904 of the North American Free Trade Agreement. Panel Review was requested of the Final resolution of the Countervailing Duty Administrative Review, regarding the importation of chicken leg quarters originating from the United States of America. This determination was published in the *Diario Oficial de la Federación,* on

August 6, 2012. The NAFTA Secretariat has assigned Case Number MEX–USA–2012–1904–01 to this request.

FOR FURTHER INFORMATION CONTACT: Ellen M. Bohon, United States Secretary, NAFTA Secretariat, Suite 2061, 14th and Constitution Avenue NW., Washington, DC 20230, (202) 482–5438.

SUPPLEMENTARY INFORMATION: Chapter 19 of the North American Free-Trade Agreement ("Agreement") established a mechanism to replace domestic judicial review of final determinations in antidumping and countervailing duty cases involving imports from a NAFTA country with review by independent binational panels. When a Request for Panel Review is filed, a panel is established to act in place of national courts to review expeditiously the final determination to determine whether it conforms with the antidumping or countervailing duty law of the country that made the determination.

Under Article 1904 of the Agreement, which came into force on January 1, 1994, the Government of the United States, the Government of Canada, and the Government of Mexico established *Rules of Procedure for Article 1904 Binational Panel Reviews* ("Rules"). These Rules were published in the **Federal Register** on February 23, 1994 (59 FR 8686).

A first Request for Panel Review was filed with the Mexican Section of the NAFTA Secretariat, pursuant to Article 1904 of the Agreement, on September 3, 2012, requesting a panel review of the determination and order described above.

The Rules provide that:

(a) A Party or interested person may challenge the final determination in whole or in part by filing a Complaint in accordance with Rule 39 within 30 days after the filing of the first Request for Panel Review;

(b) A Party, investigating authority or interested person that does not file a Complaint but that intends to appear in support of any reviewable portion of the final determination may participate in the panel review by filing a Notice of Appearance in accordance with Rule 40 within 45 days after the filing of the first Request for Panel; and

(c) The panel review shall be limited to the allegations of error of fact or law, including the jurisdiction of the investigating authority, that are set out in the Complaints filed in panel review and the procedural and substantive defenses raised in the panel review.

Dated: November 29, 2012.

Ellen M. Bohon,

United States Secretary, NAFTA Secretariat.

[FR Doc. 2012–29387 Filed 12–4–12; 8:45 am]

BILLING CODE 3510–GT–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC372

Endangered Species; File No. 17381

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

ACTION: Notice; receipt of application.

SUMMARY: Notice is hereby given that Kristen Hart, Ph.D., United States Geological Survey, Southeast Ecological Science Center, 3205 College Avenue, Davie, FL 33314, has applied in due form for a permit to take green (*Chelonia mydas*), loggerhead (*Caretta caretta*), hawksbill (*Eretmochelys imbricata*), and Kemp's ridley (*Lepidochelys kempii*) sea turtles for the purposes of scientific research.

DATES: Written, telefaxed, or emailed comments must be received on or before January 4, 2013.

ADDRESSES: The application and related documents are available for review by selecting Records Open for Public Comment from the *Features* box on the Applications and Permits for Protected Species (APPS) home page, *https://apps.nmfs.noaa.gov,* and then selecting File No. 17183 from the list of available applications.

These documents are also available upon written request or by appointment in the following offices:

Permits and Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301) 427–8401; fax (301) 713–0376; and

Southeast Region, NMFS, 263 13th Avenue South, Saint Petersburg, FL 33701; phone (727) 824–5312; fax (727) 824–5309.

Written comments on this application should be submitted to the Chief, Permits and Conservation Division

- By email to *NMFS.Pr1Comments@noaa.gov* (include the File No. in the subject line of the email),
- By facsimile to (301) 713–0376, or
- At the address listed above.

Those individuals requesting a public hearing should submit a written request to the Chief, Permits and Conservation Division at the address listed above. The request should set forth the specific reasons why a hearing on this application would be appropriate.

FOR FURTHER INFORMATION CONTACT: Colette Cairns or Amy Hapeman, (301) 427–8401.

SUPPLEMENTARY INFORMATION: The subject permit is requested under the authority of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*) and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR 222–226).

The applicant requests a 5-year permit to continue long-term research on the demographics and movements of green, loggerhead, hawksbill, and Kemp's ridley sea turtles in Florida waters. This research would take place in and around the Dry Tortugas National Park, and in the coastal waters off Florida in the Gulf of Mexico. The objectives of the research are to: (1) Obtain information on fine-scale temporal and spatial patterns of sea turtle habitat use and movement patterns inside and outside the National Park; (2) examine diet through stable isotope analysis; and (3) determine genetic distinctiveness and connectivity to other populations. Researchers would capture sea turtles by rodeo capture, cast net, tangle net, dip net or hand capture. Turtles would be weighed, measured, flipper tagged, passive integrated transponder tagged, blood sampled, tissue sampled, scute sampled, epibiota sampled, fecal sampled, undergo gastric lavage, temporarily carapace marked, photographed, and released. A subset of turtles would be fitted with some combination of up to three telemetry tags—e.g., satellite tag, acoustic transmitter, and/or accelerometer,—and tracked; upon recapture, these animals would have the tags removed.

Dated: November 30, 2012.

P. Michael Payne,

Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2012–29323 Filed 12–4–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC283

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Rocky Intertidal Monitoring Surveys along the Oregon and California Coasts

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

ACTION: Notice; issuance of an incidental harassment authorization.

SUMMARY: In accordance with the Marine Mammal Protection Act (MMPA) regulations, notification is hereby given that NMFS has issued an Incidental Harassment Authorization (IHA) to the Partnership for Interdisciplinary Study of Coastal Oceans (PISCO) at the University of California (UC) Santa Cruz to take marine mammals, by harassment, incidental to rocky intertidal monitoring surveys.

DATES: Effective December 3, 2012, through December 2, 2013.

ADDRESSES: A copy of the authorization, application, and associated Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) may be obtained by writing to Michael Payne, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910, 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, other means of effecting the least practicable impact on the species or stock and its habitat, and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth. NMFS has defined "negligible impact" in 50 CFR 216.103 as "* * * an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival."

Section 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the United States can apply for an authorization to incidentally take small numbers of marine mammals by harassment. Section 101(a)(5)(D) establishes a 45-day time limit for NMFS review of an application followed by 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

On July 18, 2012, NMFS received an application from PISCO for the taking of marine mammals incidental to rocky intertidal monitoring surveys along the Oregon and California coasts. NMFS determined that the application was adequate and complete on September 11, 2012. On October 19, 2012, we published a notice in the **Federal Register** of our proposal to issue an IHA with preliminary determinations and explained the basis for the proposal and preliminary determinations (77 FR 64320). The notice initiated a 30-day public comment period. Responses are discussed below.

The research group at UC Santa Cruz operates in collaboration with two large-scale marine research programs: PISCO and the Multi-agency Rocky Intertidal Network. The research group at UC Santa Cruz (PISCO) is responsible for many of the ongoing rocky intertidal monitoring programs along the Pacific coast. Monitoring occurs at rocky intertidal sites, often large bedrock benches, from the high intertidal to the water's edge. Long-term monitoring projects include Community Structure Monitoring, Intertidal Biodiversity Surveys, Marine Protected Area Baseline Monitoring, Intertidal Recruitment Monitoring, and Ocean Acidification. Research is conducted throughout the year along the California and Oregon coasts and will continue indefinitely. Most sites are sampled one to three times per year over a 4–6 hour period during a negative low tide series. This IHA is only effective for a 12-month period. The following specific aspects of the activities are likely to result in the take of marine mammals: Presence of survey personnel near pinniped haulout sites and approach of survey personnel towards hauled out pinnipeds. Take, by Level B harassment only, of individuals of three species of marine mammals is anticipated to result from the specified activity.

Description of the Specified Activity and Specified Geographic Region

PISCO focuses on understanding the nearshore ecosystems of the U.S. west coast through a number of interdisciplinary collaborations. PISCO integrates long-term monitoring of ecological and oceanographic processes at dozens of sites with experimental work in the lab and field. A short description is contained here. Additional information can be found in PISCO's application (see **ADDRESSES**) and the Notice of Proposed IHA (77 FR 64320, October 19, 2012).

Community Structure Monitoring involves the use of permanent photoplot quadrats which target specific algal and invertebrate assemblages (e.g. mussels, rockweeds, barnacles). This project provides managers with insight into the causes and consequences of changes in species abundance. Each Community Structure site is surveyed over a 1-day period during a low tide series one to three times a year. Sites, location, number of times sampled per year, and typical sampling months for each site are presented in Table 1 in PISCO's application (see **ADDRESSES**).

Biodiversity Surveys, which are part of a long-term monitoring project and are conducted every 3–5 years at established sites, involve point contact

identification along permanent transects, mobile invertebrate quadrat counts, sea star band counts, and tidal height topographic measurements. Table 2 in PISCO's application (see **ADDRESSES**) lists established biodiversity sites in Oregon and California.

In September 2007, the state of California began establishing a network of Marine Protected Areas along the California coast as part of the Marine Life Protection Act (MLPA). Under baseline monitoring programs funded by Sea Grant and the Ocean Protection Council, PISCO established additional intertidal monitoring sites in the Central Coast (Table 3 in PISCO's application), North Central Coast (Table 4 in PISCO's application), and South Coast (Table 5 in PISCO's application) study regions.

Intertidal recruitment monitoring collects data on invertebrate larval recruitment on a monthly basis at two central California sites. Mussel and other bivalve recruits are collected in mesh pot-scrubbers bolted into the substrate. Barnacle recruits and cyprids are collected on PVC plates covered in non-slip tape and bolted to the substrate.

The Ocean Margin Ecosystems Group for Acidification Studies is a National Science Foundation funded project that involves research at eight sites along the California Current upwelling system from Southern California into Oregon. PISCO is responsible for research at two of these sites, Hopkins and Terrace Point, located in the Monterey Bay region of mainland California. The intention of this collaboration is to monitor oceanic pH on large spatial and temporal scales and to determine if any relationship exists between changing ocean chemistry and the states of two key intertidal organisms, the purple urchin and the California mussel.

Specified Geographic Location and Activity Timeframe

PISCO's research is conducted throughout the year along the California and Oregon coasts. Figures 1 through 4 in PISCO's application depict regularly sampled sites. Red stars in the figures indicate sites where pinnipeds are found during monitoring survey activities. Most sites are sampled one to three times per year over a 1-day period (4–6 hours per site) during a negative low tide series. Due to the large number of research sites, scheduling constraints, the necessity for negative low tides and favorable weather/ocean conditions, exact survey dates are variable and difficult to predict. Table 1 in PISCO's application (see **ADDRESSES**) outlines the typical sampling season for the various locations. Some sampling is anticipated to occur in all months, except for January, August, and September.

The intertidal zones where PISCO conducts intertidal monitoring are also areas where pinnipeds can be found hauled out on the shore at or adjacent to some research sites. Accessing portions of the intertidal habitat may cause incidental Level B (behavioral) harassment of pinnipeds through some unavoidable approaches if pinnipeds are hauled out directly in the study plots or while biologists walk from one location to another. No motorized equipment is involved in conducting these surveys. The species for which Level B harassment is authorized are: California sea lions (*Zalophus californianus californianus*); harbor seals (*Phoca vitulina richardii*); and northern elephant seals (*Mirounga angustirostris*).

Comments and Responses

A Notice of Proposed IHA was published in the **Federal Register** on October 19, 2012 (77 FR 64320) for public comment. During the 30-day public comment period, NMFS received one letter from the Marine Mammal Commission (MMC). No other organizations or private citizens provided comments on the proposed issuance of an IHA for this activity.

Comment: The MMC notes that the take table in the application underestimated the number of takes based on the take estimation method within the text. If that problem is fixed, then the MMC concurs with NMFS' preliminary finding and recommends that NMFS issue the requested IHA (1) with the proposed mitigation and monitoring measures and (2) after revising the number of takes in the take table to be consistent with the take estimation method in the text of the application.

Response: NMFS has included all of the mitigation and monitoring measures proposed in the Notice of Proposed IHA (77 FR 64320, October 19, 2012) in the issued IHA. Additionally, NMFS has corrected the take estimates noted in Table 7 of PISCO's application to match the text contained on pages 16–18 of the application. Specific changes that were made to the table include the removal of takes of northern elephant seals at Sea Ranch and Hopkins. The northern elephant seal takes at Hopkins were correctly moved to the harbor seal pup columns in the table to account for the potential presence of harbor seal pups at that location. Take events per year were increased to three at Stillwater and Government Point and to two events per year at Carmel Point and Piedras Blancas. A small number of harbor seal pup takes are now included for Carmel Point. Now that these corrections have been made, the take levels outlined in the table match with those described in the text. Table 1 in this document reflects the correct number of authorized take, by Level B harassment, for each species.

Description of Marine Mammals in the Area of the Specified Activity

Several pinniped species can be found along the California and Oregon coasts. The three that are most likely to occur at some of the research sites are California sea lion, harbor seal, and northern elephant seal. None of these species are listed as threatened or endangered under the U.S. Endangered Species Act (ESA) or as depleted under the MMPA. On rare occasions, PISCO researchers have seen very small numbers (i.e., five or fewer) of Steller sea lions at one of the sampling sites. These sightings are rare. Therefore, encounters are not expected. However, if Steller sea lions are sighted before approaching a sampling site, researchers will abandon approach and return at a later date. For this reason, this species is not considered further in this IHA.

We refer the public to Carretta *et al.* (2011) for general information on these species which are presented below this section. The publication is available on the internet at: *http://www.nmfs.noaa.gov/pr/pdfs/sars/po2011.pdf.* Additional information on the status, distribution, seasonal distribution, and life history can also be found in PISCO's application and NMFS' Notice of Proposed IHA (77 FR 64320, October 19, 2012). The information has not changed and is therefore not repeated here.

California (southern) sea otters (*Enhydra lutris nereis*), listed as threatened under the ESA and categorized as depleted under the MMPA, usually range in coastal waters within 2 km (1.2 mi) of shore. This species is managed by the U.S. Fish and Wildlife Service and is not considered further in this notice.

Potential Effects of the Specified Activity on Marine Mammals

The appearance of researchers may have the potential to cause Level B harassment of any pinnipeds hauled out at sampling sites. Although marine mammals are never deliberately approached by abalone survey personnel, approach may be unavoidable if pinnipeds are hauled out in the immediate vicinity of the permanent study plots. Disturbance may result in reactions ranging from an

animal simply becoming alert to the presence of researchers (e.g., turning the head, assuming a more upright posture) to flushing from the haul-out site into the water. NMFS does not consider the lesser reactions to constitute behavioral harassment, or Level B harassment takes, but rather assumes that pinnipeds that move greater than 1 m (3.3 ft) or change the speed or direction of their movement in response to the presence of researchers are behaviorally harassed, and thus subject to Level B taking. Animals that respond to the presence of researchers by becoming alert, but do not move or change the nature of locomotion as described, are not considered to have been subject to behavioral harassment. NMFS' Notice of Proposed IHA (77 FR 64320, October 19, 2012) contains information regarding potential impacts to marine mammals from the specified activity. The information has not changed and is therefore not repeated here.

Typically, even those reactions constituting Level B harassment would result at most in temporary, short-term disturbance. In any given study season, researchers will visit sites one to three times per year for a total of 4–6 hours per visit. Therefore, disturbance of pinnipeds resulting from the presence of researchers lasts only for short periods of time and is separated by significant amounts of time in which no disturbance occurs. Because such disturbance is sporadic, rather than chronic, and of low intensity, individual marine mammals are unlikely to incur any detrimental impacts to vital rates or ability to forage and, thus, loss of fitness. Correspondingly, even local populations, much less the overall stocks of animals, are extremely unlikely to accrue any significantly detrimental impacts.

NMFS does not anticipate that the activities would result in the injury, serious injury, or mortality of pinnipeds because pups are only found at a couple of the sampling locations during certain times of the year and that many rookeries occur on the offshore islands and not the mainland areas where the activities would occur. In addition, researchers will exercise appropriate caution approaching sites, especially when pups are present and will redirect activities when pups are present.

Anticipated Effects on Marine Mammal Habitat

The only habitat modification associated with the activity is the placement of permanent bolts and other sampling equipment in the intertidal. Bolts are installed during the set-up of a site and, at existing sites, this has already occurred. In some instances, bolts will need to be replaced or installed for new plots. Bolts are 7.6 to 12.7 cm (2 to 5 in) long, stainless steel 1 cm (⅜ in) Hex or Carriage bolts. They are installed by drilling a hole with a battery powered DeWalt 24 volt rotary hammer drill with a 1 cm (⅜ in) bit. The bolts protrude 1.3–7.6 cm (0.5–3 in) above the rock surface and are held in place with marine epoxy. Although the drill does produce noticeable noise, researchers have never observed an instance where near-by or offshore marine mammals were disturbed by it. Any marine mammal at the site would likely be disturbed by the presence of researchers and retreat to a distance where the noise of the drill would not increase the disturbance. In most instances, wind and wave noise also drown out the noise of the drill. The installation of bolts and other sampling equipment is conducted under the appropriate permits (Monterey Bay National Marine Sanctuary, California State Parks). Once a particular study has ended, the respective sampling equipment is removed. No trash or field gear is left at a site. Thus, the activity is not expected to have any habitat-related effects, including to marine mammal prey species, that could cause significant or long-term consequences for individual marine mammals or their populations.

Mitigation

In order to issue an incidental take authorization (ITA) under Section 101(a)(5)(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).

PISCO shall implement several mitigation measures to reduce potential take by Level B (behavioral disturbance) harassment. Measures include: (1) Conducting slow movements and staying close to the ground to prevent or minimize stampeding; (2) avoiding loud noises (i.e., using hushed voices); (3) avoiding pinnipeds along access ways to sites by locating and taking a different access way and vacating the area as soon as sampling of the site is completed; (4) monitoring the offshore area for predators (such as killer whales and white sharks) and avoid flushing of pinnipeds when predators are observed in nearshore waters; (5) using binoculars to detect pinnipeds before close approach to avoid being seen by animals; (6) only flushing pinnipeds if they are located in the sampling plots and there are no other means to accomplish the survey (however, flushing must be done slowly and quietly so as not to cause a stampede); (7) no intentional flushing if pups are present at the sampling site; and (8) rescheduling sampling if Steller sea lions are present at the site.

The methodologies and actions noted in this section will be utilized and are included as mitigation measures in the IHA to ensure that impacts to marine mammals are mitigated to the lowest level practicable. The primary method of mitigating the risk of disturbance to pinnipeds, which will be in use at all times, is the selection of judicious routes of approach to study sites, avoiding close contact with pinnipeds hauled out on shore, and the use of extreme caution upon approach. In no case will marine mammals be deliberately approached by survey personnel, and in all cases every possible measure will be taken to select a pathway of approach to study sites that minimizes the number of marine mammals potentially harassed. In general, researchers will stay inshore of pinnipeds whenever possible to allow maximum escape to the ocean. Each visit to a given study site will last for approximately 4–6 hours, after which the site is vacated and can be re-occupied by any marine mammals that may have been disturbed by the presence of researchers. By arriving before low tide, worker presence will tend to encourage pinnipeds to move to other areas for the day before they haul out and settle onto rocks at low tide.

PISCO will suspend sampling and monitoring operations immediately if an injured marine mammal is found in the vicinity of the project area and the monitoring activities could aggravate its condition.

NMFS has carefully evaluated PISCO'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.

Based on our evaluation of the final mitigation measures, NMFS has determined that they provide the means of effecting the least practicable impact on marine mammal species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

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.

PISCO can add to the knowledge of pinnipeds in California and Oregon by noting observations of: (1) Unusual behaviors, numbers, or distributions of pinnipeds, such that any potential follow-up research can be conducted by the appropriate personnel: (2) tag-bearing carcasses of pinnipeds, allowing transmittal of the information to appropriate agencies and personnel; and (3) rare or unusual species of marine mammals for agency follow-up.

Monitoring requirements in relation to PISCO's rocky intertidal monitoring include observations made by the applicant. Information recorded will include species counts (with numbers of pups/juveniles when possible), numbers of observed disturbances, and descriptions of the disturbance behaviors during the monitoring surveys, including location, date, and time of the event. In addition, observations regarding the number and species of any marine mammals observed, either in the water or hauled out, at or adjacent to the site, will be recorded as part of field observations during research activities. Observations of unusual behaviors, numbers, or distributions of pinnipeds will be reported to NMFS so that any potential follow-up observations can be conducted by the appropriate personnel. In addition, observations of tag-bearing pinniped carcasses as well as any rare or unusual species of marine mammals will be reported to NMFS. Information regarding physical and biological conditions pertaining to a site, as well as the date and time that research was conducted will also be noted.

If at any time injury, serious injury, or mortality of the species for which take is authorized should occur, or if take of any kind of any other marine mammal occurs, and such action may be a result of the research, PISCO will suspend research activities and contact NMFS immediately to determine how best to proceed to ensure that another injury or death does not occur and to ensure that the applicant remains in compliance with the MMPA.

A draft final report must be submitted to NMFS Office of Protected Resources within 60 days after the conclusion of the 2012–2013 field season or 60 days prior to the start of the next field season if a new IHA will be requested. The report will include a summary of the information gathered pursuant to the monitoring requirements set forth in the IHA. A final report must be submitted to the Director of the NMFS Office of Protected Resources and to the NMFS Southwest Office Regional Administrator within 30 days after receiving comments from NMFS on the draft final report. If no comments are received from NMFS, the draft final report will be considered to be the final report.

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].

All anticipated takes would be by Level B harassment, involving temporary changes in behavior. The mitigation and monitoring measures are expected to minimize the possibility of injurious or lethal takes such that take by injury, serious injury, or mortality is considered remote. Animals hauled out close to the actual survey sites may be disturbed by the presence of biologists and may alter their behavior or attempt to move away from the researchers.

As discussed earlier, NMFS considers an animal to have been harassed if it moved greater than 1 m (3.3 ft) in response to the researcher's presence or if the animal was already moving and changed direction and/or speed, or if the animal flushed into the water. Animals that became alert without such movements were not considered harassed.

For the purpose of this IHA, only Oregon and California sites that are frequently sampled and have a marine mammal presence during sampling were included in take estimates. Sites where only Biodiversity Surveys are conducted were not included due to the infrequency of sampling and rarity of occurrences of pinnipeds during sampling. In addition, Steller sea lions are not included in take estimates as they will not be disturbed by researchers or research activities since activities will not occur or be suspended if Steller sea lions are present. A small number of harbor seal and northern elephant seal pup takes are anticipated as pups may be present at several sites during spring and summer sampling

Takes estimates are based on marine mammal observations from each site. Marine mammal observations are done as part of PISCO site observations, which include notes on physical and biological conditions at the site. The maximum number of marine mammals, by species, seen at any given time throughout the sampling day is recorded at the conclusion of sampling. A marine mammal is counted if it is seen on access ways to the site, at the site, or immediately up-coast or down-coast of the site. Marine mammals in the water immediately offshore are also recorded. Any other relevant information, including the location of a marine mammal relevant to the site, any unusual behavior, and the presence of pups is also noted.

These observations formed the basis from which researchers with extensive knowledge and experience at each site estimated the actual number of marine mammals that may be subject to take. In most cases the number of takes is based on the maximum number of marine mammals that have been observed at a site throughout the history of the site (2–3 observation per year for 5–10 years or more). Section 6 in PISCO's application outlines the number of visits per year for each sampling site and the potential number of pinnipeds anticipated to be encountered at each site.

Since receipt of PISCO's application and publication of the Notice of Proposed IHA, PISCO has indicated that one of the sampling sites, Occulto (34.88122, –120.63954), has developed a small presence of adult harbor seals. This site is visited three times per year for Community Structure Monitoring. Based on this small presence, PISCO

and NMFS estimate that there may be up to five takes of adult harbor seals per event with up to three events per year. This slight increase in the amount of adult harbor seal takes is small and does not change the overall percentage of the population taken by Level B behavioral harassment. Additionally, it does not alter the analysis supporting NMFS' preliminary determinations and was considered and evaluated by NMFS prior to making final determinations in advance of its final decision on issuance of the IHA.

Based on this information, NMFS has authorized the take, by Level B harassment only, of 56 California sea lions, 487 harbor seals, and 30 northern elephant seals. These numbers are considered to be maximum take estimates; therefore, actual take may be slightly less if animals decide to haul out at a different location for the day or animals are out foraging at the time of the survey activities.

Negligible Impact and Small Numbers Analysis and Determination

NMFS has defined "negligible impact" in 50 CFR 216.103 as "* * * an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival." 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 take occurs.

No injuries or mortalities are anticipated to occur as a result of PISCO's rocky intertidal monitoring, and none are authorized. The behavioral harassments that could occur would be of limited duration, as researchers only conduct sampling one to three times per year at each site for a total of 4–6 hours per sampling event. Therefore, disturbance will be limited to a short duration, allowing pinnipeds to reoccupy the sites within a short amount of time.

Some of the pinniped species may use some of the sites during certain times of year to conduct pupping and/or breeding. However, some of these species prefer to use the offshore islands for these activities. At the sites where pups may be present, PISCO will implement certain mitigation measures, such as no intentional flushing if dependent pups are present, which will avoid mother/pup separation and trampling of pups.

Of the three marine mammal species anticipated to occur in the activity areas, none are listed under the ESA. Table 1 in this document presents the abundance of each species or stock, the authorized take estimates, and the percentage of the affected populations or stocks that may be taken by harassment. Based on these estimates, PISCO would take less than 1.6% of each species or stock. Because these are maximum estimates, actual take numbers are likely to be lower, as some animals may select other haulout sites the day the researchers are present.

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 required mitigation and monitoring measures, NMFS finds that the rocky intertidal monitoring 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 rocky intertidal monitoring program will have a negligible impact on the affected species or stocks.

TABLE 1—POPULATION ABUNDANCE ESTIMATES, TOTAL AUTHORIZED LEVEL B TAKE, AND PERCENTAGE OF POPULATION THAT MAY BE TAKEN FOR THE POTENTIALLY AFFECTED SPECIES DURING THE ROCKY INTERTIDAL MONITORING PROGRAM

Species	Abundance*	Total authorized level B take	Percentage of stock or population
Harbor Seal	30,196	487	1.6
California Sea Lion	296,750	56	0.02
Northern Elephant Seal	124,000	30	0.02

* Abundance estimates are taken from the 2011 U.S. Pacific Marine Mammal Stock Assessments (Carretta *et al.*, 2012).

Impact on Availability of Affected Species or Stock for Taking for Subsistence Uses

There are no relevant subsistence uses of marine mammals implicated by this action. Therefore, NMFS has determined that the total taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

Endangered Species Act (ESA)

None of the marine mammals for which incidental take is authorized are listed as threatened or endangered under the ESA. NMFS' Permits and Conservation Division worked with the NMFS Southwest Regional Office to ensure that effects to Steller sea lions would be avoided and incidental take would not occur. Therefore, NMFS has determined that issuance of the IHA to PISCO under section 101(a)(5)(D) of the MMPA will have no effect on species listed as threatened or endangered under the ESA.

National Environmental Policy Act (NEPA)

NMFS has prepared an EA that includes an analysis of potential environmental effects associated with NMFS' issuance of an IHA to PISCO to take marine mammals incidental to conducting rocky intertidal monitoring surveys along the California and Oregon coasts. NMFS has finalized the EA and prepared a FONSI for this action. Therefore, preparation of an Environmental Impact Statement is not necessary.

Authorization

As a result of these determinations, NMFS has authorized the take of marine mammals incidental to PISCO's rocky intertidal monitoring research activities, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated.

Dated: November 30, 2012.

Matthew J. Brookhart,

Acting Deputy Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2012–29390 Filed 12–4–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DoD–2012–OS–0044]

Submission for OMB Review; Comment Request

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

DATES: Consideration will be given to all comments received by January 4, 2013.

Title, Form, and OMB Number: Project Time Record System; OMB Control Number 0704–0452.

Type of Request: Reinstatement.

Number of Respondents: 1,200.

Responses per Respondent: 52.

Annual Responses: 62,400.

Average Burden per Response: 15 minutes.

Annual Burden Hours: 15,600 hours.

Needs and Uses: Contractors working for the Defense Logistics Agency, Information Operations, J–6, log into an automated project time record system and annotate their time on applicable projects. The system collects the records for the purpose of tracking workload/project activity for analysis and reporting purposes, and labor distribution data against projects for financial purposes; and to monitor all aspects of a contract from a financial perspective and to maintain financial and management records associated with the operations of the contract; and to evaluate and monitor the contractor performance and other matters concerning the contract, i.e., making payments, and accounting for services provided and received. Defense Logistics Agency, Information Operations, J–6, intends to execute this option on new contracts and, as necessary, modify existing contract agreements.

Affected Public: Individuals; businesses or other for profit; not-for-profit institutions.

Frequency: Weekly.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Ms. Jasmeet Seehra.

Written comments and recommendations on the proposed information collection should be sent to Ms. Seehra at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

You may also submit comments, identified by docket number and title, by the following method:

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

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

DoD Clearance Officer: Ms. Patricia Toppings.

Written requests for copies of the information collection proposal should be sent to Ms. Toppings at WHS/ESD/Information Management Division, 4800 Mark Center Drive, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

Dated: November 21, 2012.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2012–29337 Filed 12–4–12; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DoD–2012–OS–0152]

Proposed Collection; Comment Request

AGENCY: Defense Logistics Agency, DoD.

ACTION: Notice.

SUMMARY: In compliance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Defense Logistics Agency announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the reinstated information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by February 4, 2013.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Federal Docket Management System Office, 4800 Mark Center Drive, 2nd Floor, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at http://www.regulations.gov as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the Defense Logistics Agency), ATTN: Wide Area Workflow (WAWF) Program Management Office (PMO), 8725 John J. Kingman Road, Fort Belvoir, VA 22060–6221.

Title; Associated Form; and OMB Number: Wide Area Work Flow (WAWF); WAWF is not a forms based application but it accepts any supporting documentation as attachments, including the following forms in PDF format: DD1375 Request for Payment of Funeral and/or Internment Expenses (0704–0030); SF182 Authorization, Agreement and Certification of Training; SF270 Request for Advance or Reimbursement (0348–0004); SF1157 Claims for Witness Attendance Fees, Travel and Miscellaneous Expenses. WAWF captures and processes invoices and vouchers. The complete list of miscellaneous payment categories processed through WAWF is available in appendix A of the DoD Guidebook for Miscellaneous Payments.

Needs and Uses: Wide Area Workflow (WAWF) is a DoD enterprise, Web-based system that allows secure electronic submission, acceptance and procession of invoices and receiving reports in a real-time, paperless environment, resulting in complete transaction visibility, fewer interest penalties and reduced processing time. WAWF provides the Department and its suppliers the single point of entry to generate, capture and process invoice, acceptance and payments related documentation and data to support the DoD asset visibility, tracking and payment processes. WAWF also provides the department with a single point of entry to generate, capture and

process vouchers for miscellaneous payment claims. Information in identifiable form must be collected to verify the identity and banking information of claimants in order to ensure that benefits are paid to the correct individual.

Affected Public: Dependents and members of the general public to include Foreign Nationals and vendors providing goods or services to the DoD.

Annual Burden Hours: 23,125.

Number of Respondents: 2,775.

Responses per Respondent: 1 to 50.

Average Burden per Response: 10 minutes.

Frequency: On occasion for individuals; more often for vendors.

SUPPLEMENTARY INFORMATION:

Summary of Information Collection

The purpose of information collection is to monitor the status of and electronically process invoices, receiving reports and individual claims for payment through the review and validation and approval phases for submission to the Defense Finance and Accounting Service (DFAS) for payment.

Dated: November 28, 2012.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2012–29365 Filed 12–4–12; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DoD–2012–OS–0013]

Submission for OMB Review; Comment Request

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

DATES: Consideration will be given to all comments received by January 4, 2013.

Title, Form, and OMB Number: Request for approval for Procurement Technical Assistance Center Cooperative Agreement Performance Report, DLA Form 1806; OMB Control Number 0704–0320.

Type of Request: Reinstatement.

Number of Respondents: 95.

Responses per Respondent: 4.

Annual Responses: 380.

Average Burden per Response: 7 hours.

Annual Burden Hours: 2,660 hours.

Needs and Uses: The Defense Logistics Agency uses the report as the principal instrument for measuring the performance of Cooperative Agreement awards made under 10 U.S.C. Chapter 142.

Affected Public: State and local governments; private nonprofit organizations; Indian tribal organizations and Indian economic enterprises.

Frequency: Quarterly.

Respondent's Obligation: Required to obtain or retain benefits.

OMB Desk Officer: Ms. Jasmeet Seehra.

Written comments and recommendations on the proposed information collection should be sent to Ms. Seehra at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

You may also submit comments, identified by docket number and title, by the following method:

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

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

DoD Clearance Officer: Ms. Patricia Toppings.

Written requests for copies of the information collection proposal should be sent to Ms. Toppings at WHS/ESD/Information Management Division, 4800 Mark Center Drive, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

Dated: November 21, 2012.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2012–29339 Filed 12–4–12; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DoD–2012–OS–0025]

Submission for OMB Review; Comment Request

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

DATES: Consideration will be given to all comments received by January 4, 2013.

Title, Form, and OMB Number: Defense Logistics Agency Criminal Incident Reporting System records, DLA Forms 1622, 1623, 1624A, and 1753; OMB Control Number 0704–TBD.

Type of Request: New.

Number of Respondents: 500.

Responses per Respondent: 1.

Annual Responses: 500.

Average Burden per Response: 2 hours.

Annual Burden Hours: 1,000 hours.

Needs and Uses: Information in this system is used by DLA Office of the Inspector General (OIG), Investigations Division (ID), DLA Installation Support Offices, and the DLA Office of General Counsel personnel to monitor progress of cases and to develop non-personal data on crime and criminal investigative support for the future. DLA General Counsel also uses data to review cases, determine proper legal action, and coordinate on all available remedies. Information is released to DLA managers who use the information to determine actions required to correct the causes of loss and to take appropriate action against DLA employees or contractors in cases of their involvement. Records are also used by DLA to monitor the progress of investigations, identify crime conducive conditions, and prepare crime vulnerability assessments.

Affected Public: Individuals or households.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Ms. Jasmeet Seehra.

Written comments and recommendations on the proposed information collection should be sent to Ms. Seehra at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

You may also submit comments, identified by docket number and title, by the following method:

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

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make

these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

DOD Clearance Officer: Ms. Patricia Toppings.

Written requests for copies of the information collection proposal should be sent to Ms. Toppings at WHS/ESD/Information Management Division, 4800 Mark Center Drive, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

Dated: November 21, 2012.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2012–29342 Filed 12–4–12; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DoD–2012–OS–0037]

Submission for OMB Review; Comment Request

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

DATES: Consideration will be given to all comments received by January 4, 2013.

Title, Form, and OMB Number: The Application of Child Care Services Form, DLA Form 1854; OMB Control Number 0704–TBD.

Type of Request: New.

Number of Respondents: 30.

Responses per Respondent: 1.

Annual Responses: 30.

Average Burden per Response: 0.33 hours (20 minutes).

Annual Burden Hours: 10 hours.

Needs and Uses: The Application of Child Care Services Form, DLA Form 1854, is used to request child care services provided by DLA managed facilities. Enrollee records are provided to the Child and Youth Programs Coordinator, the CDP Director, and the Headquarters DLA Inspection Team upon request for the purpose of ensuring safe and effective services.

Waiting List Applicant records include the names of the sponsor and spouse (when applicable); home and electronic mail addresses; work, home, cell telephone numbers; place of employment; rank or civilian pay grade; child's name and birth date; documentation of any special needs or health concerns regarding the child, to include documentation of food restrictions; physical abilities and limitations; physical, emotional, or other special care requirements (including restrictions or special precautions concerning diet); special services Individual Development Plans (IDP) when special needs have already been diagnosed.

Enrollee records include all items listed above plus names and phone numbers of emergency points of contact; medical, dental and insurance provider data; medical examination reports, health assessments and screening results; immunization, allergy and medication information; documentation of Special Needs Resource Team (SNRT) meetings (when applicable) as well as serious event/incident report forms; symptoms records; and other records used to provide effective services.

Affected Public: Individuals or households.

Frequency: On occasion.

Respondent's Obligation: Required to obtain or retain benefits.

OMB Desk Officer: Ms. Jasmeet Seehra.

Written comments and recommendations on the proposed information collection should be sent to Ms. Seehra at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

You may also submit comments, identified by docket number and title, by the following method:

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

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

DOD Clearance Officer: Ms. Patricia Toppings.

Written requests for copies of the information collection proposal should be sent to Ms. Toppings at WHS/ESD/Information Management Division, 4800 Mark Center Drive, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

Dated: November 21, 2012.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2012–29340 Filed 12–4–12; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DoD–2012–OS–0039]

Submission for OMB Review; Comment Request

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

DATES: Consideration will be given to all comments received by January 4, 2013.

Title, Form, and OMB Number: Militarily Critical Technical Data Agreement, DD Form 2354; OMB Control Number 0704–0207.

Type of Request: Reinstatement.

Number of Respondents: 8,000.

Responses per Respondent: 1.

Annual Responses: 8,000.

Average Burden per Response: 0.33 hours (20 minutes).

Annual Burden Hours: 2,667 hours.

Needs and Uses: The information collection requirement is necessary as a basis for certifying enterprises or individuals to have access to DoD export-controlled militarily critical technical data subject to the provisions of 32 CFR part 250. Enterprises and individuals that need access to unclassified DoD-controlled militarily critical technical data must certify on DD Form 2345, Militarily Critical Technical Data Agreement, that data will be used only in ways that will inhibit unauthorized access and maintain the protection afforded by U.S. export control laws. The information collected is disclosed only to the extent consistent with prudent business practices, current regulations, and statutory requirements and is so indicated on the Privacy Act Statement of DD Form 2345.

Affected Public: Individuals or Households; businesses or other for profit; not-for-profit institutions.

Frequency: On occasion.

Respondent's Obligation: Required to obtain or retain benefits.

OMB Desk Officer: Ms. Jasmeet Seehra.

Written comments and recommendations on the proposed

information collection should be sent to Ms. Seehra at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

You may also submit comments, identified by docket number and title, by the following method:

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

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

DOD Clearance Officer: Ms. Patricia Toppings.

Written requests for copies of the information collection proposal should be sent to Ms. Toppings at WHS/ESD/Information Management Division, 4800 Mark Center Drive, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

Dated: November 21, 2012.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2012–29336 Filed 12–4–12; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DoD–2012–OS–0153]

Proposed Collection; Comment Request

AGENCY: Defense Logistics Agency, DoD.

ACTION: Notice.

SUMMARY: In compliance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Defense Logistics Agency announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the reinstated information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by February 4, 2013.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

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

• *Mail:* Federal Docket Management System Office, 4800 Mark Center Drive, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the Defense Logistics Agency, DLA Information Operations Richmond, ATTN: Mr. Walter B. Gooch, 8000 Jefferson Davis Highway, Richmond Virginia 23297–5000; or call (804) 279–3075.

Title; Associated Form; and OMB Number: Account Management and Provisioning System (AMPS). OMB Control Number 0704–TBD.

Needs and Uses: System contains records relating to requests for and grants of access to DLA computer networks, systems, or databases. The records contain the individual's name; social security number; and citizenship. Once collected, AMPS encrypts the SSN and makes it available for viewing only to the personnel security officer. Once system access is approved or denied by the personnel security officer, the SSN is re-encrypted and then deleted from the AMPS application.

Affected Public: State, Local or Tribal Government; DoD Contractors.

Annual Burden Hours: 4,000.

Number of Respondents: 20,000.

Responses per Respondent: 1.

Average Burden per Response: 12 minutes.

Frequency: On occasion.

SUPPLEMENTARY INFORMATION:

Summary of Information Collection

The system is maintained by DLA Information Operations to control and track access to DLA-controlled networks, computer systems, and databases. The records may also be used by law enforcement officials to identify the occurrence of and assist in the prevention of computer misuse and/or crime. Data, with all personal identifiers removed, may be used by management for system efficiency, workload calculation, or reporting purposes.

Dated: November 30, 2012.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2012–29351 Filed 12–4–12; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DoD–2012–OS–0017]

Submission for OMB Review; Comment Request

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

DATES: Consideration will be given to all comments received by January 4, 2013.

Title, Form, and OMB Number: Physical Fitness Facility/Recreation Center Membership and Use Records; OMB Control Number 0704–TBD.

Type of Request: New.

Number of Respondents: 1,000.

Responses per Respondent: 1.

Annual Responses: 1,000.

Average Burden per Response: 15 minutes.

Annual Burden Hours: 250 hours.

Needs and Uses: To collect facility usage data to prepare monthly metrics and data management reports; to register applicants for classes; to notify users of future events or cancellations in cases of emergency; and to develop workplace wellness programs based on customer need.

Affected Public: Individuals or Households.

Frequency: On occasion.

Respondent's Obligation: Required to obtain or retain benefits.

OMB Desk Officer: Ms. Jasmeet Seehra.

Written comments and recommendations on the proposed information collection should be sent to Ms. Seehra at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

You may also submit comments, identified by docket number and title, by the following method:

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

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

DOD Clearance Officer: Ms. Patricia Toppings.

Written requests for copies of the information collection proposal should be sent to Ms. Toppings at WHS/ESD/Information Management Division, 4800 Mark Center Drive, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

Dated: November 21, 2012.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2012–29375 Filed 12–4–12; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DoD–2012–OS–0014]

Submission for OMB Review; Comment Request

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

DATES: Consideration will be given to all comments received by January 4, 2013.

Title, Form, and OMB Number: End-Use Certificate, DLA Form 1822; OMB Control Number 0704–0382. *Type of Request:* Reinstatement.

Number of Respondents: 40,000.

Responses per Respondent: 1.

Annual Responses: 40,000.

Average Burden per Response: 0.33 hours (20 minutes).

Annual Burden Hours: 13,333 hours.

Needs and Uses: All individuals wishing to acquire government property identified as Munitions List Items (MLI) or Commerce Control List Item (CCLI) must complete this form each time they enter into a transaction. It is used to clear recipients to ensure their eligibility to conduct business with the government. That they are not debarred bidders; Specially Designated Nationals (SDN) or Blocked Persons; have not violated U.S. export laws; will not divert the property to denied/sanctioned countries, unauthorized destinations or sell to debarred/Bidder Experience List firms or individuals. The EUC informs the recipients that when this property is to be exported, they must comply with the International Traffic in Arms Regulation (ITAR), 22 CFR 120 *et seq.*; Export Administration Regulations (EAR), 15 CFR 730 *et seq.*; Office of Foreign Asset Controls (OFAC), 31 CFR 500 *et seq.*; and the United States Customs Service rules and regulations.

Affected Public: Individuals; businesses or other for profit; not-for-profit institutions.

Frequency: On occasion.

Respondent's Obligation: Required to obtain or retain benefits.

OMB Desk Officer: Ms. Jasmeet Seehra.

Written comments and recommendations on the proposed information collection should be sent to Ms. Seehra at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

You may also submit comments, identified by docket number and title, by the following method:

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

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

DOD Clearance Officer: Ms. Patricia Toppings.

Written requests for copies of the information collection proposal should be sent to Ms. Toppings at WHS/ESD/Information Management Division, 4800 Mark Center Drive, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

Dated: November 21, 2012.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2012–29341 Filed 12–4–12; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Army

[Docket ID USA–2012–0016]

Privacy Act of 1974; System of Records

AGENCY: Department of the Army, DoD.

ACTION: Notice to delete a System of Records.

SUMMARY: The Department of the Army is deleting a system of records notice in its existing inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: This proposed action will be effective on January 7, 2013 unless comments are received which result in a contrary determination. Comments will be accepted on or before January 4, 2013.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

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

• *Mail:* Federal Docket Management System Office, 4800 Mark Center Drive, East Tower, 2nd Floor, Suite 02G09, Alexandria, VA 22350–3100.

Instructions: All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Mr. Leroy Jones, (703) 428–6815.

SUPPLEMENTARY INFORMATION: The Department of the Army systems of records notices subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the contact in **FOR FURTHER INFORMATION CONTACT**. The proposed deletion is not within the purview of subsection (r) of the Privacy Act of 1974 (5 U.S.C. 552a), as amended, which requires the submission of a new or altered system report.

Dated: November 26, 2012.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

Deletion:
A0215–2a CFSC

SYSTEM NAME:

Army Club Membership Files (June 21, 2001, 66 FR 33239).

REASON:

The records were copies of military and government civilian applications for membership at Army clubs and are no longer collected by the Community and Family Support Centers or at clubs in the Army; therefore, the A0215–2a CFSC, Army Club Membership Files system of records notice can be deleted. Records have met the required National Archives and Records Administration retention and have been destroyed.

[FR Doc. 2012–29352 Filed 12–4–12; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF ENERGY

Notice of Availability of the Injury Assessment Plan for the Hanford Site, Richland, WA

AGENCY: Department of Energy.

ACTION: Notice and Request for Comments.

SUMMARY: The U.S. Department of Energy (DOE), on behalf of the Hanford Natural Resource Trustee Council, announces the release of the Injury Assessment Plan for the Hanford Site. The Injury Assessment Plan describes the activities that constitute the currently proposed approach of the natural resource trustees (DOE, Department of the Interior (DOI), U.S. Fish and Wildlife Service, Department of Commerce National Oceanic and Atmospheric Administration, State of Washington, State of Oregon, Confederated Tribes of the Umatilla Indian Reservation, Confederated Tribes and Bands of the Yakama Nation, and Nez Perce Tribe) for conducting the assessment of natural resources exposed to hazardous substances.

DATES: Submit written comments on the Injury Assessment Plan on or before January 4, 2013.

ADDRESSES: Send written comments to Larry Goldstein/Hanford Natural Resource Trustee Council Chair/ Washington State Department of Ecology, Nuclear Waste Program, P.O. Box 47600, Olympia, Washington 98504–7600; via email to *Larry.Goldstein@ecy.wa.gov.* You may download the Injury Assessment Plan at *www.hanfordnrda.org.*

SUPPLEMENTARY INFORMATION: The Injury Assessment Plan (Plan) is being released to the public in accordance with the Natural Resource Damage Assessment Regulations found at 43 CFR Part 11. In accordance with those regulations, since one or more natural resources located on the Hanford site have been contaminated with hazardous substances, including metals, organics and radionuclides, the Trustees will be conducting a Type B assessment. The Plan is one of the first steps in the damage assessment process, the goal of which is to restore, replace, or acquire the equivalent of natural resources injured by the release of hazardous substances.

Copies of the Injury Assessment Plan are available for public review at the following locations:

Administrative Record and Public Information Repository,
2440 Stevens Center Place,
Room 1101,
Richland, Washington 99352;

Portland State University,
Branford P. Millar Library,
1875 SW Park Avenue,
Portland, Oregon 97201;

University of Washington,
Suzallo Library,
Government Publications Department,
P.O. Box 352900,
Seattle, Washington 98195;

Washington State University,
Tri-Cities Consolidated Information Center,
Room 101–L,
2770 University Drive,
Richland, Washington 99354;

Gonzaga University Foley Center Library,
502 East Boone Avenue,
Spokane, Washington 99258.

FOR FURTHER INFORMATION CONTACT: To request further information about the Injury Assessment Plan for the Hanford Site, contact Larry Goldstein at 360–407–6573, *Larry.Goldstein@ecy.wa.gov.*

Issued in Washington, DC on November 30, 2012.

Mark A. Gilbertson,

Deputy Assistant Secretary for Site Restoration.

[FR Doc. 2012–29420 Filed 12–4–12; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

Apps for Vehicles Challenge

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

ACTION: Notice of a Competition.

SUMMARY: The U.S. Department of Energy (DOE) announced the administration of a prize competition (Challenge) titled "Apps for Vehicles: improving safety and fuel efficiency through technology innovation".

DATES: See, 1. Key Challenge Dates & Deadlines in **SUPPLEMENTARY INFORMATION.**

ADDRESSES: The Apps for Vehicles Challenge is available for review, participation and submissions at *appsforvehicles.challenge.gov.*

FOR FURTHER INFORMATION CONTACT: Mr. Ian Kalin, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, EE–2D, 1000 Independence Ave. SW., Washington, DC 20585; email: *Ian.Kalin@ee.doe.gov.* Mr. Matthew Loveless, U.S. Department of Energy, Office of Public Affairs, 7A–145, 1000 Independence Ave. SW., Washington, DC 20585; email: *Matthew.Loveless@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

I. Key Challenge Dates & Deadlines

October 1, 2012 = Vehicle Data Challenge announced at the Energy Datapalooza.
December 5, 2012 = Challenge officially opens.
January 15, 2013 = Deadline for first phase submittals.
February 1, 2013 = Phase I Finalist Teams announced.
Early February 2013 = Finalist Teams engage industry leaders to refine ideations and products.
March 15, 2013 = Deadline for second phase; final product submittals.
April 1, 2013 = Winners announced.
May 2013 = Final cash prizes disbursed.

II. Introduction

The Administration launched the *Energy Data Initiative* in 2012 to liberate data as a fuel for innovation while rigorously protecting privacy. The primary fuel for the Energy Data Initiative is *open data.* Open data can take many forms but generally includes information that is machine-readable, freely accessible and in an industry-standard format. In particular, open data from the private sector made available

to consumers may spur a uniquely scalable degree of innovation. For example, enabling energy customers to securely access their own household or building energy data—via a "*Green Button*" on their utility Web site—has fueled the next generation of energy efficiency products and services. Within this context, the U.S. Department of Energy (DOE) is launching the *Apps for Vehicles Challenge: Improving Safety and Fuel Efficiency through Technology Innovation* (the Challenge). It is worth reiterating that safety—such as preventing distracted driving—is an essential goal of the Challenge.

The Challenge seeks to provide drivers access to their own vehicle's data, safely and securely, in a readable, useful common syntax and format. A full description of the open data from vehicles is in Section V, but generally includes text-based information on things like vehicle speed, brake position, headlights on/off, and distance covered since restart. This vehicle data has long been available to mechanics and technicians using specialized equipment. But by applying open data principles, individuals will be able to readily access this on-board data directly through Bluetooth, USB, and other standard hardware. Associated platforms will enable vehicle owners to provide this data to authorized third-party developers to create and then deliver new apps, products, and services. As a result, these third-party developers will help Americans while also creating jobs.

Under Federal initiatives like the "*EV Everywhere*" Grand Challenge and new fuel economy standards, the DOE's Vehicles Technology program has a long-term role to play in the acceleration of automotive technology. Looking to a near-term project that can support this vision, a prize-based Challenge is an effective method to spur innovation with step-jump additions in the availability of new open data.

III. The Prize

This Challenge prize is a three-part combination of: (1) A cash award; (2) an opportunity to work directly with industry leaders; and (3) an opportunity to be recognized at a public announcement of the final winners. The Challenge prize will be awarded in phases and component pieces in two phases of competition. Phase I of the Challenge will cast a wide net to gather compelling ideas, business plans, product development plans, and very-early-stage products ("Ideations") that address the Challenge's goals. Phase I concludes with a selection of Finalists that will be permitted to continue into Phase II and each Finalist will be awarded a small portion of the total cash pool, ranging from $1000 to $5000. During Phase II, Finalists will have an opportunity to refine their Ideations with industry leaders supporting the Challenge. These industry leaders will provide some combination of: technical guidance, customer analysis, market assessments, IT roadmap recommendations, and general consulting. Following consultation with industry leaders, Finalists will have a period of time to complete and submit their final software applications, web technology, or products ("Products") for Phase II. Phase II winner(s) will be invited to a public announcement event hosted by DOE and its supporters and will also be highlighted on DOE's web site. For the purposes of this Challenge, the term Submissions ("Submissions") refers to the total portfolio of Phase I Ideations and Phase II Products. The total cash prize pool, inclusive of all cash awards available to be made in Phases I and II, is $50,000.

IV. Authority and Prize Amount

This Challenge is being conducted under the authority of the America COMPETES Act of 2010, 15 U.S.C. § 3719. The total dollar amount of the prize pool is $50,000.00, subject to the availability of funds. DOE reserves the right to suspend, cancel, extend, or curtail the Challenge as required or determined by appropriate DOE officials. Nothing within this document or in any documents supporting the Challenge shall be construed as obligating DOE or any other Federal agency or instrumentality to any expenditure of appropriated funds, or any obligation or expenditure of funds in excess of or in advance of available appropriations. DOE will award a single dollar amount to winning Team(s) and each Team is solely responsible for allocating any prize amount among its member Contestants as they deem appropriate. DOE will not arbitrate, intervene, advise on, or resolve any matters between entrant members. It will be up to the winning Team to reallocate the prize money among its member Contestants, if they deem it appropriate.

V. Prize Eligibility

To be eligible to compete within this Challenge all of the requirements stated below must be met:

A. All Challenge entrants must be identified in their Challenge Submission under a named Team ("Team").

B. Each Team member(s) ("Contestant") must be: citizens or permanent residents of the United States who are at least eighteen years old at the time of entry.

C. Each Team that registers for the Challenge as an entity (or other than an individual), must be a lawfully organized entity established in accordance with applicable State laws and in good standing in their respective jurisdiction, with operations in the U.S. or its Territories or a foreign legal entity having an officially recognized place of business in the U.S. or its Territories. The Team must be able to receive payments that are legally made from the U.S. in U.S. dollars.

D. The Team must have a bank account into which funds can be legally deposited from the U.S. in U.S. dollars.

E. Based on the subject matter of the Competition, the type of work that it possibly will require, and the likelihood of any claims for death, bodily injury, or property damage, or loss potentially resulting from challenge participation, Participant is not required to obtain liability insurance or demonstrate fiscal responsibility in order to participate in this Competition.

F. The Team and all its Contestant members must agree to assume any and all risks related to the Challenge and waive all claims against the Federal Government and related entities, except in cases of willful misconduct, for any injury, death, damage, or loss of personal property, revenue or profits, whether direct, indirect, or consequential, arising from their participation in the competition, whether the injury, death, damage, or loss arises through negligence or otherwise.

G. The Team shall submit all required documentation in English and any monetary figures shall be stated or referenced in U.S. dollars.

H. DOE employees, employees of sponsoring organizations (including participating industry leaders and employees of their associated or affiliated organizations), and members of their immediate family (spouses, children, siblings, parents), and persons living in the same household as such persons, whether or not related, are not eligible to participate in the Challenge.

VI. Open Data Specifications

There are many electrical and digital systems operating within vehicles. For this Challenge, the data resources that are to be used by entrants are the datasets that can be directly and legally accessed by vehicle owners on their own cars. The principal example of this data stream is available through the onboard diagnostics port, also known as OBD–II, which has been mandatory for U.S. cars since 1996. The OBD–II port

contains hundreds of data messages regarding engine and transmission operation as communicated through the vehicle's controller area network, which is referred to as the CAN. The OBD–II port also frequently contains information on operator-adjustable items such as headlight or windshield wiper status. Additional hardware is commercially available for individuals to directly access their own vehicles' OBD–II data. However, to remove the need to acquire special hardware for this Challenge and to level the playing field, sample data will be provided by DOE and supporters of the Challenge ("Sample Vehicle Data"). The Sample Vehicle Data will contain the following representative types of data fields:

1. Ignition status (on/off).
2. Engine speed (average engine speed can be calculated).
3. Vehicle speed (average vehicle speed can be calculated).
4. Fuel level.
5. Fuel consumed since restart.
6. Odometer.
7. Distance covered since restart.
8. Longitude and latitude.
9. Fuel efficiency.
10. Condition based maintenance.
11. Brake pedal status (on/off).
12. Headlamp status (on/off).
13. High beam status (on/off).
14. Windshield wiper status (on/off).
15. ABS status (on/off).
16. Accelerator pedal position.
17. Torque at transmission.
18. Parking brake status (on/off).
19. Door open status (open/closed).
20. Steering wheel angle.
21. Transmission gear.

The above list of example data streams is not comprehensive and is subject to change. Multiple sets of data detailing different driving cycles may be made available.

There are additional manufacturer proprietary data fields that also stream through the OBD–II port. Such proprietary and confidential data—such as those that deal with air bags—shall not be provided or considered at any point in the Challenge.

Use of open vehicle data is mandatory to be considered for a prize in this Challenge. However, combining the value of this data with other non-open data—such as mashing up/combining the OBD–II with GPS technologies on a smart phone—is highly encouraged.

VII. Evaluation Criteria

The protection of *safety* and *privacy* are paramount to both DOE's Energy Data Initiative and this Challenge. Any business plan or product that presents a clear or potential violation of this principle will be rejected by the judges.

Each of the four criteria categories below has equal importance in the evaluation (*i.e.* 25% weighting for each).

Common Criteria for Both Phases

Potential Impact: Each Submission will be rated on the strength of its potential to help individuals, organizations, and communities make informed decisions to *improve their fuel efficiency.*

Creativity and Innovation: Each Submission will be rated for the degree of *new thinking* it brings to applications for the transportation sector, and the *creativity* shown in designing for impact.

Use of Open Vehicle Data: Each Submission must make use of open vehicle data. Judges will be looking at both the *depth* of usage for each data stream and the *breadth* of different data streams that are integrated. The combination of the Sample Vehicle Data with other data sets—such as those that are universally generated by smart phones—is highly encouraged. You can find other sample datasets at *http://www.energy.gov/developer.*

Special Criteria for Phase I Ideations

Plan Viability: Each Submission will be rated on the completeness of the Ideation and the evidence—such as can be demonstrated by documented/demonstrated experience—that the Team's proposal can actually be created in the remaining time period of the Challenge.

Special Criteria for Phase II Products

Implementation: Each Submission will be rated on its ability to be immediately used by consumers, such as a vehicle owner being able to download an app onto their smartphone from a Web site or mobile app platform. User experience and interactive capabilities will also be assessed. Preference will be given to applications/products that are accessible to a range of consumers, including those with disabilities. Phase II needs to result in real products that can be used; not just illustrations or demonstrations.

Submissions will be judged by an expert panel as well as the public. The expert judging panel will be appointed by DOE, may include both Federal and non-Federal personnel, and will determine Phase I and Phase II winners. The Popular Choice Product will be determined by public vote on Challenge.gov. Public votes may be displayed on the Challenge Web site, on a real-time basis, before being verified for integrity. These unverified votes will not necessarily reflect accurately the voting for the Popular Choice Awards. The winners of the Popular Choice Awards will be determined on the basis of the verified vote counts, as determined by DOE, and DOE reserves the right to suspend, cancel or extend the Popular Choice Product voting period at any time for any reason.

VIII. Submission Requirements

The Administrator's computer, within the DOE's Office of Energy Efficiency and Renewable Energy, is the official time-keeping device for this Challenge. The rules for Submissions—defined above as referring to both the Phase I Ideations and Phase II Products—by Teams are as follows:

(a) Visit *http://AppsforVehicles.challenge.gov* and click "Sign Up" to create a ChallengePost account, or click "Log In" and log in with an existing ChallengePost account.

(b) Register your interest in participating by clicking "Accept this Challenge" on the Challenge Web site in order to receive important Challenge updates. Registration is free; no purchase necessary.

(c) After you sign up on Challenge.gov, a confirmation email will be sent to the email address you provided. Use the confirmation email to verify your email address. As a registered Contestant, you will then be able to enter the Challenge by submitting an application that conforms to the requirements set forth herein.

(d) Explore the Sample Vehicle Data and other resources available at *energy.gov/developer.*

(e) For Phase I, create an Ideation. For Phase II, create a Product. Both Submissions must use the Sample Vehicle Data.

(f) Phase I Submission Requirements: Between noon EST on December 5, 2012 and noon EST on January 15, 2013, visit Appsfor Vehicles.challenge.gov confirm that you have read and agree to the Official Rules, and submit your application by including:

1. A web link to your Submission.
2. A text description of your Submission.
3. At least one photograph, image, graphic, or design that visually captures key attributes of your Submission.
4. Optionally, Submissions may include other data in addition to the Sample Vehicle Data to be used when judging the Submission.

(g) Phase II Submission Requirements: Between noon EST on January 15, 2013 and noon EST on March 15, 2013, visit AppsforVehicles.challenge.gov, confirm that you have read and agree to the Official Rules, and submit your application by including:

1. A Web link to your Submission.

2. A text description of your Submission.

3. At least one photograph, image, graphic, or design that visually captures key attributes of your Submission.

4. Optionally, Submissions may include other data in addition to the Sample Vehicle Data to be used when judging the Submission.

5. The Product must also include a demonstration video with contained audio to present the Product's purpose, value, navigation, and functionality.

(h) Submission Rights:

1. You must permit use of your Submission by both the public and DOE free of charge throughout the Challenge and for 12 consecutive months following the announcement of the Challenge winners.

2. By sending in the Submission to this Challenge, you grant to DOE, and the other supporters a royalty-free license to: (i) post on Challenge.gov your Submission(s) and a link to the downloadable Product in the online store of the applicable software platform (*e.g.,* Google Play) or, if not distributed through such platform, to your Web site; and (ii) publicize the names of Challenge participants (including the individual members of a team) and winners and their Submissions through media and events of DOE's choosing. Such license shall remain in force for the duration of the Challenge and for a period of no less than 12 consecutive months following the announcement of the Challenge winners.

(h) Submission Requirements: In order for Submissions to be eligible to win this Challenge, they must meet the following requirements:

1. Acceptable platforms—The Submission must be designed for the Web, a personal computer, a mobile handheld device, console, or any platform broadly accessible on the open Internet.

2. Data used—The Submission must utilize some portion of the Sample Vehicle Data. The use of data from other sources in conjunction with Sample Vehicle Data is strongly encouraged.

3. No DOE logo—The Submission must not use DOE's logo or official seal in the Submission, and must not claim DOE endorsement.

4. Functionality/Accuracy—A Submission may be disqualified if the software application fails to function as expressed in the description and video provided by the user, or if the software application provides inaccurate information.

5. Third Party Approval—Submissions requiring approval from a third party, such as an app store, in order to be accessible to the public, must be submitted to such third party or app store for review before the end of the Challenge period. For any software platform that is not easily shared on the web before store approval, such as Apple iPhone, you may submit your working software Product using a web framework designed for those platforms (such as PhoneGap), and provide the required link to a video of your working application. DOE may request access to the Product in person or via device provisioning to verify any criteria or functionality of your Product.

6. Security—Submissions must be free of malware. Contestant agrees that DOE may conduct testing on the Product to determine whether malware or other security threats may be present. DOE may disqualify the Product if, in DOE's judgment, the Product may damage Government or others' equipment or operating environment.

7. No Previous Winners—Contestant may not submit a Submission that is substantially similar to a Submission that has previously been submitted by the Team to another contest and won a prize.

8. The DOE will also screen Submissions for Team eligibility, IT security, and compliance with Challenge.gov's *Terms of Participation.* Once a Submission has been submitted, the Team cannot make any changes or alterations to any part of the Submission. Ideations and Products failing to meet Submission requirements or other Submission screenings will be deemed ineligible to win a prize. Posting an app to *AppsforVehicles.challenge.gov* does not constitute DOE's final determination of Team eligibility.

9. Each Submission must be original, the work of the Team, and must not infringe, misappropriate, or otherwise violate the lawful rights of any individual or organization including intellectual property rights and proprietary rights, privacy rights, or any other rights of any person or entity. Each Team further represents and warrants to DOE and the other sponsors that the Submission, and any use thereof by DOE or the other sponsors (or any of their respective partners, subsidiaries and affiliates), shall not: (i) Be defamatory or libelous in any manner toward any person, (ii) constitute or result in any misappropriation or other violation of any person's publicity rights or right of privacy, or (iii) infringe, misappropriate, or otherwise violate any intellectual property rights, proprietary rights, privacy rights, moral rights, or any other rights of any person or entity.

10. It is an express condition of Submission and eligibility that each Team warrants and represents that the Team's Submission is solely owned by the Team, that the Submission is wholly original with the Team, and that no other party has any ownership rights or ownership interest in the Submission.

11. A Team may contract with a third party for technical assistance to create the Submission, provided the Ideation or Product is solely the Team's work product and the result of the Team's ideas and creativity and the Team owns all rights to it.

12. Each Submission must be in English or, if in a language other than English, the Submission must be accompanied by an English translation of the text.

13. Submissions will not be accepted if they contain any matter that, in the sole discretion of DOE or its judges, is indecent, obscene, defamatory, libelous, in bad taste, or demonstrates a lack of respect for public morals or conduct. If DOE, or the judges, in their discretion, find any Submission to be unacceptable, then such Submission shall be deemed disqualified.

14. Winners are responsible for both reporting and paying all applicable Federal, state, and local taxes payable from any prize amounts awarded under this Challenge.

IX. Additional Terms and Conditions

Challenge Subject to Applicable Law: the Challenge is subject to all applicable Federal laws and regulations. Registering for this Challenge constitutes each Team and/or Contestant's agreement to these Official Rules ("Official Rules") and administrative decisions, which are final and binding in all matters related to the Challenge. Eligibility for a prize award is contingent upon fulfilling all requirements set forth herein.

Judges: The finalist Submissions will be judged by the judges listed at AppsforVehicles.challenge.gov or by another qualified judging panel selected by DOE at its sole discretion. The judging panel will judge the Submissions on the judging criteria identified in these Challenge rules in order to select winners in each category.

Publicity: Except where prohibited, participation in the Challenge constitutes each winner's consent to DOE's and its agents' use of each winner's name, likeness, photograph, voice, biographical information, opinions, and/or hometown and state information for promotional purposes through any form of media, worldwide, without further permission, payment, or consideration.

Liability and Insurance: Any and all information provided by or obtained from the Federal Government is without any warranty or representation whatsoever, including but not limited to its suitability for any particular purpose. Upon registration, all participants agree to assume and, thereby, have assumed any and all risks of injury or loss in connection with or in any way arising from participation in this competition, development of any application or the use of any application by the participants or any third-party. Upon registration all participants agree to and, thereby, do waive and release any and all claims or causes of action against the Federal Government and its officers, employees and agents for any and all injury and damage of any nature whatsoever (whether existing or thereafter arising, whether direct, indirect, or consequential and whether foreseeable or not), arising from their participation in the contest, whether the claim or cause of action arises under contract or tort. Upon registration, all participants agree to and, thereby, shall indemnify and hold harmless the Federal Government and its officers, employees and agents for any and all injury and damage of any nature whatsoever (whether existing or thereafter arising, whether direct, indirect, or consequential and whether foreseeable or not), including but not limited to any damage that may result from a virus, malware, etc., to Government computer systems or data, or to the systems or data of end-users of the software and/or application(s) which results, in whole or in part, from the fault, negligence, or wrongful act or omission of the participants or participants' officers, employees or agents.

Records Retention and FOIA: All materials submitted to DOE as part of a Submission become DOE records and cannot be returned. No confidential information will be accepted with any Submission. Submitters will be notified of any Freedom of Information Act requests for their Submissions in accordance with 29 CFR § 70.26.

508 Compliance: Participants should keep in mind that the Department of Energy considers universal accessibility to information a priority for all individuals, including individuals with disabilities. In this regard, the Department is strongly committed to meeting its compliance obligations under Section 508 of the Rehabilitation Act of 1973, as amended, to ensure the accessibility of its programs and activities to individuals with disabilities. This obligation includes acquiring accessible electronic and information technology. When evaluating Submissions for this contest, the extent to which a Submission complies with the requirements for accessible technology required by Section 508 will be considered.

Public Voting: DOE is not responsible for, nor is it required to count, incomplete, late, misdirected, damaged, unlawful, or illicit votes, including those secured through payment or achieved through automated means.

IX. Contact Information

Department of Energy, Office of Public Affairs, 7A–145, Attn: Vehicle Data Challenge, 1000 Independence Ave. SW., Washington, DC 20585.

For questions about these official rules, contact *DataInnovation@hq.doe.gov*.

Issued in Washington, DC on November 29, 2012.

Ian J. Kalin,

Presidential Innovation Fellow, Office of Energy Efficiency and Renewable Energy.

[FR Doc. 2012–29416 Filed 12–4–12; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC06–129–005.
Applicants: Capital Research and Management Company.
Description: Request for Amended Order Under Section 203 of the Federal Power Act of Capital Research and Management Company, et. al.
Filed Date: 11/28/12.
Accession Number: 20121128–5025.
Comments Due: 5 p.m. ET 12/19/12.
Docket Numbers: EC13–48–000.
Applicants: NewPage Corporation, GS Funds.
Description: Joint Application of New Page Corporation, et. al. for Authorization Under Section 203 of the Federal Power Act and Request for Expedited Consideration.
Filed Date: 11/27/12.
Accession Number: 20121127–5264.
Comments Due: 5 p.m. ET 12/18/12.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER12–2480–002.
Applicants: Alcoa Power Generating Inc.
Description: Refiling of Yadkin OATT—ER12–2480 to be effective 11/15/2012.
Filed Date: 11/19/12.
Accession Number: 20121119–5200.
Comments Due: 5 p.m. ET 12/10/12.
Docket Numbers: ER13–242–001.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: SA 2013 G586 2nd Amended GIA to be effective 11/1/2012.
Filed Date: 11/27/12.
Accession Number: 20121127–5237.
Comments Due: 5 p.m. ET 12/18/12.
Docket Numbers: ER13–413–002.
Applicants: USG Oregon LLC.
Description: Amended USGO Tariff Filing to be effective 1/17/2013.
Filed Date: 11/27/12.
Accession Number: 20121127–5120.
Comments Due: 5 p.m. ET 12/18/12.
Docket Numbers: ER13–464–000.
Applicants: Arizona Public Service Company.
Description: APS Service Agreement No. 324 Foothills Solar Project LGIA, Amendment 1 to be effective 11/30/2012.
Filed Date: 11/27/12.
Accession Number: 20121127–5135.
Comments Due: 5 p.m. ET 12/18/12.
Docket Numbers: ER13–465–000.
Applicants: New England Power Pool Participants Committee, ISO New England Inc.
Description: MR1 Rev. Rel. to Procurement of 10-Min. Non-Spinning Res in FRM to be effective 3/1/2013.
Filed Date: 11/27/12.
Accession Number: 20121127–5163.
Comments Due: 5 p.m. ET 12/18/12.
Docket Numbers: ER13–466–000.
Applicants: Shipley Choice, LLC.
Description: Initial Application for Market-Based Rate Authority to be effective 1/26/2013.
Filed Date: 11/27/12.
Accession Number: 20121127–5243.
Comments Due: 5 p.m. ET 12/18/12.
Docket Numbers: ER13–467–000.
Applicants: Southern California Edison Company.
Description: Amended SGIA and DSA to Sunshine Canyon Landfill Project to be effective 11/29/2012.
Filed Date: 11/28/12.
Accession Number: 20121128–5000.
Comments Due: 5 p.m. ET 12/19/12.
Docket Numbers: ER13–468–000.
Applicants: Footprint Power LLC.
Description: Request for Waiver of Footprint Power LLC.
Filed Date: 11/28/12.
Accession Number: 20121128–5056.
Comments Due: 5 p.m. ET 12/19/12.

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: November 28, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–29346 Filed 12–4–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER13–454–000]

NDR Energy Group, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding, of NDR Energy Group, LLC's application for market-based rate authority, with an accompanying rate schedule, noting that such application includes a request for blanket authorization, under 18 CFR Part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability is December 19, 2012.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding(s) are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: November 29, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–29347 Filed 12–4–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER13–466–000]

Shipley Choice, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding, of Shipley Choice, LLC's application for market-based rate authority, with an accompanying rate schedule, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability is December 19, 2012.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding(s) are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov;* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: November 29, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–29345 Filed 12–4–12; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2012–0390; FRL–9371–2]

Notice of Receipt of Pesticide Products; Registration Applications

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has received applications to register pesticide products containing an active ingredient not included in any currently registered pesticide products. Pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), EPA is hereby providing notice of receipt and opportunity to comment on these applications.

DATES: Comments must be received on or before January 4, 2013.

ADDRESSES: Submit your comments, identified by docket identification (ID) number and the EPA File Symbol for the product of interest as shown in the body of this document, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the 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.*

FOR FURTHER INFORMATION CONTACT: A contact person is listed at the end of each registration application summary and may be contacted by telephone, email, or mail. Mail correspondence to the Registration Division (RD) (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001. As part of the mailing address, include the contact person's name, division, and mail code.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

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. Registration Applications

EPA has received applications to register pesticide products containing an active ingredient not included in any currently registered pesticide products. Pursuant to the provisions of FIFRA section 3(c)(4), EPA is hereby providing notice of receipt and opportunity to comment on these applications. Notice of receipt of these applications does not imply a decision by the Agency on these applications. For actions being evaluated under the Agency's public participation process for registration actions, there will be an additional opportunity for a 30-day public comment period on the proposed decision. Please see the Agency's public participation Web site for additional information on this process (*http://www.epa.gov/pesticides/regulating/registration-public-involvement.html*). EPA received the following applications to register pesticide products containing an active ingredient not included in any currently registered products:

1. *EPA File Symbol:* 43808–R. *Docket ID Number:* EPA–HQ–OPP–2012–0815. *Applicant:* State of Florida, Department of Citrus, 605 East Main Street, P.O. Box 9010, Bartow, FL 33831–9010. *Active ingredient:* 5-chloro-3-methyl-4-nitro-1*H*-pyrazole (CMNP) and its metabolite (5-chloro-4-nitro-1*H*-pyrazol-3-yl)-methanol (CHNP) at 96.5%. *Product type:* Plant regulator. *Proposed uses:* Manufacturing Use Only. Contact: Tony Kish, (703) 308–9443, email address: *kish.tony@epa.gov.*

2. *EPA File Symbol:* 43808–E. *Docket ID Number:* EPA–HQ–OPP–2012–0815. *Applicant:* State of Florida, Department of Citrus, 605 East Main Street, P.O. Box 9010, Bartow, FL 33831–9010. *Active ingredient:* 5-chloro-3-methyl-4-nitro-1*H*-pyrazole (CMNP) and its metabolite (5-chloro-4-nitro-1*H*-pyrazol-3-yl)-methanol (CHNP) at17%. *Product type:* Plant regulator (Abscission Agent). *Proposed use:* Oranges. Contact: Tony Kish, (703) 308–9443, email address: *kish.tony@epa.gov.*

List of Subjects

Environmental protection, Pesticides and pest.

Dated: November 26, 2012.

G. Jeffrey Herndon,

Acting Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 2012–29249 Filed 12–4–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2009–1017; FRL–9370–4]

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 January 4, 2013.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2009–1017, 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 suf

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 43 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 orders in the **Federal Register** canceling all of the affected registrations.

TABLE 1—REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION

Registration No.	Product name	Chemical name
000100–00641	Banner Fungicide	Propiconazole.
000100–00781	Orbit 45W Fungicide	Propiconazole.
000352–00558	DuPont Muster Herbicide	Ethametsulfuron.
000352–00559	DuPont Ethametsulfuron Methyl Technical Herbicide	Ethametsulfuron.
000499–00518	Prescription Treatment Brand 2% Propoxur Bait	Propoxur.
009404–00087	Permethrin 0.25% Insecticide Granules	Permethrin.
009404–00088	Sunniland Chinch Bug & Mole Cricket Spray	Permethrin.
010163–00298	GWN–3772 Technical	Tribenuron-methyl.
010466–00024	Ultrafresh 300 DD Nonionic	Triclosan/Tributyltin oxide (no inert use).
010466–00043	T-Bate	Tributyltin oxide (no inert use).
010807–00146	Weed-A-Cide Concentrate	Prometon.
010807–00206	Misty Weed-A-Cide CF	Prometon.
010807–00444	CB Fogger IV	Tetramethrin/Esfenvalerate.
010807–00451	Bee, Wasp & Hornet Jet Stream	Phenothrin/Tetramethrin.
028293–00293	Unicorn 30 Day Flea & Tick Treatment	Permethrin.
028293–00357	Unicorn 45% Permethrin Fly & Tick Insecticide	Permethrin.
028293–00358	Unicorn 45% Permethrin Flee & Tick Insecticide	Permethrin.
038167–00029	Mach 2 1.5G	Benzoic acid,4-chloro-,2-benzoyl-2-(1,1-dimethylethyl) hydrazide.
061483–00058	Pentacon-7	Pentachlorophenol.
061483–00059	Pentacon-10	Pentachlorophenol.

TABLE 1—REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION—Continued

Registration No.	Product name	Chemical name
062719–00351	Dursban HF Insecticidal Concentrate	Chlorpyrifos.
062719–00352	Dursban W Insecticidal Chemical	Chlorpyrifos.
062719–00364	Dursban 20 MEC Microencapsulated Insecticidal Concentrate.	Chlorpyrifos.
066222–00025	Pramitol 1.5% Liquid Vegetation Killer	Prometon.
066222–00044	Pramitol 1.8L	Prometon.
066222–00045	Pramitol 2.2L	Prometon.
066222–00052	Pramitol 1.8 RTU	Prometon.
066222–00118	Bumper 41.8 EC Calif	Propiconazole.
066330–00037	Chloropicrin	Chloropicrin.
066330–00047	TM–442	Chloropicrin.
066330–00228	Malathion Technical	Malathion (no inert use).
066330–00248	Malathion 8EC	Malathion (no inert use).
066330–00325	Propiconazole 14.3% T&O	Propiconazole.
066330–00331	Bifenthrin 13% MUP	Bifenthrin.
068451–00003	Deltamethrin Technical Insecticide (micronized)	Deltamethrin.
068451–00004	Deltamethrin Technical Insecticide	Deltamethrin.
073327–00011	Green Light Conquest Indoor & Outdoor Pest Control	Permethrin.
073327–00012	Green Light Conquest Insecticide Concentrate	Permethrin.
075829–00001	H2Pro Maintenance Treatment	Silver.
081880–00020	MON 12036 Herbicide	Halosulfuron-methyl.
088058–00002	Chlorothalonil 720 Fungicide	Chlorothalonil.
CA900030	Pest Strip	Amvac Small Insect Strip.

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
100	Syngenta Crop Protection, LLC, 410 Swing Rd., P.O. Box 18300, Greensboro, NC 27419–8300.
352	E.I. DuPont de Nemours and Company (S300/419), Manager, Registration & Regulatory Affairs, 1007 Market St., Wilmington, DE 19898–0001.
499	Whitmire Micro-Gen Research Laboratories, Inc., Agent: BASF Corporation, 3568 Tree Court Industrial Blvd., St. Louis, MO 63122–6682.
9404	Sunniland Corporation, P.O. Box 8001, Sanford, FL 32772–8001.
10163	Gowan Company, P.O. Box 5569, Yuma, AZ 853668844.
10466	Thomas Research Associates, Shenstone Estates, 17804 Braemar Plaza, Leesburg, VA 20176–7046.
10807	Amreo, Inc., 990 Industrial Park Dr., Marietta, GA 30062.
28293	Phaeton Corporation, P.O. Box 1019, Salem, VA 24153.
38167	Helena Chemical Company, D/B/A Setre Chemical Company, 225 Schilling Blvd., Suite 300, Collierville, TN 38017.
61483	KMG-Bernuth, Inc., 9555 W. Sam Houston Parkway South, Suite 600, Houston, TX 77099.
62719	Dow Agrosciences, LLC, 9330 Zionsville Rd., 308/2E, Indianapolis, IN 46268–1054.
66222	Makhteshim Agan of North America, Inc., 3120 Highwoods Blvd., Suite 100, Raleigh, NC 27604.
66330	Arysta Lifescience North America, LLC, 15401 Weston Parkway, Suite 150, Cary, NC 27513.
68451	Intervet, Inc., 556 Morris Avenue, S5–2145A, Summit, NJ 07901.
73327	Swiss Farms Products, 3993 Howard Hughs Parkway, Suite 250, Las Vegas, NV 89109–6754.
75829	Garrison Dental Solutions, 150 Dewitt Lane, Ispring Lake, MI 49456.
81880	Canyon Group, LLC, C/O Gowan Company, 370 S. Main St., Yuma, AZ 85364.
88058	Orion Ato, LLC, Agent: Source Dynamics, LLC, S122230 E. Del Norte, Yuma, AZ 85377–7355.
CA 900030	California Dept. of Food and Agriculture, 1220 N. Street Room 221, Sacramento, CA 95814.

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 requested that EPA waive the 180-day comment period. Accordingly, EPA will provide a 30-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 (except for registration no. 066330–00037 and 066330–00047) 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.

A. Registration No. 066330–00037

The continued sale and distribution of existing stocks of this product will be allowed through December 1, 2012. Additionally, the use of existing stocks of this product will be allowed until those existing stocks are exhausted.

B. Registration No. 066330–00047

The continued sale and distribution of existing stocks of this product will be allowed through December 1, 2012. Additionally, the use of existing stocks of this product will be allowed until those existing stocks are exhausted.

List of Subjects

Environmental protection, Pesticides and pests.

Dated: November 21, 2012.

Richard P. Keigwin, Jr.,

Director, Pesticide Re-evaluation Division, Office of Pesticide Programs.

[FR Doc. 2012–29384 Filed 12–4–12; 8:45 am]

BILLING CODE 6560–50–P

EXPORT-IMPORT BANK OF THE UNITED STATES

Notice of Open Special Meeting of the Sub-Saharan Africa Advisory Committee of the Export-Import Bank of the United States (Ex-Im Bank)

SUMMARY: The Sub-Saharan Africa Advisory Committee was established by Public Law 105–121, November 26, 1997, to advise the Board of Directors on the development and implementation of policies and programs designed to support the expansion of Ex-Im Bank's financial commitments in Sub-Saharan Africa under its loan, guarantee, and insurance programs. Further, the Committee shall make recommendations on how Ex-Im Bank can facilitate greater support by U.S. commercial banks for trade with Sub-Saharan Africa.

Time and Place: Monday, December 17, 2012, between 10:30 a.m. and 12:30 p.m. Security processing will be necessary for reentry into the building. The meeting will be held at Ex-Im Bank in the Main Conference Room 326, 811 Vermont Avenue NW., Washington, DC 20571.

Agenda: Presentation on recent developments in Sub-Saharan Africa markets by Ex-Im Bank staff; an update on Ex-Im Bank's on-going business development initiatives in the region; and Committee discussion of current challenges and opportunities for U.S. exporters.

Public Participation: The meeting will be open to public participation and the last 10 minutes will be set aside for oral questions or comments. Members of the public may also file written statement(s) before or after the meeting. If you plan to attend, a photo ID must be presented at the guard's desk as part of the clearance process into the building and you may contact Exa Richards to be placed on an attendee list. If any person wishes auxiliary aids (e.g., a sign language interpreter) or other special accommodations, please contact, prior to December 5, 2012, Exa Richards, 811 Vermont Avenue NW., Washington, DC 20571, (202) 565–3455.

FURTHER INFORMATION: For further information, please contact Exa Richards, 811 Vermont Avenue NW., Washington, DC 20571; (202) 565–3455.

Lisa V. Terry,

Assistant General Counsel.

[FR Doc. 2012–29257 Filed 12–4–12; 8:45 am]

BILLING CODE 6690–01–P

FEDERAL COMMUNICATIONS COMMISSION

Information Collection Being Reviewed by the Federal Communications Commission Under Delegated Authority

AGENCY: Federal Communications Commission.

ACTION: Notice; request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burden and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the Federal Communications Commission invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s). Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize

the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information burden for small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid OMB control number.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before February 4, 2013. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

ADDRESSES: Submit your PRA comments to Nicholas A. Fraser, Office of Management and Budget, via fax at 202–395–5167 or via Internet at *Nicholas_A._Fraser@omb.eop.gov* and to Judith B.Herman, Federal Communications Commission, via the Internet at *Judith-b.herman@fcc.gov*. To submit your PRA comments by email send them to: *PRA@fcc.gov*.

FOR FURTHER INFORMATION CONTACT: Judith B. Herman, Office of Managing Director, (202) 418–0214.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0286.

Title: Section 80.302, Notice of Discontinuance, Reduction or Impairment of Service Involving a Distress Watch.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities, not-for-profit institutions and state, local or tribal government.

Number of Respondents: 160 respondents; 160 responses.

Estimated Time per Response: 1 hour.

Frequency of Response: On occasion reporting requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. sections 151—155, 301—609 of the Communications Act of 1934, as amended; and 3 UST 3450, 3 UST 4726 and 12 UST 2377.

Total Annual Burden: 160 hours.

Total Annual Cost: N/A.

Privacy Impact Assessment: N/A.

Nature and Extent of Confidentiality: There is no need for confidentiality.

Needs and Uses: The Commission is submitting this expiring information collection to the Office of Management and Budget (OMB) for approval of an extension request (no change in the public reporting and/or third party disclosure requirements). There is no change in the Commission's previous burden estimates.

Section 80.302 of the Commission's rules states that when changes occur in the operation of a public coast station which include discontinuance, relocation, reduction or suspension of a watch required to be maintained on 2182 kHz or 156.800 MHz, notification must be may be the licensee to the nearest district office of the U.S. Coast Guard as soon as practicable. This notification must include the estimated or know resumption time of the watch.

OMB Control Number: 3060–0599.

Title: Sections 90.425 and 90.467, Station Identification.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities and state, local or tribal government.

Number of Respondents: 209 respondents; 209 responses.

Estimated Time per Response: 1.66 hours (10 minutes).

Frequency of Response: On occasion reporting requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. sections 151(i), 309(j) and 332 as amended by the Communications Act of 1934, as amended.

Total Annual Burden: 347 hours.

Total Annual Cost: N/A.

Privacy Impact Assessment: N/A.

Nature and Extent of Confidentiality: There is no need for confidentiality.

Needs and Uses: The Commission is submitting this expiring information collection to the Office of Management and Budget (OMB) for approval of an extension request (no change in the public reporting requirement). There is no change in the Commission's (2010) burden estimates.

Sections 90.425 and 90.647, Station Identification set forth station identification requirements under these rule sections. Section 90.425(e) states that 929–930 MHz nationwide paging licensees and MTA-based SMR licensees or MTA or Economic Area (EA)-based SMR licensees are exempt from meeting these identification requirements as opposed to all other Commercial Mobile Radio Service (CMRS). Further the remaining CMRS providers need comply only once with the streamlined station identification requirements which amend requirements from once every 15 minutes to once an hour.

Federal Communications Commission.

Marlene H. Dortch,

Secretary, Office of the Secretary, Office of Managing Director.

[FR Doc. 2012–29344 Filed 12–4–12; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Information Collection Being Reviewed by the Federal Communications Commission

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burden and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the Federal Communications Commission invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s). Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information burden for small business concerns with fewer than 25 employees. The FCC may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid OMB control number.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before February 4, 2013. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

ADDRESSES: Submit your PRA comments to Benish Shah, Federal Communications Commission, via the Internet at *Benish.Shah@fcc.gov*. To submit your PRA comments by email send them to: *PRA@fcc.gov*.

FOR FURTHER INFORMATION CONTACT: Benish Shah, Office of Managing Director, (202) 418–7866.

SUPPLEMENTARY INFORMATION:

OMB Approval Number: 3060–0059.

Title: Statement Regarding the Importation of Radio Frequency Devices Capable of Harmful Interference.

Form No.: FCC 740.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents: 10,000 respondents, 2,000,000 responses.

Estimated Time per Response: 30 sec (.0084 hours).

Frequency of Response: One time reporting requirement and third party disclosure.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this collection of information is contained in 47 U.S.C. sections 154(i), 157(a), 302(a), 303(b), 303(f), 303(g) and 303(r).

Total Annual Burden: 33,600 hours.

Total Annual Costs: N/A.

Privacy Act Impact Assessment: N/A.

Nature and Extent of Confidentiality: There are no confidentiality issues.

Needs and Uses: The Commission will submit this expiring information collection to the Office of Management and Budget (OMB) after this 60 day comment period in order to obtain the full three year clearance from them.

The FCC, working in conjunction with the U.S. Customs Service is responsible for the regulation of both authorized radio services and devices that can cause interference. FCC Form 740 must be completed for each radio frequency device which is imported into the United States, and is used to keep non-compliant devices from being distributed to the general public, thereby reducing the potential for harmful interference being caused to authorized communications. FCC Form 740 is submitted to the U.S. Customs Service and Border Patrol electronically or in a few cases paper format. The FCC Form 740 is not submitted to the Federal Communications Commission. When a violation is discovered, the FCC can issue a fine. If a product is suspected of illegal entry, the FCC works with the U.S. Customs Service to resolve the issue.

Federal Communications Commission.

Marlene H. Dortch,

Secretary, Office of the Secretary, Office of Managing Director.

[FR Doc. 2012–29343 Filed 12–4–12; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[CG Docket No. 06–181; DA 12–1833]

Notice of Exemption Dismissals and Obligation To Begin Providing Closed Captioning

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: In this document, the Commission, via the Consumer and Governmental Affairs Bureau (Bureau) identifies the petitions that were dismissed pursuant to the procedures described in the Bureau's *April 2012 Public Notice*. Also, this document serves to remind these petitioners of their obligation to provide closed captioning, unless they have already filed a new petition for exemption with the Commission.

FOR FURTHER INFORMATION CONTACT: Traci Randolph, Consumer and Governmental Affairs Bureau, at (202) 418–0569 (voice), (202) 418–0537 (TTY); email: *Traci.Randolph@fcc.gov*.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Public Notice, document DA 12–1833, released November 14, 2012, in CG Docket No. 06–181. The full text of this document and copies of any subsequently filed documents in this matter will be available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street SW., Room CY–A257, Washington, DC 20554. Document DA 12–1833 and copies of subsequently filed documents in this matter may also be purchased from the Commission's duplicating contractor, Best Copying and Printing, Inc. (BCPI), at Portals II, 445 12th Street SW., Room CY–B402, Washington, DC 20554. Customers may contact BCPI at its Web site: *http://www.bcpiweb.com*, or by calling (202) 488–5300. Document DA 12–1833 and the Appendix listing the petitions dismissed on July 5, 2012, pursuant to DA 12–514 can also be downloaded in Word or Portable Document Format (PDF) at: *http://www.fcc.gov/encyclopedia/economically-burdensome-exemption-closed-captioning-requirements.*

Synopsis

The *April 2012 Public Notice* addressed unresolved petitions for exemption that were filed before passage of the Twenty-First Century Communications and Video Accessibility Act (CVAA) on October 8, 2010. Although some of these petitions were previously placed on public notice, no decision to grant or to deny was ever made regarding these petitions. Because considerable time had passed since many of these petitions were first filed, and various circumstances including, but not limited to, the financial status of the petitioners and the cost of captioning may have changed, the Bureau required each petitioner whose petition was listed in the *April 2012 Public Notice* to do one of the following by July 5, 2012: (1) File an affirmation with the Commission that its previously submitted petition and supporting information were accurate and up-to-date; (2) file updated information in accordance with the Commission's rules to support its claim that captioning its program(s) would be economically burdensome; or (3) withdraw its previously submitted petition. The *April 2012 Public Notice* alerted petitioners that if they did not take one of the steps listed above by July 5, 2012, their petitions would be dismissed without prejudice on July 5, 2012. The Bureau sent a copy of the *April 2012 Public Notice*, along with instructions on filing updated information, by certified mail, return receipt requested, to each petitioner at its last known address.

The petitioners listed in the document DA 12–1833 Appendix did not take one of the above steps by July 5, 2012; therefore, their respective petitions were dismissed on July 5, 2012. Accordingly, these petitioners were required to begin captioning their programs on July 6, 2012. In this regard, the Bureau notes that if the programming that was the subject of a petition listed herein aired without captions after the dismissal date of July 5, 2012, the video programming distributor that aired such programming may be in violation of the Commission's closed captioning rules from that date up until the time that a new petition is filed.

If any petitioner listed in DA 12–1833 filed a new petition after July 6, 2012, such petition is considered pending as of the date it was received at the Commission. While a petition for exemption is pending, the video programming that is subject to the petition is exempt from the closed captioning requirements.

Federal Communications Commission.

Karen Peltz Strauss,

Deputy Chief, Consumer and Governmental Affairs Bureau.

[FR Doc. 2012–29358 Filed 12–4–12; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL MARITIME COMMISSION

Notice of Agreements Filed

The Commission hereby gives notice of the filing of the following agreements under the Shipping Act of 1984. Interested parties may submit comments on the agreements to the Secretary, Federal Maritime Commission, Washington, DC 20573, within ten days of the date this notice appears in the **Federal Register**. Copies of the agreements are available through the Commission's Web site (*www.fmc.gov*) or by contacting the Office of Agreements at (202)–523–5793 or *tradeanalysis@fmc.gov*.

Agreement No.: 011707–009.

Title: Gulf/South America Discussion Agreement.

Parties: BBC Chartering & Logistic GMBH & Co. KG; Industrial Maritime Carriers LLC; Seaboard Marine, Ltd.; and West Coast Industrial Express, LLC.

Filing Party: Wade S. Hooker, Esq.; 211 Central Park W; New York, NY 10024.

Synopsis: The amendment removes BBC Chartering & Logistic GMBH & Co. KG as a party to the agreement.

By Order of the Federal Maritime Commission.

Dated: November 30, 2012.

Rachel E. Dickon,

Assistant Secretary.

[FR Doc. 2012–29421 Filed 12–4–12; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

[DOCKET NO. 12–10]

SBI International, Inc. v. Mr. Howard Finkel c/o Cosco Container Lines; Notice of Filing of Complaint and Assignment

Notice is given that a complaint has been filed with the Federal Maritime Commission (Commission) by SBI International, Inc., a corporation registered in Florida, hereinafter "Complainant," against Mr. Howard Finkel c/o Cosco Container Lines, hereinafter "Respondent."

Complainant alleges that "4 refrigerated containers originating from the USA port of Wilmington, NC consisting of USA frozen poultry belonging to the Shipper were detained since May/June 2012 in the China port of Xingang," and that "Cosco Container Lines America failed to actively participate" in an informal dispute resolution processes pursued by "shipper" through the Commission's Office of Consumer Affairs and Dispute Resolution Services. Therefore, Complainant alleges that "shipper remains unable to retrieve his cargo valued at USD$164,176.81," and that Respondent is in violation of sections 10(b)(1), 10(b)(3), 10(b)(4), 10(b)(4)(D), 10(b)(4)(E), and 10(b)(10) of the Ocean Shipping Reform Act of 1988.

Complainant requests that the Commission order Respondent to "cease and desist from the aforesaid violations of said acts; to establish and put in force such practices as the Commission determines to be lawful and reasonable; to pay to said Complainant by way of reparations and damages for the unlawful conduct herein described the sum of $164,176.81 with interest and attorney's fees (or time spent fees) or other such sum as the Commission may determine to be proper as an award of reparations; and that such other and further order or orders be made as the Commission determines to be just and proper in the premises." The full text of the complaint can be found in the Commission's Electronic Reading Room at *www.fmc.gov*.

This proceeding has been assigned to the Office of Administrative Law Judges. The initial decision of the presiding officer in this proceeding shall be issued by November 29, 2013 and the final decision of the Commission shall be issued by March 31, 2014.

Karen V. Gregory,

Secretary.

[FR Doc. 2012–29399 Filed 12–4–12; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL RESERVE SYSTEM

Proposed Agency Information Collection Activities; Comment Request

AGENCY: Board of Governors of the Federal Reserve System.

SUMMARY: On June 15, 1984, the Office of Management and Budget (OMB) delegated to the Board of Governors of the Federal Reserve System (Board) its approval authority under the Paperwork Reduction Act (PRA), pursuant to 5 CFR 1320.16, to approve of and assign OMB control numbers to collection of information requests and requirements conducted or sponsored by the Board under conditions set forth in 5 CFR part 1320 Appendix A.1. Board-approved collections of information are incorporated into the official OMB inventory of currently approved collections of information. Copies of the Paperwork Reduction Act Submission, supporting statements and approved collection of information instruments are placed into OMB's public docket files. The Federal Reserve 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.

DATES: Comments must be submitted on or before February 4, 2013.

ADDRESSES: You may submit comments, identified by FR *2230*, by any of the following methods:

- *Agency Web Site: http://www.federalreserve.gov*. Follow the instructions for submitting comments at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm*.
- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Email: regs.comments@federalreserve.gov*. Include OMB number in the subject line of the message.
- *Fax:* (202) 452–3819 or (202) 452–3102.
- *Mail:* Robert deV. Frierson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW., Washington, DC 20551.

All public comments are available from the Board's web site at *www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm* as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper form in Room MP–500 of the Board's Martin Building (20th and C Streets NW.) between 9:00 a.m. and 5:00 p.m. on weekdays.

Additionally, commenters may send a copy of their comments to the OMB Desk Officer—Shagufta Ahmed—Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235 725 17th Street NW., Washington, DC 20503 or by fax to (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: A copy of the PRA OMB submission, including the proposed reporting form and instructions, supporting statement, and other documentation will be placed into OMB's public docket files, once approved. These documents will also be made available on the Federal Reserve

Board's public Web site at: *http://www.federalreserve.gov/boarddocs/reportforms/review.cfm* or may be requested from the agency clearance officer, whose name appears below.

Federal Reserve Board Clearance Officer — Cynthia Ayouch — Division of Research and Statistics, Board of Governors of the Federal Reserve System, Washington, DC 20551 (202) 452–3829. Telecommunications Device for the Deaf (TDD) users may contact (202) 263–4869, Board of Governors of the Federal Reserve System, Washington, DC 20551.

SUPPLEMENTARY INFORMATION:

Request for Comment on Information Collection Proposal

The following information collection, which is being handled under this delegated authority, has received initial Board approval and is hereby published for comment. At the end of the comment period, the proposed information collection, along with an analysis of comments and recommendations received, will be submitted to the Board for final approval under OMB delegated authority. Comments are invited on the following:

a. Whether the proposed collection of information is necessary for the proper performance of the Federal Reserve's functions; including whether the information has practical utility;

b. The accuracy of the Federal Reserve's estimate of the burden of the proposed information collection, including the validity of the methodology and assumptions used;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of information collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

e. Estimates of capital or start up costs and costs of operation, maintenance, and purchase of services to provide information.

Proposal To Approve Under OMB Delegated Authority the Extension for Three Years, With Revision, of the Following Report

Report title: Bank Secrecy Act Suspicious Activity Report (BSA–SAR).

Agency form number: FR 2230.

OMB control number: 7100–0212.

Frequency: On occasion.

Reporters: State member banks, bank holding companies and their nonbank subsidiaries, Edge and agreement corporations, and the U.S. branches and agencies, representative offices, and nonbank subsidiaries of foreign banks supervised by the Federal Reserve.

Estimated annual reporting hours: 139,515 hours.

Estimated average hours per response: 1.5 hours.

Number of respondents: 6,000.

General description of report: The BSA–SAR is mandatory, pursuant to authority contained in the following statutes: 12 U.S.C. 248(a)(1), 625, 1844(c), 3105(c)(2), 3106(a), and 1818(s). SARs are exempt from Freedom of Information Act (FOIA) disclosure by 31 U.S.C. 5319 and FIOA exemption 3 which incorporates into the FOIA certain nondisclosure provisions that are contained in other federal statutes. 5 U.S.C. 552(b)(3), and by FOIA exemption 7, which generally exempts from public disclosure "records or information compiled for law enforcement purposes," 5 U.S.C. 552(b)(7). Additionally, pursuant to 31 U.S.C. 5318(g), officers and employees of the Federal government are generally forbidden from disclosing the contents of a SAR, or even acknowledging that a SAR exists, to a party involved in a transaction that is the subject of a SAR. Finally, information contained in SARs may be exempt from certain disclosure and other requirements of the Privacy Act pursuant to 5 U.S.C. 552a(k)(2).

Abstract: Since 1996, the federal banking agencies (the Federal Reserve Board, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and the National Credit Union Administration) and the Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) have required certain types of financial institutions to report known or suspected violations of law and suspicious transactions. To fulfill these requirements, supervised banking organizations file SARs. Law enforcement agencies use the information submitted on the reporting form to initiate investigations and the Federal Reserve uses the information in the examination and oversight of supervised institutions.

Current Actions: As BSA administrator, FinCEN is transitioning from industry specific paper forms to electronic submissions. Based on type, financial institutions (depository institutions, broker-dealers in securities, futures commission merchants and introducing brokers in commodities, insurance companies, mutual funds, money services businesses, and casinos) currently provide data on four separate forms. FinCEN has proposed to have one electronically-filed dynamic and interactive BSA–SAR that would be used by all filing institutions to report suspicious activity as of April 1, 2013.

The BSA–SAR would integrate four institution-specific SARs into one data collection. The previous five parts of the SAR–DI remain with changes to their titles and order of completion. Fields from other industry SARs that may be new to depository institutions as well as specific data fields that are new to all types of industry filers have been identified. Please use the following link for a detailed listing of all the proposed revisions. *http://www.federalreserve.gov/reportforms/review.cfm.*

Board of Governors of the Federal Reserve System, November 29, 2012.

Robert deV. Frierson,

Secretary of the Board.

[FR Doc. 2012–29312 Filed 12–4–12; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Delegation of Authorities

Notice is hereby given that I have delegated to the Administrator, Health Resources and Services Administration (HRSA), the authorities vested in the Secretary under Section 1861(aa)(4)(B) (42 U.S.C. 1395x(aa)(4)(B)) of the Social Security Act (the Act), as amended, and Section 1905(l)(2)(B)(iii) (42 U.S.C. 1396d(l)(2)(B)(iii)) of the Act, as amended, to make determinations that entities meet the requirements for receiving a grant under section 330 of the Public Health Service Act, as amended, and to qualify to be federally qualified health centers (FQHCs).

I hereby amend the authorities delegated to CMS under Title XVIII of the Act (42 U.S.C. 1395 et seq.) and Title XIX of the Act (42 U.S.C. 1396 et seq.) that were published in the **Federal Register** notice on September 6, 1984 and contained in Section F.50.—Limitations of Authority, *2.—Under Title XVIII of the Social Security Act (42 U.S.C. 1395 et. seq),* is amended by adding the following paragraph:

f. The Health Resources and Services Administration shall exercise the authority under section 1861(aa)(4)(B) (42 U.S.C. 1395x(aa)(4)(B)) of the Social Security Act to make determinations that entities meet the requirements for receiving a grant under section 330 of the Public Health Service Act, and to qualify as a federally qualified health center. This authority will not extend to issues of payment rates or provider enrollment under Title XVIII of the Act. Section F.50.—Limitations of Authority, *3.—Under Title XIX of the Social*

Security Act (42 U.S.C. 1396 et. seq), is amended by adding the following paragraph:

d. The Health Resources and Services Administration shall exercise the authority under section 1905(l)(2)(B)(iii) (42 U.S.C. 1396d(l)(2)(B)(iii)) of the Social Security Act to make determinations that entities meet the requirements for receiving a grant under section 330 of the Public Health Service Act, and to qualify as a federally qualified health center. This authority will not extend to issues of payment rates or provider enrollment under Title XIX of the Act.

I instruct HRSA to consult and collaborate with CMS, as appropriate. HRSA will notify the appropriate regional office of its determination that entities meet the requirements to qualify as an FQHC in order to ensure that CMS' provider enrollment process continues without interruption.

This delegation of authority excludes the authority to issue regulations, to establish advisory committees and councils, and appoint their members, and shall be exercised in accordance with the Department's applicable policies, procedures, and guidelines.

I hereby affirm and ratify any actions taken by the Administrator, HRSA, and Administrator, CMS, or other HRSA and CMS officials, which involve the exercise of the authorities prior to the effective date of this delegation of authority.

These authorities may be re-delegated.

This delegation of authority is effective upon date of signature.

Authority: 44 U.S.C. 3101.

Dated: November 15, 2012.

Kathleen Sebelius,

Secretary.

[FR Doc. 2012–29409 Filed 12–4–12; 8:45 am]

BILLING CODE 4150–03–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifiers CMS–10305]

Agency Information Collection Activities: Submission for 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.

Type of Information Collection Request: Revision of a currently approved collection; Title: Medicare Part C and Part D Data Validation (42 CFR 422.516g and 423.514g); *Use:* The Centers for Medicare and Medicaid Services (CMS) established reporting requirements for Medicare Part C and Part D sponsoring organizations (Medicare Advantage Organizations [MAOs], Cost Plans, and Medicare Part D sponsors) under the authority described in 42 CFR 422.516(a) and 423.514(a), respectively. Under these reporting requirements, each sponsoring organization must submit Medicare Part C, Medicare Part D, or Medicare Part C and Part D data (depending on the type of contracts they have in place with CMS).

In order for the reported data to be useful for monitoring and performance measurement, it must be reliable, valid, complete, and comparable among sponsoring organizations. In 2009, CMS developed the data validation program as a mechanism to verify the data reported are accurate, valid, and reliable. To maintain the independence of the validation process, sponsoring organizations do not use their own staff to conduct the data validation. Instead, sponsoring organizations are responsible for hiring external, independent data validation contractors (DVCs) who meet a minimum set of qualifications and credentials.

CMS developed standards and data validation criteria for specific Medicare Part C and Part D reporting requirements that the DVCs use in validating the sponsoring organizations' data. These standards and criteria are described in Appendix 1 "Data Validation Standards." The data validation standards for each reporting section include standard instructions relating to the types of information that should be reviewed, and reporting section criteria (MSC) that are aligned with the "Medicare Part C and Part D Reporting Requirement Technical Specifications." Furthermore, the standards and criteria describe how the DVCs should validate the sponsoring organizations' compilations of reported data, taking into account appropriate data exclusions, and verifying calculations, source code, and algorithms. The data validation reviews are conducted at the contract level given that the Medicare Part C and Part D data are generally available at the contract level and the contract is the basis of any legal and accountability issues concerning the rendering of services.

The review is conducted over a three-month period following the final submission of data by the sponsoring organizations. In addition to the "Data Validation Standards" described in Appendix 1, the DVCs employ a set of information collection tools when performing their reviews, which are included in the appendices described below:

Appendix 2: "Organizational Assessment Instrument"
Appendix 3: "Data Extraction and Sampling Instructions"
Appendix 4: "Instructions for the Findings Data Collection Form"
Appendix 5: "Findings Data Collection Form (FDCF)"

Data collected via "Medicare Part C and Part D Reporting Requirements Technical Specifications" is an integral resource for oversight, monitoring, compliance and auditing activities necessary to ensure quality provision of the Medicare benefits to beneficiaries. CMS uses the data collected through the Medicare Data Validation Program to substantiate the data collected via "Medicare Part C and Part D Reporting Requirements Technical Specifications." If CMS detects data anomalies, the CMS division with primary responsibility for the applicable reporting requirement assists with determining a resolution.

The hour burden on industry is estimated at 179,301 total hours, or 879 hours for one contract within one organization reporting both Part C and Part D reporting sections. The validation would require 378 hours from the sponsoring organization and 501 from the DVCs. The estimates are based on the total number of Part C and/or Part D reporting sections, the average number of sponsors, and the average number of contracts by type (Part C, Part D, Part C/D) being validated as well as a level of effort associated with the individual activities associated with the data validation process. *Form Number:* CMS–10305 (OMB#: 0938–1115); *Frequency:* Reporting—Annually;

Affected Public: sponsoring organizations. *Number of Respondents:* 135; *Total Annual Responses:* 657; *Total Annual Hours:* 179,301. (For policy questions regarding this collection contact Terry Lied at 410–786–8973. 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 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 *January 4, 2013*.

OMB, Office of Information and Regulatory Affairs, *Attention:* CMS Desk Officer, *Fax Number:* (202) 395–6974, *Email:* *OIRA_submission@omb.eop.gov*.

Dated: November 29, 2012.

Martique Jones,

Director, Regulations Development Group, Division B, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2012–29308 Filed 12–4–12; 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

Proposed Projects

Title: Form OCSE–396–A, Child Support Enforcement Program Expenditure Report, Form OCSE–34–A, Child Support Enforcement Program Collection Report.

OMB No.: 0970–0181.

Note: This Comment Request supersedes the Comment Request published November 28, 2012 (77 FR 71005), concerning OMB Control No. 0970–0181.

Description: Form OCSE–396–A is a financial report submitted following the end of each fiscal quarter by each State with an approved plan under title IV–D of the Social Security Act to administer the Child Support Enforcement Program. The purpose of this form is to enable each State to meet its statutory and regulatory requirement to report program expenditures made in the preceding fiscal quarter and to estimate program expenditures to be made in the upcoming fiscal quarter and to estimate the amount of incentive payments to be earned in the upcoming quarter.

Form OCSE–34–A is a financial report submitted following the end of each fiscal quarter by each State and Tribe with an approved plan under title IV–D of the Social Security Act to administer the Child Support Enforcement Program. The purpose of this form is to enable each State and Tribe to meet its statutory and regulatory requirement to report child support collection activity during the preceding quarter, including collection received, collections remaining undistributed from previous quarters, if any, and the distribution and disbursement of collections.

The Administration for Children and Families provides Federal funding to States for the Child Support Enforcement Program at the rate of 66 percent for all allowable and legitimate administrative costs of this program. (Federal funding is also provided to Tribes at the rates of 80 or 90 percent. However, in accordance with program regulations, Tribes are not required to submit Form OCSE–396–A and use, instead, quarterly submissions of OMB Standard Form 425. SF–425 is not included in this comment request.)

The information collected in these reports is used by this agency to calculate quarterly Federal grant awards and incentive payments to States, to enable oversight of the financial management of the program for both States and Tribes and may be included in statistical and financial reports available to the public.

Respondents: States (including Puerto Rico, Guam, the Virgin Islands and the District of Columbia) and Tribes with approved title IV–D plans.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
OCSE–396A	54	4	6	1,296
OCSE–34A	112	4	14	6,272

Estimated Total Annual Burden Hours: 7,568.

In compliance with the requirements of Section 506(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: ACF Reports Clearance Officer. Email address: *infocollection@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.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 2012–29264 Filed 12–4–12; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2012–N–0813]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Applications for Food and Drug Administration Approval To Market a New Drug; Revision of Postmarketing Reporting Requirements—Discontinuance

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Fax written comments on the collection of information by January 4, 2013.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: FDA Desk Officer, FAX: 202–395–7285, or emailed to *oira_submission@omb.eop.gov*. All comments should be identified with the OMB control number 0910–0699. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Ila S. Mizrachi, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–796–7726, *Ila.Mizrachi@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Applications for Food and Drug Administration Approval To Market a New Drug; Revision of Postmarketing Reporting Requirements—Discontinuance—(OMB Control Number 0910–0699)—Reinstatement

FDA published an interim final rule on December 19, 2011 (76 FR 78530), amending its postmarketing reporting regulations implementing certain provisions of the Federal Food, Drug and Cosmetic Act (FD&C Act). The provisions of the FD&C Act require manufacturers who are the sole manufacturers of certain drug products to notify FDA at least 6 months before discontinuance of manufacture of the products. The interim final rule modified the term "discontinuance" and clarified the term "sole manufacturer" with respect to notification of discontinuance requirements. The broader reporting resulting from these changes will enable FDA to improve its collection and distribution of drug shortage information to physician and patient organizations and to work with manufacturers and other stakeholders to respond to potential drug shortages.

Sections 314.81(b)(3)(iii) and 314.91 (21 CFR 314.81(b)(3)(iii) and 314.91) of FDA's regulations implement section 506C of the FD&C Act (21 U.S.C. 355c). Section 314.81(b)(3)(iii) requires entities who are the sole manufacturers of certain drug products to notify us at least 6 months before discontinuance of manufacture of the product. For the regulations to apply, a product must meet the following three criteria:

1. The product must be life supporting, life sustaining, or intended for use in the prevention of a debilitating disease or condition;
2. The product must have been approved by FDA under section 505(b) or 505(j) (21 U.S.C. 355(b) or 355(j)) of the FD&C Act; and
3. The product must not have been originally derived from human tissue and replaced by a recombinant product.

Under § 314.81(b)(3)(iii)(c), FDA will publicly disclose information about drug products subject to section 506C that are to be discontinued. Section 314.91 allows us to reduce the 6-month notification period if we find that good cause exists for the reduction. A manufacturer may request that we reduce the notification period by certifying that good cause for the reduction exists.

FDA added §§ 314.81(b)(3)(iii) and 314.91 to its regulations in the **Federal Register** of October 18, 2007 (72 FR 58993). Sections 314.81(b)(3)(iii) and 314.91 require two new reporting requirements to FDA that are subject to OMB approval under the PRA: Notification of Discontinuance and Certification of Good Cause. The December 19, 2011, interim final rule added two new definitions to § 314.81(b)(3)(iii): "Discontinuance" and "sole manufacturer." The interim final rule clarified the scope of manufacturers required to report and expanded the range of circumstances required to be reported to the Agency under § 314.81(b)(3)(iii), but did not change the substantive content of the reports required to be submitted to the Agency. This PRA analysis covers the information collection resulting from the October 18, 2007, final rule and also includes estimates of how the number of Notifications of Discontinuance and Certifications of Good Cause may increase as a result of the interim final rule.

A. Notification of Discontinuance

Under § 314.81(b)(3)(iii), at least 6 months before a sole manufacturer intends to discontinue manufacture of a drug product subject to section 506C of the FD&C Act, the manufacturer must send us notification of the discontinuance. The notification of discontinuance generally contains the name of the manufacturer, the name of the product to be discontinued, the reason for the discontinuance, and the date of discontinuance. FDA will work with relevant manufacturers during the 6-month notification period to help minimize the effect of the discontinuance on patients and health care providers, and to distribute appropriate information about the discontinuance to physician and patient organizations. The interim final rule added definitions of "discontinuance" and "sole manufacturer" to § 314.81(b)(3)(iii). The inclusion of these definitions expands notification requirements under § 314.81(b)(3)(iii) to additional discontinuance circumstances and clarifies the scope of manufacturers who must report discontinuances. The interim final rule also required that notifications of discontinuance be submitted either electronically or by telephone according to instructions on FDA's Drug Shortage Web site at *http://www.fda.gov/Drugs/DrugSafety/DrugShortages*. This change ensures that the appropriate offices are timely notified of all relevant discontinuances. It also reflects existing practice for submitting notices of discontinuance, and reduces the burden on industry to submit multiple copies of the notification.

B. Certification of Good Cause

FDA may reduce the 6-month notification period if we find good cause for the reduction. As described in § 314.91, a manufacturer can request a reduction in the notification period by submitting written certification that good cause exists to the following designated offices: (1) The Center for Drug Evaluation and Research (CDER) Drug Shortage Coordinator at the address of the Director of CDER; (2) the CDER Drug Registration and Listing Team, Division of Compliance Risk Management and Surveillance in CDER; and (3) the director of either the CDER

division or the Center for Biologics Evaluation and Research office that is responsible for reviewing the application. The following circumstances may establish good cause:

- A public health problem may result from continuation of manufacturing for the 6-month period (§ 314.91(d)(1));
- A biomaterials shortage prevents the continuation of manufacturing for the 6-month period (§ 314.91(d)(2));
- A liability problem may exist for the manufacturer if the manufacturing is continued for the 6-month period (§ 314.91(d)(3));
- Continuation of the manufacturing for the 6-month period may cause substantial economic hardship for the manufacturer (§ 314.91(d)(4));
- The manufacturer has filed for bankruptcy under chapter 7 or 11 of title 11, United States Code (§ 314.91(d)(5));
- The manufacturer can stop making the product but still distribute it to satisfy existing market need for 6 months (§ 314.91(d)(6)); or
- Other good cause exists for a reduction in the notification period (§ 314.91(d7) (7)).

With each certification described previously, the manufacturer must describe in detail the basis for its conclusion that such circumstances exist. We require that the written certification that good cause exists be submitted to the offices identified previously to ensure that our efforts to address the discontinuance take place in a timely manner. The interim final rule made no changes to the requirements or process for certification of good cause.

Description of Respondents: An applicant that is the sole manufacturer and who is discontinuing manufacture of a drug product that meets the following criteria: (1) Is life supporting, life sustaining, or intended for use in the prevention of a debilitating disease or condition; (2) was approved by FDA under section 505(b) or (j) of the FD&C Act; and (3) was not originally derived from human tissue and replaced by a recombinant product.

Burden Estimate: The table below provides an estimate of the annual reporting burden for notification of a product discontinuance and certification of good cause under §§ 314.81(b)(3)(iii) and 314.91, as amended by the interim final rule.

Notification of Discontinuance: Based on data collected from the CDER Drug Shortage Coordinator since December 17, 2007, when §§ 314.81(b)(3)(iii) and 314.91 went into effect, one manufacturer during each year reported to FDA a discontinuance of one drug product meeting the criteria of section 506C and its implementing regulations (i.e., the drug product was approved under section 505(b) or (j) of the FD&C Act, the drug product was "life-supporting, life-sustaining or intended for use in the prevention of a debilitating disease or condition," the drug product was produced by a sole manufacturer, and the drug product was permanently discontinued). CDER's Drug Shortages Coordinator tracked 220 drug shortages between January and October of 2011. The Agency estimates that 30 percent (66) of these shortages would relate to discontinuances subject to mandatory reporting under section 506C of the FD&C Act as a result of the interim final rule. Adjusting to include an additional 2 months of reporting (November and December), we estimate that FDA will receive a total of 80 notifications of a discontinuance per year under section 506C of the FD&C Act, as amended by the interim final rule. Based on experience, a manufacturer submits only one notification of a discontinuance per year, thus the total number of manufacturers who would be required to notify us of a discontinuance would be 80. Therefore, the number of respondents is estimated to be 80. The hours per response is the estimated number of hours that a respondent would spend preparing the information to be submitted with a notification of product discontinuance, including the time it takes to gather and copy the statement. Based on experience in working with manufacturers to submit notifications under § 314.81(b)(3)(iii), we estimate that approximately 2 hours on average are needed per response. We do not expect the changes in the interim final rule to affect the number of hours per response. Therefore, we estimate that respondents will spend 160 hours per year notifying us of a product discontinuance under these regulations.

Certification of Good Cause: Based on data collected from the CDER drug shortage coordinator since 2007, one manufacturer each year reported a discontinuance of one drug product under section 506C of the FD&C Act and its implementing regulations. Each manufacturer has the opportunity under § 314.91 to request a reduction in the 6-month notification period by certifying to us that good cause exists for the reduction. The Agency has received no certifications of good cause since 2007. Although we expect we will receive an increase in the number of reports of discontinuances as a result of the changes in the interim final rule, because of the limited circumstances under which good cause can be requested or would be appropriately granted, we do not expect a correspondingly large increase in the number of manufacturers requesting a certification of good cause. We estimate that only five manufacturers will request a certification of good cause each year. Therefore, the number of respondents is estimated to be five. The total annual responses are the total number of certifications of good cause that are expected to be submitted to us in a year. We estimate that the total annual responses will remain small, averaging one response per respondent. The hours per response is the estimated number of hours that a respondent spends preparing the detailed information certifying that good cause exists for a reduction in the notification period, including the time it takes to gather and copy the documents. We estimate that approximately 16 hours on average are needed per response. Therefore, we estimate that 80 hours will be spent per year by respondents certifying that good cause exists for a reduction in the 6-month notification period under § 314.91.

In the **Federal Register** of August 1, 2012 (77 FR 45619), FDA published a 60-day notice requesting public comment on the proposed collection of information. No comments were received.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN[1]

21 CFR Section	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
Notification of Discontinuance (314.81(b)(3)(iii)	80	1	80	2	160
Certification of Good Cause (314.91)	5	1	5	16	80

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN[1]—Continued

21 CFR Section	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
Total					240

[1]There are no capital costs or operating and maintenance costs associated with this collection of information.

Dated: November 30, 2012.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2012–29327 Filed 12–4–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No FDA–2012–N–0273]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Review; Experimental Study of Graphic Cigarette Warning Labels

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a reinstatement collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995 (the PRA).

DATES: Fax written comments on the collection of information by January 4, 2013.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: FDA Desk Officer, FAX: 202–395–7285, or emailed to *oira_submission@omb.eop.gov*. All comments should be identified with the OMB control number 0910–0668. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Daniel Gittleson, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–796–5156, *Daniel.Gittleson@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

The Tobacco Control Act (Pub. L. 111–31) amends the Federal Food, Drug, and Cosmetic Act (the FD&C Act) to grant FDA authority to regulate the manufacture, marketing, and distribution of tobacco products to protect the public health and to reduce tobacco use by minors.

The purpose of this submission is to request OMB approval to conduct Web-based surveys to evaluate the relative effectiveness of various graphic health warnings on cigarette packs, which will inform the Agency's efforts to implement the mandatory graphic warnings required by the Tobacco Control Act.

Experimental Study of Graphic Cigarette Warning Labels (OMB Control Number 0910–0668—Reinstatement)

The current approval for this information collection expired October 31, 2012. FDA seeks to reinstate the collection and to reflect that there is no change in the reporting burden. At this time, the Agency is not collecting the information, but awaits OMB review and approval, and therefore believes that we are not in violation of the PRA.

Tobacco products are responsible for more than 400,000 deaths each year. The Centers for Disease Control and Prevention report that approximately 46 million U.S. adults smoke cigarettes in the United States, even though this behavior will result in death or disability for half of all regular users. Paralleling this enormous health burden is the economic burden of tobacco use, which is estimated to total $193 billion annually in medical expenditures and lost productivity. Curbing the significant adverse consequences of tobacco use is one of the most important public health goals of our time.

On June 22, 2009, the President signed the Tobacco Control Act (Pub. L. 111–31) into law. The Tobacco Control Act granted FDA authority to regulate the manufacture, marketing, and distribution of tobacco products to protect the public health generally and to reduce tobacco use by minors. Section 201 of the Tobacco Control Act, which amends section 4 of the Federal Cigarette Labeling and Advertising Act (15 U.S.C. 1333), requires FDA to issue "regulations that require color graphics depicting the negative health consequences of smoking to accompany the label statements specified in subsection (a)(1)." The study proposed here is an effort by FDA to collect data concerning graphic warnings on cigarette packages and their impact on consumer perceptions, attitudes, and behavior with respect to smoking.

On June 22, 2011, FDA issued a final rule in the **Federal Register** of June 22, 2011 (76 FR 36628), entitled "Required Warnings for Cigarette Packages and Advertisements," which specified nine graphic images to accompany the new textual warnings for cigarettes. Although the rule was scheduled to become effective 15 months after it issued, a panel of the U.S. Court of Appeals of the District of Columbia held, on August 24, 2012, that the rule in its current form violates the First Amendment. FDA expects that the information that FDA proposes to collect will be relevant to FDA's regulation of cigarette warnings no matter the final outcome of the current litigation.

This study, the Experimental Study of Graphic Cigarette Warning Labels, is a voluntary annual experimental survey of consumers. The purpose of the study is to assess the effectiveness of various graphic warnings on cigarette packs for achieving three communication goals: (1) Conveying information about various health risks of smoking; (2) encouraging cessation of smoking among current smokers; and (3) discouraging initiation of smoking among youth and former smokers. The study will collect data from various groups of consumers, including current smokers aged 13 years and older, former smokers aged 13 years and older, and non-smokers aged between 13 and 25 years who may be susceptible to initiation of smoking. The study goals are to: (1) Measure consumer attitudes, beliefs, and intended behaviors related to cigarette smoking in response to graphic warning labels; (2) determine whether consumer responses to graphic warning labels differ across various groups based on smoking status, age, or other demographic variables; and (3) evaluate the relative effectiveness of various graphic images associated with each of the nine warning statements specified in

the Tobacco Control Act for achieving each of the communication goals. The information collected from the study will help inform the Agency's efforts to implement the mandatory graphic health warnings required by the Tobacco Control Act.

The experimental study data will be collected from participants of an Internet panel of approximately 43,000 people. Participation in the experimental study is voluntary.

In the **Federal Register** of March 27, 2012 (77 FR 18250), FDA published a 60-day notice requesting public comment on its proposed collection of information. FDA received eight comments that were not PRA-related and that were outside the scope of this collection of information. FDA also received a comment that asked FDA to provide more detail about the design of the proposed consumer research study to allow for meaningful public comments. The commenter also encouraged FDA to provide additional information for public comment, including details of the protocol, screen, questionnaire, and actual graphic warnings images to be used with study participants to enhance the quality, utility, and clarity of the information to be collected and further the goals of the PRA to ensure the greatest possible public benefit from and maximize the utility of the information. FDA notes in response to this comment that the study and copies of the instruments used to collect this information are described in detail as part of the overall package submitted to OMB for review. The study and copies of the instrument were made available to the public during the original information collection period. They will also be available to the public at *www.reginfo.gov* once OMB receives the package for review.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

Portion of study	No. of respondents	No. of responses per respondent	Total annual responses	Average burden per response	Total hours
Pretest	60	1	60	0.5 (30 minutes) ..	30
Screener	15,000	1	15,000	0.016 (1 minute) ..	240
Experimental Survey	5,400	1	5,400	0.5 (30 minutes) ..	2,700
Total					2,970

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

FDA's burden estimate is based on prior experience with Internet panel experiments similar to the study proposed here. Sixty panel members will take part in a pretest of the study, estimated to last 30 minutes (0.5 hours), for a total of 30 hours. Approximately 15,000 respondents will complete a screener to determine eligibility for participation in the study, estimated to take 1 minute (0.016 hours), for a total of 240 hours. Fifty-four hundred respondents will complete the full study, estimated to last 30 minutes (0.5 hours), for a total of 2,700 hours. The total estimated burden is 2,970 hours (30 hours plus 240 hours plus 2,700 hours).

Dated: November 29, 2012.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2012–29321 Filed 12–4–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–N–0656]

Animal Drug User Fee Act; Public Meeting; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of meeting; request for comments.

The Food and Drug Administration (FDA) is announcing the following meeting: Animal Drug User Fee Act. The topic to be discussed is proposed recommendations for the reauthorization of the Animal Drug User Fee Act (ADUFA III).

Date and Time: The meeting will be held on December 18, 2012, from 9 a.m. to 12 p.m.

Location: The meeting will be held at FDA's Metro Park North Campus, 7519 Standish Pl., third floor, Meeting Room A, Rockville, MD 20855. There is parking near the building.

Contact: Jacqueline Farmer, Center for Veterinary Medicine (HFV–10), Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855, 240–276–8695, FAX: 240–276–9744, email: *ADUFAReauthorization@fda.hhs.gov.*

Registration and Requests for Oral Presentations: Send registration information (including name, title, firm name, address, telephone, and fax number), and written material and requests to make oral presentations, to the contact person by December 11, 2012.

If you need special accommodations due to a disability, please contact Jacqueline Farmer at least 7 days in advance.

Transcripts: Please be advised that as soon as a transcript is available, it will be accessible at *http://www.regulations.gov.* It may be viewed at the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD. A transcript will also be available in either hardcopy or on CD–ROM, after submission of a Freedom of Information request. Written requests are to be sent to the Division of Freedom of Information (ELEM–1029), Food and Drug Administration, 12420 Parklawn Dr., Element Bldg., Rockville, MD 20857.

Comments: Interested persons may submit either written comments regarding this meeting to the Division of Dockets Management (see Transcripts) or electronic comments to *http://www.regulations.gov.* 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.* So that FDA can consider comments and revise the recommendations as necessary, we request that comments be submitted to the docket by January 4, 2013.

SUPPLEMENTARY INFORMATION:

I. The ADUFA Program

A. What is ADUFA? What does it do?

FDA considers the timely review of the safety and effectiveness of new animal drug applications (NADAs) to be central to the Agency's mission to protect and promote the public health. Prior to 2004, the timeliness and predictability of the new animal drug review program was a concern. The Animal Drug User Fee Act enacted in 2003 (Pub. L. 108–130; hereinafter referred to as "ADUFA I"), authorized FDA to collect user fees that were to be dedicated to expediting the review of new animal drug applications in accordance with certain performance goals and to expand and modernize the new animal drug review program. The Agency agreed, under this new Act, to meet a comprehensive set of performance goals established to show significant improvement in the timeliness and predictability of the new animal drug review process. The implementation of ADUFA I provided a significant funding increase that enabled FDA to increase the number of staff dedicated to the new animal drug application review process by 30 percent since 2003.

In 2008, before ADUFA I expired, Congress passed the Animal Drug User Fee Amendments of 2008 (Pub. L. 110–316; hereinafter referred to as "ADUFA II") which included an extension of ADUFA for an additional 5 years—fiscal year (FY) 2009 to FY 2013. ADUFA II performance goals were established based on ADUFA I FY 2008 review timeframes. In addition, FDA provided program enhancements to reduce review cycles and improve communications during reviews. The ADUFA programs have enabled FDA to speed up the application review process for new animal drugs without compromising the quality of the Agency's review.

B. ADUFA Achievements

As part of ADUFA I, FDA established review performance goals that were phased in over a 5-year period. These performance goals, set from FY 2004 through FY 2008, enabled FDA to achieve progressive, yearly improvements in the time allotted for review of new animal drug applications. By the final year of ADUFA I ending on September 30, 2008, FDA reviewed and acted on 90 percent of the following submission types within the times specified:

- New animal drug applications and reactivations of such applications within 180 days after submission date.
- Non-manufacturing supplemental new animal drug applications and reactivations of such supplemental applications within 180 days after submission date.
- Manufacturing supplemental new animal drug applications and reactivations of such supplemental applications within 120 days after submission date.
- Investigational new animal drug study submissions within 180 days after submission date.
- Investigational new animal drug submissions consisting of protocols without substantial data within 60 days after submission date.
- Administrative new animal drug applications within 60 days after submission date.

With the reauthorization of ADUFA for an additional 5 years under ADUFA II (FY 2009 to FY 2013), FDA agreed to enhance and further improve the review process via the following changes.

A key improvement under ADUFA II is the "end-review amendment" (ERA) process that allows FDA reviewers to work with the drug sponsor to amend certain pending submissions. The ERA process allows us to decrease the number of review cycles, which ultimately leads to a shorter time to approval. Improved communication early in the process has the greatest potential of reducing review cycles. The greatest impact of this new tool in the first 3 years under ADUFA II has been with submissions of investigational new animal drug (INAD) studies and study protocols, which are the earliest review processes impacted by ADUFA performance goals.

The development of an electronic submission tool has enabled sponsors to submit applications and submissions electronically, and has provided FDA reviewers with the ability to evaluate submissions online.

The joint participation of FDA and the regulated industry in 10 public workshops by the end of FY 2013 on mutually agreed-upon topics has enhanced communication and transparency on topics critical to the animal drug review and approval process. To date, FDA and the regulated industry have participated in eight workshops with the final two planned for FY 2013.

FDA is committed to improving the animal drug review and business processes to facilitate the timely scheduling and conducting of foreign preapproval inspections. Because of processes developed under ADUFA II, sponsors are now able to voluntarily submit an annual facilities list and notification 30 days prior to submitting an NADA, a supplemental NADA, or an INAD submission to inform FDA that the application or submission includes a foreign manufacturing facility.

FDA has published a number of reports that provide useful background on ADUFA I and ADUFA II. ADUFA-related **Federal Register** notices, guidances, legislation, performance reports, and financial reports can be found at: *http://www.fda.gov/ForIndustry/UserFees/AnimalDrugUserFeeActADUFA/default.htm.*

II. Proposed ADUFA III Recommendations

A. Enhancing the Process for Premarket Review

We are proposing changes to the performance goals that ADUFA II established to further enhance the process for review of animal drug applications.

The ERA procedure implemented as part of ADUFA II resulted in an increase in the number of one-cycle reviews; however, certain challenges associated with the process restricted its full utilization. We are proposing, among other changes, to further improve the review process by replacing the ERA with shorter review times for certain resubmissions and reactivations. To allow time for the programming and system changes required to make this and other changes, we are proposing to maintain the ADUFA II ERA process and associated review performance goals for FY 2014 for non-administrative animal drug applications, non-manufacturing supplemental animal drug applications, investigational animal drug study submissions, and investigational animal drug submissions consisting of protocols without substantial data.

Starting on October 1, 2014 (for FYs 2015 to 2018), we are proposing to discontinue the ERA procedures and replace them with the process for shorter review times for reactivations and resubmissions. The performance goals listed below for the shorter reactivation and resubmission times only apply when the sponsor provides submissions for the NADA and the INAD through the use of the eSubmitter electronic submission tool.

The Agency will review and act on 90 percent of non-administrative NADAs within 180 days after the submission date. An application is incomplete if it would require additional data or information to enable the Agency to complete a comprehensive review of the application and reach a decision on the issue(s) presented in the application.

The Agency will review and act on 90 percent of reactivated applications:

- Within 180 days after the reactivated NADA submission date if the Agency determines and notifies the sponsor that the deficiencies are substantial;
- Within 135 days after the reactivated NADA submission date if the Agency determines and notifies the sponsor that the deficiencies are not substantial; and the NADA reactivation must be submitted no more than 120 days after the Agency's dated incomplete letter to qualify for the shorter review time; and
- Within 180 days after the reactivated NADA submission date if the NADA reactivation is submitted after 120 days of the Agency's dated incomplete letter or new substantial information is provided in the reactivated application.

The Agency will review and act on 90 percent of non-manufacturing supplemental animal drug applications (*i.e.*, supplemental animal drug applications for which safety or effectiveness data are required) within 180 days after the submission date. A supplemental application is incomplete if it would require additional data or information to enable the Agency to complete a comprehensive review of the supplement and reach a decision on the issue(s) presented in the supplement.

- The Agency will review and act on 90 percent of reactivated supplements:
- Within 180 days after the resubmission date if the Agency determines and notifies the sponsor that the deficiencies are substantial.
- Within 135 days after the resubmission date if the Agency determines and notifies the sponsor that the deficiencies are not substantial; and the resubmission to the supplemental application must be submitted no more than 120 days after the Agency's dated incomplete letter to qualify for the shorter review time; and
- Within 180 days after the resubmission date if the resubmission to the supplemental application is submitted after 120 days of the Agency's dated incomplete letter or new substantial information is provided in the resubmission.

The Agency will review and act on 90 percent of INAD study submissions within 180 days after the submission date. An INAD study submission is incomplete if it would require additional data or information to enable the Agency to complete a comprehensive review of the submission and reach a decision on the issue(s) presented in the submission.

The Agency will review and act on 90 percent of resubmitted INAD study submissions:

- Within 180 days after the resubmitted INAD study submission date if the Agency determines and notifies the sponsor that the deficiencies are substantial;
- Within 60 days after the resubmitted INAD study submission date if the Agency determines and notifies the sponsor that the deficiencies are not substantial; and the resubmission must be submitted no more than 120 days after the Agency's dated incomplete letter to qualify for the shorter review time; and
- Within 180 days after the resubmitted INAD study submission date if the resubmission is submitted after 120 days of the Agency's dated incomplete letter or new substantial information is provided in the resubmission.

The Agency will review and act on 90 percent of INAD submissions consisting of protocols without data that the Agency and the sponsor consider to be an essential part of the basis for making the decision to approve or not approve an animal drug application or supplemental animal drug application within 50 days after the submission date. An INAD protocol without data submission is incomplete if it would require additional information to enable the Agency to complete a comprehensive review of the protocol and reach a decision on the issue(s) presented in the protocol.

The Agency will review and act on 90 percent of resubmitted INAD protocol without data submissions:

- Within 50 days after the resubmission date if the Agency determines and notifies the sponsor that the deficiencies are substantial;
- Within 20 days after the resubmitted INAD protocol without data submission date if the Agency determines and notifies the sponsor that the deficiencies are not substantial; and the resubmission must be submitted no more than 120 days after the Agency's dated nonconcurrence letter to qualify for the shorter review time; and
- Within 50 days after the resubmission date if the resubmission is submitted after 120 days of the Agency's dated nonconcurrence letter or new substantial information is provided in the resubmission.

B. Additional Review Enhancements Proposal for FYs 2015 to 2018

The Agency will review and act on 90 percent of microbial food safety hazard characterization submissions within 100 days after the submission date.

The Agency will review and act on 90 percent of qualifying labeling supplements as described in 21 CFR 514.8(c)(2)(i)(A) and (D) within 60 days after the submission date. Qualifying labeling supplements are defined as those submitted through the use of the eSubmitter electronic submission tool, for which the sponsor provides and certifies a complete list of label changes made in the application and that CVM can determine upon initial review do not decrease the safety of drug use.

The Agency will review and act on 90 percent of non-qualifying supplemental applications within 180 days after the submission date.

C. Performance Goals Proposal Affecting All Fiscal Years of ADUFA III (2014 to 2018)

The Agency will maintain the ADUFA II goals regarding work queue procedures, timely meetings with industry, review of administrative NADAs, and preapproval foreign inspections.

The Agency will review and act on 90 percent of manufacturing supplemental animal drug applications within 120 days after the submission date. A submission is incomplete if it would require additional data or information to enable the Agency to complete a comprehensive review of the submission and reach a decision on the issue(s) presented in the submission.

- If the Agency determines and notifies the sponsor that the deficiencies are not substantial for manufacturing supplements requiring prior approval according to § 514.8(b), the Agency will permit the manufacturing supplements to be resubmitted as "Supplement—Changes Being Effected in 30 Days" as described in § 514.8(b)(3).
- If the Agency determines and notifies the sponsor that the deficiencies are substantial or new substantial information is provided in the resubmission, the Agency will review and act on 90 percent of reactivated manufacturing supplements within 120 days after the resubmission date.

The Agency will permit comparability protocols as described in § 514.8(b)(2)(v) to be submitted as protocols without substantial data in an INAD file. The Agency will review and act on 90 percent of INAD submissions consisting of protocols without substantial data within 50 days after the submission date of the protocol.

The Agency will develop guidance for a two-phased Chemistry, Manufacturing, and Controls (CMC) technical section submission and review process under the INAD file by the end of FY 2014.

The Agency and the regulated industry agree that data and/or information which uniquely describes

the general attributes of the new animal drug (e.g., the known characteristics of the drug that can impact safety, effectiveness, and/or quality) needs to be submitted early in the new animal drug development process in order to enable the parties to reach agreement at a presubmission conference or to begin review of a protocol. Predicated on submission of this information:

- The Agency will allow short justifications within INAD protocols without data submissions that are limited in scope.
- The Agency will allow for the concurrent submission of supporting data and protocols provided that the protocol is not submitted until the supporting data has been in the Agency's queue for at least 50 days.

The Agency will allow for the inclusion of this data and/or information in presubmission conferences, however it would not preclude holding a presubmission conference without such data. Presubmission conferences will be held approximately 100 days after the submission of the data supporting the request.

The Agency and the regulated industry agree that dosage characterization is part of the effectiveness technical section of an investigational new animal drug file. In instances where data and/or information about the dosage is integral to the review of a protocol, the Agency and the regulated industry agree that this data and/or information should be submitted as supporting data well in advance of the protocol submission.

The Agency agrees to explore the feasibility of pursuing statutory revisions, consistent with the Agency's mission to protect and promote the public health, that may expand the use of conditional approvals to other appropriate categories of new animal drug applications and that may modify the current requirement that the use of multiple new animal drugs in the same medicated feed be subject to an approved application.

D. ADUFA III Enhancements for a Modified Inflation Adjuster and Workload Adjuster

ADUFA III financial enhancements include a new statutory inflation adjuster provision that accounts for changes in FDA's costs related to payroll compensation and benefits as well as changes in nonpayroll costs through use of the Consumer Price Index. ADUFA III also modifies the base years for calculating the workload adjuster, as specified in the ADUFA III performance goals letter, to ensure that it adequately captures changes in FDA's workload during ADUFA III.

E. Impact of ADUFA III Enhancements on User Fee Revenue

The following table summarizes the FY 2014 baseline and added funding to support ADUFA III program:

Financial baseline	Dollars
FY 2014 Base Revenue[1]	21,600,000
One-Time Information Technology (IT) Funding	2,000,000
Total Statutory Revenue for FY 2014	23,600,000

[1] For each year in FY 2015 to FY 2018, the annual fee revenue will be further adjusted according to the new statutory provision for the inflation adjuster and may be further adjusted by the workload adjuster. In fiscal years 2016 to 2018, if applicable, the annual fee revenue is subject to a number of possible adjustments, including for inflation and collection shortfalls.

The statutory revenue for 2009, the first year of ADUFA II, was $15,260,000. The statutory revenue for the first year of ADUFA III will be $23,600,000, which includes one-time IT funding in the amount of $2,000,000 for FY 2014. The statute specifies annual revenue of $21,600,000 for each of the FY 2015 through FY 2018, however this amount is subject to a number of possible adjustments, including for inflation and collection shortfalls.

Additionally, ADUFA III offers the following financial recommendations:

- A new provision for recovering collection shortfalls is being offered to ensure adequate funding for the animal drug review process. For example, when FDA sets fees for FY 2016, it may add to the fee revenue the amount of any shortfall in fees collected in FY 2014. This process would follow in subsequent years through the final year adjustment, as specified in the statute.
- FDA has modified the fee revenue distribution from 25 percent for each fee type in ADUFA II to 20 percent in application, 27 percent in product, 27 percent in sponsor, and 26 percent in establishment fees in ADUFA III. The purpose of changing the fee distribution is to increase the revenue stream stability, reduce application fee costs, and minimize the potential for collection shortfalls.

III. What information should you know about the meeting?

We will convene a public meeting to hear the public's views on the proposed recommendations for reauthorization of the ADUFA program. We will conduct the meeting on December 18, 2012, at FDA's Metro Park North Campus (see *Location*). The meeting will include a presentation by FDA and we will provide an opportunity for other organizations and individuals to make presentations at the meeting or to submit written comments to the docket. So that FDA can consider comments and revise the recommendations as necessary, we request that comments be submitted to the docket by January 4, 2013.

Dated: December 3, 2012.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2012–29498 Filed 12–3–12; 4:15 pm]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–N–0655]

Animal Generic Drug User Fee Act; Public Meeting; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of meeting; request for comments.

The Food and Drug Administration (FDA) is announcing the following meeting: Animal Generic Drug User Fee Act. The topic to be discussed is proposed recommendations for the reauthorization of the Animal Generic Drug User Fee Act (AGDUFA II).

Date and Time: The meeting will be held on December 18, 2012, from 1 p.m. to 4 p.m.

Location: The meeting will be held at FDA's Metro Park North Campus, 7519 Standish Pl., third floor, Meeting Room A, Rockville, MD 20855. There is parking near the building.

Contact: Jacqueline Farmer, Center for Veterinary Medicine (HFV–10), Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855, 240–276–8695, FAX: 240–276–9744, email: *AGDUFAReauthorization@fda.hhs.gov.*

Registration and Requests for Oral Presentations: Send registration information (including name, title, firm name, address, telephone, and fax number), and written material and requests to make oral presentations, to the contact person by December 11, 2012.

If you need special accommodations due to a disability, please contact Jacqueline Farmer at least 7 days in advance.

Transcripts: Please be advised that as soon as a transcript is available, it will be accessible at *http://www.regulations.gov.* It may be viewed

at the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD. A transcript will also be available in either hardcopy or on CD–ROM, after submission of a Freedom of Information request. Written requests are to be sent to the Division of Freedom of Information (ELEM–1029), Food and Drug Administration, 12420 Parklawn Dr., Element Bldg., Rockville, MD 20857.

Comments: Interested persons may submit either written comments regarding this meeting to the Division of Dockets Management (see *Transcripts*) or electronic comments to *http://www.regulations.gov*. 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*. So that FDA can consider comments and revise the recommendations as necessary, we request that comments be submitted to the docket by January 4, 2013.

SUPPLEMENTARY INFORMATION:

I. The AGDUFA Program

A. What is AGDUFA? What does it do?

FDA considers the timely review of abbreviated new animal drug applications (ANADAs) to be central to the Agency's mission to protect and promote the public health. Prior to 2009, the timeliness and predictability of the generic animal drug review program was a concern. The Animal Generic Drug User Fee Act enacted in 2008 (Pub. L. 110–316; hereinafter referred to as "AGDUFA I") amended the Federal Food, Drug, and Cosmetic Act (the FD&C Act) to authorize the FDA's first-ever generic animal drug user fee program. AGDUFA I provides FDA with additional funds to enhance the performance of the generic animal drug review process. Furthermore, the authorization of AGDUFA I enabled FDA's continued assurance that generic animal drug products are safe and effective, and enabled FDA's continued support for lower cost alternatives to brand name drugs for consumers.

Under AGDUFA I, FDA agreed to meet review performance goals for certain submissions over 5 years from fiscal year (FY) 2009 through FY 2013. The purpose of establishing these review performance goals was to expedite the review of ANADAs and reactivations, supplemental ANADAs, and generic investigational new animal drug (JINAD) submissions and to enable FDA to speed up the application review process for generic new animal drugs without compromising the quality of the Agency's review.

B. AGDUFA Achievements

AGDUFA I established increasingly stringent review performance goals over a 5-year period from FY 2009 through FY 2013. Based on those performance goals, in the final year of AGDUFA I (FY 2013) FDA has agreed to review and act on 90 percent of the following submission types within the specified timeframes:

- Original ANADAs and reactivations within 270 days after the submission date.
- Administrative ANADAs within 100 days after the submission date.
- Manufacturing supplemental ANADAs and reactivations within 270 days after the submission date.
- JINAD study submissions within 270 days after the submission date.
- JINAD protocol submissions within 100 days after submission date.

In the 3 years of AGDUFA I review performance evaluated to date (FY 2009 to FY 2011) FDA has exceeded all performance goals for ANADAs, manufacturing supplements, JINAD data submissions, and administrative ANADAs. FDA did not meet the FY 2009 performance goal for JINAD protocol submissions, with 86 percent reviewed by the goal for that year but has exceeded the performance goal for JINAD protocol submissions in FY 2010 and FY 2011. The additional resources provided under AGDUFA I enabled FDA to completely eliminate the backlog of ANADA and JINAD submissions by August 2010.

FDA has published a number of reports that provide useful background on AGDUFA I. AGDUFA-related **Federal Register** notices, guidances, legislation, performance reports, and financial reports can be found at: *http://www.fda.gov/ForIndustry/UserFees/AnimalGenericDrugUserFeeAct AGDUFA/default.htm*.

II. Proposed AGDUFA II Recommendations

A. Enhancing the Process for Premarket Review

We are proposing to maintain the AGDUFA I goals regarding work queue procedures, timely meetings with industry, review of administrative ANADAs, review of protocols without substantial data, and amending similar applications and submissions. We are proposing the following changes to the performance goals that AGDUFA I established to further enhance the process for review of generic animal drug applications.

The Agency will review and act on 90 percent of non-administrative ANADAs within 270 days after the submission date. An application is incomplete if it would require additional data or information to enable the Agency to complete a comprehensive review of the application and reach a decision on the issue(s) presented in the application.

The Agency will review and act on 90 percent of reactivated applications:

- Within 190 days after the reactivated ANADA submission date if the Agency determines that the deficiencies are not substantial;
- Within 270 days after the reactivated ANADA submission date if the Agency determines that the deficiencies are substantial or new substantial information is provided.

The Agency will review and act on 90 percent of manufacturing supplemental ANADAs within 270 days after the submission date. A submission is incomplete if it would require additional data or information to enable the Agency to complete a comprehensive review of the submission and reach a decision on the issue(s) presented in the submission.

- If the Agency determines that the deficiencies are not substantial for manufacturing supplements requiring prior approval according to 21 CFR 514.8(b), the Agency will permit the manufacturing supplements to be resubmitted as "Supplement-Changes Being Effected in 30 Days" as described in 21 CFR 514.8(b)(3).
- If the Agency determines that the deficiencies are substantial or new substantial information is provided in the resubmission, the Agency will review and act on 90 percent of reactivated manufacturing supplements within 270 days after the resubmission date.

The Agency will review and act on 90 percent of JINAD study submissions within 270 days after the submission date. A JINAD study submission is incomplete if it would require additional data or information to enable the Agency to complete a comprehensive review of the submission and reach a decision on the issue(s) presented in the submission.

The Agency will review and act on 90 percent of resubmitted JINAD study submissions:

- Within 90 days after the JINAD study resubmission date if the Agency determines that the deficiencies are not substantial;
- Within 270 days after the JINAD study resubmission date if the Agency

determines that the deficiencies are substantial or new substantial information is provided in the resubmission.

The Agency will permit comparability protocols as described in 21 CFR 514.8(b)(2)(v) to be submitted as protocols without substantial data in a JINAD file. The Agency will continue to review and act on 90 percent of JINAD submissions consisting of protocols without substantial data within 100 days after the submission date.

The Agency will develop guidance for a two-phased Chemistry, Manufacturing, and Controls technical section submission and review process under the JINAD file by the end of FY 2014.

The Agency will develop and implement a question based review process for bioequivalence submissions by the end of FY 2016. At its discretion, the Agency may extend the timeline for completion if necessary, depending on available resources.

To improve the timeliness and predictability of foreign preapproval inspections (PAIs), sponsors may voluntarily submit, at the beginning of the calendar year, a list of foreign manufacturing facilities that are included in abbreviated animal drug applications, supplemental animal drug applications, or investigational animal drug submissions and may be subject to foreign PAIs for the following fiscal year.

If such a list is voluntarily submitted, the sponsor should submit a notification 30 days prior to submitting an abbreviated animal drug application, an abbreviated supplemental animal drug application, or generic investigational animal drug submission that informs the Agency that the application includes a foreign manufacturing facility. Should any changes to the annual list occur after its submission to the Agency, the sponsor may provide the updated information to the Agency.

B. AGDUFA II Enhancements for a Modified Inflation Adjuster and Workload Adjuster

Similar to AGDUFA I, we agreed to a fixed inflation adjuster over the 5-year period that results in the statutory revenues specified in sections 741(b) and 741(g)(3) of FD&C Act (21 U.S.C. 379j–21(b) and 379–21(g)(3)).

AGDUFA II also modifies the base years for calculating the workload adjuster, as specified in the AGDUFA II performance goals letter, to ensure that it adequately captures changes in FDA's workload during AGDUFA II.

C. Impact of AGDUFA II Enhancements on User Fee Revenue

The following table summarizes FY 2014 baseline and added funding to support AGDUFA II program, as well as the AGDUFA II total 5-year revenue:

Financial baseline	Dollars
FY 2014 Base Revenue [1]	6,478,000
One-Time Information Technology (IT) Funding	850,000
Total Statutory Revenue for FY 2014	7,328,000
Total Financial Funding	
Total 5-Year Revenue	38,100,000

[1] For each year in FY 2015 to FY 2018, the annual statutory revenue amounts established in section 741(b) of the FD&C Act may be further adjusted by the workload adjuster for FY 2015 to FY 2018 user fee revenues.

The total 5-year revenue for AGDUFA I was $27,100,000. The total 5-year revenue for AGDUFA II will be $38,100,000, which also includes one-time IT funding in the amount of $850,000 for FY 2014.

Additionally, the fee revenue distribution has been modified from 30 percent in application fees, 35 percent in product fees, and 35 percent in sponsor fees under AGDUFA I to 25 percent in application fees, 37.5 percent in product fees, and 37.5 percent in sponsor fees under AGDUFA II. The purpose of changing the fee distribution is to increase the revenue stream stability and reduce application fee costs.

III. What information should you know about the meeting?

We will convene a public meeting to hear the public's views on the proposed recommendations for reauthorization of AGDUFA I. The public meeting will be held on December 18, 2012, at FDA's Metro Park North Campus (see *Location*). The meeting will include a presentation by FDA, and we will also provide an opportunity for other organizations and individuals to make presentations at the meeting or to submit written comments to the docket. So that FDA can consider comments and revise the recommendations as necessary, we request that comments be submitted to the docket by January 4, 2013.

Dated: December 3, 2012.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2012–29499 Filed 11–26–12; 4:15 pm]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Agency Information Collection Activities: Proposed Collection; Comment Request; Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery

SUMMARY: As part of a Federal Government-wide effort to streamline the process to seek feedback from the public on service delivery, the National Institute of Allergy and Infectious Diseases (NIAID), National Institutes of Health (NIH), has submitted a Generic Information Collection Request (Generic ICR): "Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery" to OMB for approval under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*).

DATES: Comments must be submitted within 30-days after publication of this notice in the **Federal Register.**

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to 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.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact Brandie K. Taylor, MA, Strategic Planning and Evaluation Branch, Office of Strategic Planning and Initiative Development, NIAID, NIH, 6610 Rockledge Drive, Room 2502, MSC, 6620, Bethesda, MD 20892, by phone at (301) 451–3068 or Email your request, including your address to: *taylorbr@niaid.nih.gov.*

SUPPLEMENTARY INFORMATION:

Title: Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery (NIAID) .

Abstract: The information collection activity will garner qualitative customer and stakeholder feedback in an efficient, timely manner, in accordance with the Administration's commitment to improving service delivery. By qualitative feedback we mean information that provides useful insights on perceptions and opinions, but are not statistical surveys that yield quantitative results that can be generalized to the population of study. This feedback will provide insights into

customer or stakeholder perceptions, experiences and expectations, provide an early warning of issues with service, or focus attention on areas where communication, training or changes in operations might improve delivery of products or services. These collections will allow for ongoing, collaborative and actionable communications between the Agency and its customers and stakeholders. It will also allow feedback to contribute directly to the improvement of program management.

Feedback collected under this generic clearance will provide useful information, but it will not yield data that can be generalized to the overall population. This type of generic clearance for qualitative information will not be used for quantitative information collections that are designed to yield reliably actionable results, such as monitoring trends over time or documenting program performance. Such data uses require more rigorous designs that address: the target population to which generalizations will be made, the sampling frame, the sample design (including stratification and clustering), the precision requirements or power calculations that justify the proposed sample size, the expected response rate, methods for assessing potential non-response bias, the protocols for data collection, and any testing procedures that were or will be undertaken prior fielding the study. Depending on the degree of influence the results are likely to have, such collections may still be eligible for submission for other generic mechanisms that are designed to yield quantitative results.

The Agency received no comments in response to the 60-day notice published in the **Federal Register** of December 22, 2010 (75 FR 80542).

Below we provide the NIAID's projected average estimates for the next three years:

Current Actions: New collection of information.

Type of Review: New Collection.

Affected Public: Individuals and Households, Businesses and Organizations, State, Local or Tribal Government.

Average Expected Annual Number of activities: 25.

Respondents: 28,000.

Annual responses: 28,000.

Frequency of Response: Once per request.

Average minutes per response: Ranges from 15 minutes to 120 minutes.

Burden hours: 16,100 hours.

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 Office of Management and Budget control number.

Dated: November 27, 2012.

Shamay D. Knox,

NIAID Project Clearance Liaisan.

[FR Doc. 2012–29403 Filed 12–4–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name af Cammittee: Center for Scientific Review Special Emphasis Panel, Member Conflict: AIDS and AIDS Related Research.

Date: December 12, 2012.

Time: 11:00 a.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Cantact Persan: Mary Clare Walker, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5208, MSC 7852, Bethesda, MD 20892, (301) 435–1165, *walkermc@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name af Committee: Center for Scientific Review Special Emphasis Panel Member Conflict: AIDS Clinical Studies and Epidemiology Study Section.

Date: December 13, 2012.

Time: 11:00 a.m. to 1:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Cantact Persan: Mark P Rubert, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5218, MSC 7852, Bethesda, MD 20892, 301–435–1775, *rubertm@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Biobehavioral Mechanisms of Emotion, Stress and Health.

Date: January 4, 2013.

Time: 12:00 p.m. to 1:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Cantact Person: Melissa Gerald, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3172, MSC 7848, Bethesda, MD 20892, (301) 408–9107, *geraldmel@csr.nih.gav.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: November 28, 2012.

David Clary,

Program Analyst, Office of Federal Advisary Cammittee Policy.

[FR Doc. 2012–29304 Filed 12–4–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable materials, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel; Review of Career Development Award.

Date: December 18, 2012.

Time: 9:00 a.m. to 10:00 a.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Raul A. Saavedra, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Research, NINDS/NIH/DHHS, NSC, 6001 Executive Blvd., Suite 3208, MSC 9529, Bethesda, MD 20892–9529, (301) 496–9223, *saavedrr@ninds.nih.gov.*

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel; Ancillary Studies SEP.

Date: December 21, 2012.

Time: 9:30 a.m. to 12:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Shanta Rajaram, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Research, NINDS/NIH/DHHS, NSC, 6001 Executive Blvd., Suite 3208, MSC 9529, Bethesda, MD 20892–9529, (301) 435–6033, *rajarams@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS)

Dated: November 28, 2012.

Carolyn A. Baum,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–29297 Filed 12–4–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute Of Nursing Research; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the National Advisory Council for Nursing Research.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Council for Nursing Research.

Date: January 22–23, 2013.

Open: January 22, 2013, 1:00 p.m. to 5:00 p.m.

Agenda: Discussion of Program Policies and Issues.

Place: National Institutes of Health, Building 31, 31 Center Drive, Conference Room 6, Bethesda, MD 20892.

Closed: January 23, 2013, 9:00 a.m. to 1:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Building 31, 31 Center Drive, Conference Room 6, Bethesda, MD 20892.

Contact Person: Ann R. Knebel, Ph.D., RN, FAAN, Deputy Director, National Institute of Nursing Research, National Institutes of Health, 31 Center Drive, Building 31, Room 5B05, Bethesda, MD 20892, 301–496–8230, *knebelar@mail.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit. Information is also available on the Institute's/Center's home page: *www.nih.gov/ninr/a_advisory.html,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.361, Nursing Research, National Institutes of Health, HHS)

Dated: November 29, 2012.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–29296 Filed 12–4–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Library of Medicine; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App), notice is hereby given of a meeting of the Literature Selection Technical Review Committee.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The portions of the meeting devoted to the review and evaluation of journals for potential indexing by the National Library of Medicine will be closed to the public in accordance with the provisions set forth in section 552b(c)(9)(B), Title 5 U.S.C., as amended. Premature disclosure of the titles of the journals as potential titles to be indexed by the National Library of Medicine, the discussions, and the presence of individuals associated with these publications could significantly frustrate the review and evaluation of individual journals.

Name of Committee: Literature Selection Technical Review Committee.

Date: February 21–22, 2013.

Open: February 21, 2013, 9:00 a.m. to 11:00 a.m.

Agenda: Administrative.

Place: National Library of Medicine, Building 38, 2nd Floor, Board Room, 8600 Rockville Pike, Bethesda, MD 20894.

Closed: February 21, 2013, 11:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate journals as potential titles to be indexed by the National Library of Medicine.

Place: National Library of Medicine, Building 38, 2nd Floor, Board Room, 8600 Rockville Pike, Bethesda, MD 20894.

Closed: February 22, 2013, 8:30 a.m. to 2:00 p.m.

Agenda: To review and evaluate journals as potential titles to be indexed by the National Library of Medicine.

Place: National Library of Medicine, Building 38, 2nd Floor, Board Room, 8600 Rockville Pike, Bethesda, MD 20894.

Contact Person: Joyce Backus, M.S.L.S., Acting Associate Director, Division of Library Operations, National Library of Medicine, 8600 Rockville Pike, Building 38, Room 2W04, Bethesda, MD 20892, 301–496–6921, *backusj@mail.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

(Catalogue of Federal Domestic Assistance Program No. 93.879, Medical Library Assistance, National Institutes of Health, HHS).

Dated: November 29, 2012.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–29294 Filed 12–4–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Library of Medicine; Notice of Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App), notice is hereby given of meetings of the Board of Regents of the National Library of Medicine.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 USC, as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable materials, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Board of Regents of the National Library of Medicine Extramural Programs Subcommittee.

Date: February 4, 2013.

Closed: 2:30 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Library of Medicine, Building 38, 2nd Floor, Conference Room B, 8600 Rockville Pike, Bethesda, MD 20892.

Contact Person: Donald A.B. Lindberg, MD, Director, National Library of Medicine, 8600 Rockville Pike, Bethesda, MD 20892, 301–496–6221, *lindberg@mail.nih.gov.*

Name of Committee: Board of Regents of the National Library of Medicine Subcommittee on Outreach and Public Information.

Date: February 5, 2013.

Open: 7:45 a.m. to 8:45 a.m.

Agenda: To review and discuss outreach activities.

Place: National Library of Medicine, Building 38, 2nd Floor, Conference Room B, 8600 Rockville Pike, Bethesda, MD 20892.

Contact Person: Donald A.B. Lindberg, MD, Director, National Library of Medicine, 8600 Rockville Pike, Bethesda, MD 20892, 301–496–6221, *lindberg@mail.nih.gov.*

Name of Committee: Board of Regents of the National Library of Medicine.

Date: February 5–6, 2013.

Open: February 5, 2013, 9:00 a.m. to 4:15 p.m.

Agenda: Program Discussion.

Place: National Library of Medicine, Building 38, 2nd Floor, Board Room, 8600 Rockville Pike, Bethesda, MD 20892.

Closed: February 5, 2013, 4:15 p.m. to 4:45 p.m.

Agenda: To review and evaluate grant applications.

Place: National Library of Medicine, Building 38, 2nd Floor, Board Room, 8600 Rockville Pike, Bethesda, MD 20892.

Open: February 6, 2013, 9:00 a.m. to 12:00 p.m.

Agenda: Program Discussion.

Place: National Library of Medicine, Building 38, 2nd Floor, Board Room, 8600 Rockville Pike, Bethesda, MD 20892.

Contact Person: Donald A.B. Lindberg, MD, Director, National Library of Medicine, 8600 Rockville Pike, Bethesda, MD 20892, 301–496–6221, *lindberg@mail.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *www.nlm.nih.gov/od/bor/bor.html,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program No. 93.879, Medical Library Assistance, National Institutes of Health, HHS).

Dated: November 29, 2012.

Michelle Trout,

Program Analyst, Office of the Federal Advisory Committee Policy.

[FR Doc. 2012–29295 Filed 12–4–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; NIAID Investigator Initiated Program Project Applications (P01).

Date: January 29, 2013.

Time: 10:00 a.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Room 3120, 6700B Rockledge Drive, Bethesda, MD 20817, (Telephone Conference Call).

Contact Person: Lynn Rust, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, NIAID/NIH/DHHS, 6700B Rockledge Drive, MSC 7616, Bethesda, MD 20892, 301–402–3938, *lr228v@nih.gov.*

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; NIAID Investigator Initiated Program Project Application (P01).

Date: February 6, 2013.

Time: 11:00 a.m. to 2:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Room 3120, 6700B Rockledge Drive, Bethesda, MD 20817, (Telephone Conference Call).

Contact Person: Lynn Rust, Ph.D., Scientific Review Officer, Scientific Review Program. Division of Extramural Activities, NIAID/NIH/DHHS, 6700B Rockledge Drive, MSC 7616, Bethesda, MD 20892, 301–402–3938, *lr228v@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: November 28, 2012.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–29301 Filed 12–4–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the National Advisory Council on Drug Abuse.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Council on Drug Abuse.

Date: February 5–6, 2013.

Closed: February 5, 2013, 2:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Conference Rooms C & D, Rockville, MD 20852.

Open: February 6, 2013, 8:30 a.m. to 1:00 p.m.

Agenda: This portion of the meeting will be open to the public for announcements and reports of administrative, legislative and program developments in the drug abuse field.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Conference Rooms C & D, Rockville, MD 20852.

Contact Person: Teresa Levitin, Ph.D., Director, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, Room 4243, MSC 9550, 6001 Executive Boulevard, Bethesda, MD 20892–89550, (301) 443–2755, *tlevitin.nida.nih.gov.*

Any member of the public interested in presenting oral comments to the committee may notify the Contact Person listed on this notice at least 10 days in advance of the meeting. Interested individuals and representatives of organizations may submit a letter of intent, a brief description of the organization represented, and a short description of the oral presentation. Only one representative of an organization may be allowed to present oral comments and if accepted by the committee, presentations may be limited to five minutes. Both printed and electronic copies are requested for the record. In addition, any interested person may file written comments with the committee by forwarding their statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Information is also available on the Institute's/Center's home page: *www.drugabuse.gov/NACDA/NACDAHome.html,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos.: 93.279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS)

Dated: November 29, 2012.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–29299 Filed 12–4–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Library of Medicine; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable materials, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Library of Medicine Special Emphasis Panel; Conflict R01/K99/K22.

Date: January 25, 2013.

Time: 12:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Library of Medicine, 6705 Rockledge Drive, Suite 301, Bethesda, MD 20817, (Telephone Conference Call).

Contact Person: Zoe H. Huang, MD, Scientific Review Officer, Extramural Programs, National Library of Medicine, NIH, 6705 Rockledge Drive, Suite 301, Bethesda, MD 20892–7968, 301–594–4937, *huangz@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program No. 93.879, Medical Library Assistance, National Institutes of Health, HHS)

Dated: November 29, 2012.

Michelle Trout,

Program Analyst, Office of the Federal Advisory Committee Policy.

[FR Doc. 2012–29291 Filed 12–4–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Biomedical Imaging and Bioengineering; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the National Advisory Council for Biomedical Imaging and Bioengineering.

The meeting will be open to the public as indicated below. This will be a virtual meeting. Please log on to the following URL: *https://webmeeting.nih.gov/nacbibopen/* to join the open session. If you have questions please notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and/or contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications and/or contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Council for Biomedical Imaging and Bioengineering NACBIB, January 25, 2013, Virtual Meeting.

Date: January 25, 2013.

Open: 11:00 a.m. to 11:30 a.m.

Agenda: Report from the Institute Director and other Institute Staff.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Suite 200, Room 241, Bethesda, MD 20892.

Closed: 11:45 a.m. to 1:00 p.m.

Agenda: To review and evaluate grant applications and/or proposals.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Suite 200, Room 241, Bethesda, MD 20892.

Contact Person: Anthony Demsey, Ph.D., Director, National Institute of Biomedical

Imaging and Bioengineering, 6707 Democracy Boulevard, Room 241, Bethesda, MD 20892.

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Information is also available on the Institute's/Center's home page: *http://www.nibib1.nih.gov/obout/NACBIB/NACBIB.htm*, where an agenda and any additional information for the meeting will be posted when available.

Dated: November 29, 2012.

David Clary,

Program Anolyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–29300 Filed 12–4–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Nome of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; PAR–10–271, NIAID Investigator Initiated Program Project Application (P01).

Date: December 18, 2012.

Time: 12:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6700B Rockledge Drive, Bethesda, MD 20817, (Telephone Conference Call).

Contact Person: Maja Maric, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, DHHS/NIH/NIAID, 6700B Rockledge Drive, Room 3266, Bethesda, MD 20892–7616, 301–451–2634, *mojo.maric@nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: November 28, 2012.

David Clary,

Program Anolyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–29303 Filed 12–4–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 USC, as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable materials, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel; NIH Pathway to Independence Award (Parent K99/R00).

Dote: December 10, 2012.

Time: 11:00 a.m. to 1:00 p.m.

Agendo: To review and evaluate grant applications.

Ploce: National Institutes of Health Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852, (Telephone Conference Call).

Contoct Person: Elaine Lazar-Wesley, Ph.D., Scientific Review Officer, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, Room 4245, MSC 9550, 6001 Executive Blvd., Bethesda, MD 20892–9550, 301–451–4530, *el6r@nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Nome of Committee: National Institute on Drug Abuse Special Emphasis Panel; Cognitive Remediation and Work Therapy.

Dote: December 13, 2012.

Time: 10:00 a.m. to 12:00 p.m.

Agenda: To review and evaluate grant applications.

Ploce: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Gerald L. McLaughlin, Ph.D., Scientific Review Officer, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, 6001 Executive Blvd., Room 4238, MSC 9550, Bethesda, MD 20892–9550, 301–402–6626, *gm145a@nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos.: 93.279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS)

Dated: November 29, 2012.

Michelle Trout,

Progrom Anolyst, Office of Federol Advisory Committee Policy.

[FR Doc. 2012–29298 Filed 12–4–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Library of Medicine; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App), notice is hereby given of the meetings.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 USC, as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable materials, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Biomedical Library and Informatics Review Committee.

Date: March 7–8, 2013.

Time: March 7, 2013, 8:00 a.m. to 6:00 p.m.

Agendo: To review and evaluate grant applications.

Place: National Library of Medicine, Building 38, 2nd Floor, Board Room, 8600 Rockville Pike, Bethesda, MD 20892.

Time: March 8, 2013, 8:00 a.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Contoct Person: Arthur A. Petrosian, Ph.D., Chief Scientific Review Officer, Division of Extramural Programs, National Library of Medicine, 6705 Rockledge Drive, Suite 301, Bethesda, MD 20892–7968, 301–496–4253, *petrosio@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program No. 93.879, Medical Library Assistance, National Institutes of Health, HHS)

Dated: November 29, 2012.

Michelle Trout,

Program Analyst, Office of the Federal Advisory Committee Policy.

[FR Doc. 2012–29292 Filed 12–4–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR 10–135: Understanding and Promoting Health Literacy (R21).

Date: December 5, 2012.

Time: 10:00 a.m. to 12:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Rebecca Henry, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3222, MSC 7808, Bethesda, MD 20892, 301–435–1717, *henryrr@mail.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: November 29, 2012.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–29305 Filed 12–4–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5604–N–12]

Notice of Submission of Proposed Information Collection to OMB; Comment Request: Notice of Requirements for Reporting for the Tax Credit Assistance Program (TCAP)

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice of proposed information collection.

SUMMARY: The proposed information collection requirement described below has been 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:* February 4, 2013.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name/or OMB approval number and should be sent to: LaRuth M.Harper, Correspondence Unit Supervisor, U.S. Department of Housing and Urban Development, 451 Seventh Street SW., Room 7223 Washington, DC 20410; email: *LaRuth.M.Harper@hud.gov.*

FOR FURTHER INFORMATION CONTACT: Danielle Frazier, Affordable Housing Specialist, DGHF, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410; email: *Danielle.Frazier@hud.gov;* telephone (202) 402–7354. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Frazier.

SUPPLEMENTARY INFORMATION: This Notice will inform the public that the U.S. Department of Housing and Urban Development (HUD) will submit revised information collection to OMB for review for the Tax Credit Assistance Program (TCAP), which is authorized under the American Recovery and Reinvestment Act (ARRA) of 2009, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35 as amended. This program provided $2.25 billion of grant funding for capital investment in Low Income Housing Tax Credit (LIHTC) projects, which could not move forward because the economic crisis reduced the private capital available to them. HUD is administering these funds as the Tax Credit Assistance Program (TCAP). TCAP grant amounts were determined by a formula established in ARRA and were awarded by HUD to the housing credit allocating agencies of each state, the District of Columbia and the Commonwealth of Puerto Rico.

This Notice also lists the following information:

Title of Proposal: Tax Credit Assistance Program (TCAP).

Description of Information Collection: This is a revision of an already approved information collection. The Department of Housing and Urban Development is seeking review of the Paperwork Reduction Act requirements associated with the Tax Credit Assistance Program (TCAP).

Each TCAP grantee is required to use IDIS to report on project level information including the following information identified in the Office of Management and Budget (OMB) Initial Implementing Guidance for the American Recovery and Reinvestment Act of 2009 issued On February 18, 2009. Specifically, the guidance requires quarterly reporting on:

(1) The total amount of recovery funds received from that agency;

(2) The amount of recovery funds received that were obligated and expended to projects or activities. This reporting will also include unobligated Allotment balances to facilitate reconciliations.

(3) A detailed list of all projects or activities for which recovery funds were obligated and expended, including:

(A) The name of the project or activity;

(B) A description of the project or activity;

(C) An evaluation of the completion status of the project or activity;

(D) An estimate of the number of jobs created and the number of jobs retained by the project or activity; and

(E) For infrastructure investments made by State and local governments, the purpose, total cost, and rationale of the agency for funding the infrastructure investment with funds made available under this Act, and name of the person to contact at the agency if there are concerns with the infrastructure investment.

(4) Detailed information on any subcontracts or subgrants awarded by the recipient to include the data elements required to comply with the Federal Funding Accountability and Transparency act of 2006 (Pub. L. 109–282), allowing aggregate reporting on awards below $25,000 or to individuals, as prescribed by the Director of OMB.

OMB Control Number: 2506–0181.

Agency Form Numbers: None.

Members of Affected Public: State housing credit agencies.

Estimation of the total numbers of hours needed to prepare the information

collection including number of respondents, frequency of responses, and hours of responses: An estimation of the total number of record keeping and reporting hours per response is 11 hours. The number of respondents is 52. The total hours requested is 8,320.

Paperwork requirement	Number of respondents	Number of responses	Total responses	Hours per response	*Total hours	Cost per response*	Total cost
IDIS Activity Completion	52	14	728	10	7,280	$290.00	$211,120
Grantee Website Reporting	52	20	1,040	1	1,040	14.50	30,1600
Total Paperwork Burden					8,320		241,280

(* This figure is based on GS–11 salary.)

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: November 29, 2012.

Clifford Taffet,

General Deputy Assistant Secretary, Office of Community Planning & Development.

[FR Doc. 2012–29354 Filed 12–4–12; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5613–N–11]

Privacy Act of 1974; Notice of a New System of Records, Enterprise Wide Operations Data Store

AGENCY: Office of the Chief Information Officer.

ACTION: Notification of New Privacy Act System of Records, Enterprise Wide Operations Data Store.

SUMMARY: Pursuant to the provision of the Privacy Act of 1974, as amended (5 U.S.C. 552a), the U.S. Department of Housing and Urban Development (HUD) is providing notice of its intent to establish a new system of records, the Enterprise Wide Operations Data Store (EWODS) for one of its Departmental Offices, the Government Mortgage National Associate (Ginnie Mae), Office of Mortgage-Back Securities (MBS), which focuses on guaranteeing Ginnie Mae investors a timely payment of principal and interest on MBS backed by federally insured or guaranteed loans. The EWODS is to serve as a central back-end repository to manage various reporting, pooling, and risk management activities associated with the mortgage-backed securities process. The EWODS production activities will typically maintain data submitted to Ginnie Mae by Issuers who issue securities backed by insured or guaranteed mortgage loans, mainly those administered for HUD's Federal Housing Administration or the U.S. Department of Veterans Affairs. The EWODS system is expected to standardize the mortgage-backed securities activities and improve significantly the efficiency of Ginnie Mae's production activities, pooling, reporting and risk management efforts.

DATES: *Effective Date:* This proposal shall become effective, without further notice, January 4, 2013, unless comments are received during or before this period which would result in a contrary determination.

Comments Due Date: January 4, 2013.

ADDRESSES: Interested persons are invited to submit comments regarding this notice to the Rules Docket Clerk, Office of General Counsel, U.S. Department of Housing and Urban Development, 451 Seventh Street SW., Room 10276, Washington, DC 20410–3000. Communications should refer to the above docket number and title. FAX comments are not acceptable. A copy of each communication submitted will be available for public inspection and copying between 8:00 a.m. and 5:00 p.m. weekdays at the above address.

FOR FURTHER INFORMATION CONTACT: Inquiries pertaining to Privacy Act records, contact Donna Robinson-Staton, Chief Privacy Officer, telephone number (202) 402–8073, 451 Seventh Street SW., Washington, DC 20410 (Attention: Capitol View Building, 4th Floor) [The above telephone number is not a toll free number]. A telecommunications device for hearing- and speech-impaired persons (TTY) is available by calling the Federal Information Relay Service's toll-free telephone number (800) 877–8339.

SUPPLEMENTARY INFORMATION: Pursuant to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, notice is given that HUD proposes to establish a new system of records. The system report was submitted to the Office of Management and Budget (OMB), the Senate Committee on Homeland Security and Governmental Affairs, and the House Committee on Government Reform pursuant to Paragraph 4c of Appendix I to OMB Circular No. A–130, "Federal Agencies Responsibilities for Maintaining Records About Individuals," July 25, 1994 (59 FR 37914).

Authority: 5 U.S.C. 552a; 88 Stat. 1896; 42 U.S.C. 3535(d).

Dated: November 7, 2012.

Kevin R. Cooke,

Deputy Chief Information Officer.

GINNIE MAE/TN.01

SYSTEM NAME:

Enterprise Wide Operational Data Store (EWODS)

SYSTEM LOCATION:

Bank of New York Mellon (Contractor site), New York, New York. Access is authorized via application and approval process for rights and privileges administered by Ginnie Mae's Security Officer.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Categories of individuals covered by this system include individual borrower data associated with government insured or guaranteed mortgage loans that are the underlying collateral for Ginnie Mae-guaranteed mortgage-backed securities (MBS); issuers and document custodians involved in the pooling, certification, and monthly reporting process; and individuals who currently or previously held physical certificates of Ginnie Mae-guaranteed mortgage-backed securities.

CATEGORIES OF RECORDS IN THE SYSTEM:

Information collected and nature collected are defined in the following four categories:

1. Loan origination and servicing data: Borrower/co-borrower name, Social Security Number, gender, date of birth, and income and other financial data (such as credit score) of the borrower and any co-borrower; property address, mortgage amount, origination date, funding date, payments made, maximum claim amount, payment option selected by the borrower, remaining amount of principal that may be drawn by the borrower, reasons for delinquency, unique identifiers assigned by insuring agencies, such as the Federal Housing Administration (FHA), U.S. Department of Veterans Affairs (VA), U.S. Department of Agriculture Rural Development (RD) formerly the Rural Housing Service and Farmers Home Administration, or HUD

Office of Public and Indian Housing (PIH), the loan number assigned by the issuer, the loan number assigned by the Mortgage Electronic Registrations System, and Ginnie Mae loan number.

2. Physical security holders (investors) data: Social Security Number/Tax ID, name, mailing address, phone number, or email address of those holding the security.

3. Issuer and document custodian data: Name, title, and phone number of the issuer and document custodian employees involved in the pooling, certification, and monthly reporting process.

4. Security Level Data: Ginnie Mae pool number, Committee on Uniform Securities Identification Procedures (CUSIP) number, pool issuance characteristics, maturity date, security rate, and pool balance amount.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Section 306(g) of the National Housing Act, 12 U.S.C. 1721(g). The collection of Social Security Numbers are authorized pursuant to the Internal Revenue Service Code 26 U.S.C. 6109 and 26 C.F.R. 1.6049–4 and 1.6050H–2.

PURPOSE(S):

Ginnie Mae uses the information collected in EWODS to administer and carry out its functions as guarantor of securities under Section 306(g) of the National Housing Act, 12 U.S.C. 1721(g). The primary purpose of this system of records is to serve as a central back-end repository to house loan origination and servicing, security holder, issuer, document custodian, and security-level data associated with government insured and guaranteed mortgage loans that are underlying collateral for Ginnie Mae-guaranteed mortgage-backed securities. The system maintains data submitted to Ginnie Mae by issuers who issue securities backed by insured or guaranteed mortgage loans, mainly those administered for HUD's Federal Housing Administration or the U.S. Department of Veterans Affairs. The data housed in the system is necessary to support the pooling process by which eligible issuers create Ginnie Mae-guaranteed MBS. The system also captures security-level data that is created for the purposes of disclosure, and security holder information that is used to ensure timely payment of a pro rata share of the principal and interest on the underlying mortgage loans in a security, net of servicing and guaranty fees, to MBS investors. If Ginnie Mae defaults and extinguishes an issuer, then one of Ginnie Mae's functions as guarantor of securities will be to begin servicing the mortgage loans. Ginnie Mae must collect borrower SSNs so that it may, if it extinguishes an issuer and begins to service the mortgage loans, comply with IRS reporting requirements, including the requirement to provide the IRS and borrowers with information returns regarding interest received on which Ginnie Mae must identify the borrower SSNs.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act (Accordingly, discretionary disclosures that may apply to EWODS [1]), other routine uses are as follows:

(a) To the public for the purpose of achieving a fair and open market in Ginnie Mae-guaranteed single and multiclass securities by making information available to investors that should lead to greater investor confidence and more accurate pricing on these securities that could decrease the cost of individual borrowing. In all cases, the public will access on Ginnie Mae's Web site a public use file that will be maintained for such purposes and will only contain [de-identified] data that is structured to protect borrower and co-borrower confidentiality where identities may be discerned. The authority for this routine use is Section 306(g) of the National Housing Act, 5 U.S.C. 552a and the SORN when published to establish the routine use.

(b) To other Federal agencies to ascertain if the loan is insured or guaranteed by a Federal agency under an eligible insuring or guaranteeing authority. The authority for this routine use is Section 306(g) of the National Housing Act, 5 U.S.C. 552a and the SORN when published to establish the routine use.

(c) To the Internal Revenue Service and to state and local governments—for reporting payments for interest. The authority is Section 306(g) of the National Housing Act, 26 U.S.C. 6109, 26 CFR 1.6049–4, 5 U.S.C. 552a, and the SORN when published to establish the routine use.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Electronic files are stored on servers and back-up files are stored on tapes. Servers are stored in a secured server room and at an offsite secured facility for disaster contingency. Hard copy data submissions are imaged by a third-party vendor and stored securely at the contractor's office or at a secured offsite document storage facility.

RETRIEVABILITY:

For loan origination and servicing data, information will be retrieved by borrower/co-borrower name, Social Security Number, property address, Ginnie Mae loan number, MERS loan number, loan number assigned by the issuer, or unique identifiers assigned by insuring agencies. For physical security holders (investors) data, information can be retrieved by Social Security Number/Tax ID, name, address, phone number, or email address. For loan issuers and document custodians, information can be retrieved by name and phone number. For security-level data, information can be retrieved by Ginnie Mae pool number of CUSIP.

SAFEGUARDS:

Electronic records are maintained in a secured computer network behind a firewall. Access to records is limited to authorized personnel. All information that is stored on EWODS is accessed according to user rights and privileges that are authenticated by the access manager for the system. Paper-based records are kept in a secure location at contractor's site with limited access to authorized personnel.

RETENTION AND DISPOSAL:

In accordance with HUD Records Disposition Schedule 2225.6, Appendix 64. Records are retained for at least 7 years after pool maturity or when all claims arising under the pool have been satisfied, whichever is later. After which paper records are shredded or burned, and/or media records are disposed of pursuant to Federal media sanitization requirements.

SYSTEM MANAGER(S) AND ADDRESS:

Ginnie Mae, Office of Securities Operations, U.S. Department of Housing and Urban Development, 550 12th Street SW., 3rd Floor, Washington, DC 20024.

RECORD ACCESS AND NOTIFICATION PROCEDURES:

The Department's rules for providing access to records to the individual concerned appear in 24 CFR part 16. Since the Borrowers and Co-borrowers information associated with loan originations in EWODS is collected and submitted to Ginnie Mae by issuers responsible for the loan data, individual borrowers and co-borrowers seeking to determine whether this system of records contains information about

[1] *http://portal.hud.gov/hudportal/documents/huddoc?id=append1.pdf.*

them, or those seeking access to such loan records, should address inquiries to or contact the appropriate mortgagee identified on their loan payment statements. Ginnie Mae does not have the ability to modify these types of records within EWODS. Any other written requests must provide verification of your identity by providing two proofs of official identification. Your verification of identity must include your original signature and must be notarized.

For physical security holders (investors) data, written requests must include full name, Social Security Number/Tax ID, mailing address, and phone number of the requestor.

For loan issuers, issuer proxy, and guarantor's data, written request must include name, title, mailing address, and phone number of the requestor.

All requests should be directed to Ginnie Mae, Office of Securities Operations, U.S. Department of Housing and Urban Development, 550 12th Street SW., 3rd Floor, Washington, DC 20024. Attention: Privacy Officer.

CONTESTING RECORD PROCEDURES:

The procedures for requesting amendment or correction of records appear in 24 CFR part 16. If additional information is needed, contact:

(i) In relation to contesting contents of records, the Departmental Privacy Officer, U.S. Department of Housing and Urban Development, 451 Seventh Street SW., Room 2256, Washington, DC 20410; and

(ii) In relation to appeals of initial denials, HUD, Departmental Privacy Appeals Officer, Office of General Counsel, U.S. Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410.

RECORD SOURCE CATEGORIES:

For loan origination data, records are established using information received from issuers of Ginnie Mae-guaranteed mortgage-backed securities via system interface or via hard-copy form. For physical security holders (investors) data, records were established from information received by lenders creating the security, via hard copy forms. Physical securities are still held by investors but are no longer issued by Ginnie Mae. For loan issuers and issuer proxy data, records are established using information from the initial approval process, via hard copy application forms.

SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

None.

[FR Doc. 2012–29356 Filed 12–4–12; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5639–N–03]

Notice of Regulatory Waiver Requests Granted for the Third Quarter of Calendar Year 2012

AGENCY: Office of the General Counsel, HUD.

ACTION: Notice.

SUMMARY: Section 106 of the Department of Housing and Urban Development Reform Act of 1989 (the HUD Reform Act) requires HUD to publish quarterly **Federal Register** notices of all regulatory waivers that HUD has approved. Each notice covers the quarterly period since the previous **Federal Register** notice. The purpose of this notice is to comply with the requirements of section 106 of the HUD Reform Act. This notice contains a list of regulatory waivers granted by HUD during the period beginning on July 1, 2012, and ending on September 30, 2012.

FOR FURTHER INFORMATION CONTACT: For general information about this notice, contact Camille E. Acevedo, Associate General Counsel for Legislation and Regulations, Department of Housing and Urban Development, 451 7th Street SW., Room 10282, Washington, DC 20410–0500, telephone 202–708–1793 (this is not a toll-free number). Persons with hearing- or speech-impairments may access this number through TTY by calling the toll-free Federal Relay Service at 800–877–8339.

For information concerning a particular waiver that was granted and for which public notice is provided in this document, contact the person whose name and address follow the description of the waiver granted in the accompanying list of waivers that have been granted in the third quarter of calendar year 2012.

SUPPLEMENTARY INFORMATION: Section 106 of the HUD Reform Act added a new section 7(q) to the Department of Housing and Urban Development Act (42 U.S.C. 3535(q)), which provides that:

1. Any waiver of a regulation must be in writing and must specify the grounds for approving the waiver;

2. Authority to approve a waiver of a regulation may be delegated by the Secretary only to an individual of Assistant Secretary or equivalent rank, and the person to whom authority to waive is delegated must also have authority to issue the particular regulation to be waived;

3. Not less than quarterly, the Secretary must notify the public of all waivers of regulations that HUD has approved, by publishing a notice in the **Federal Register**. These notices (each covering the period since the most recent previous notification) shall:

a. Identify the project, activity, or undertaking involved;

b. Describe the nature of the provision waived and the designation of the provision;

c. Indicate the name and title of the person who granted the waiver request;

d. Describe briefly the grounds for approval of the request; and

e. State how additional information about a particular waiver may be obtained.

Section 106 of the HUD Reform Act also contains requirements applicable to waivers of HUD handbook provisions that are not relevant to the purpose of this notice.

This notice follows procedures provided in HUD's Statement of Policy on Waiver of Regulations and Directives issued on April 22, 1991 (56 FR 16337). In accordance with those procedures and with the requirements of section 106 of the HUD Reform Act, waivers of regulations are granted by the Assistant Secretary with jurisdiction over the regulations for which a waiver was requested. In those cases in which a General Deputy Assistant Secretary granted the waiver, the General Deputy Assistant Secretary was serving in the absence of the Assistant Secretary in accordance with the office's Order of Succession.

This notice covers waivers of regulations granted by HUD from July 1, 2012 through September 30, 2012. For ease of reference, the waivers granted by HUD are listed by HUD program office (for example, the Office of Community Planning and Development, the Office of Fair Housing and Equal Opportunity, the Office of Housing, and the Office of Public and Indian Housing, etc.). Within each program office grouping, the waivers are listed sequentially by the regulatory section of title 24 of the Code of Federal Regulations (CFR) that is being waived. For example, a waiver of a provision in 24 CFR part 58 would be listed before a waiver of a provision in 24 CFR part 570.

Where more than one regulatory provision is involved in the grant of a particular waiver request, the action is listed under the section number of the first regulatory requirement that appears in 24 CFR and that is being waived. For example, a waiver of both § 58.73 and § 58.74 would appear sequentially in the listing under § 58.73.

Waiver of regulations that involve the same initial regulatory citation are in

time sequence beginning with the earliest-dated regulatory waiver.

Should HUD receive additional information about waivers granted during the period covered by this report (the third quarter of calendar year 2012) before the next report is published (the fourth quarter of calendar year 2012), HUD will include any additional waivers granted for the third quarter in the next report.

Accordingly, information about approved waiver requests pertaining to HUD regulations is provided in the Appendix that follows this notice.

Dated: November 27, 2012.

Helen R. Kanovsky,

General Counsel.

Appendix—

Listing of Waivers of Regulatory Requirements Granted by Offices of the Department of Housing and Urban Development July 1, 2012 through September 30, 2012

Note to Reader: More information about the granting of these waivers, including a copy of the waiver request and approval, may be obtained by contacting the person whose name is listed as the contact person directly after each set of regulatory waivers granted.

The regulatory waivers granted appear in the following order:

I. Regulatory Waivers Granted by the Office of Community Planning and Development.
II. Regulatory Waivers Granted by the Office of Housing.
III. Regulatory Waivers Granted by the Office of Public and Indian Housing.

I. Regulatory Waivers Granted by the Office of Community Planning and Development

For further information about the following regulatory waivers, please see the name of the contact person that immediately follows the description of the waiver granted.

• *Regulation:* 24 CFR 58.22(a).

Project/Activity: Muskegon County, Michigan, requested a waiver of 24 CFR 58.22(a) for some NSP2 activities in the City of Muskegon. The proposed project was the rehabilitation of single family housing. A waiver was needed because the grantee committed non-HUD funds to acquire several properties prior to the approval of the environmental review as well as prior to the submission and HUD approval of the Request for Release of Funds (RROF).

Nature of Requirement: The HUD environmental regulation under 24 CFR 58.22(a) pertaining to limitations on activities pending clearance require: "Neither a recipient nor any participant in the development process, including public or private nonprofit or for-profit entities, or any of their contractors, may commit HUD assistance under a program listed in 24 CFR 58.1(b) on an activity or project until HUD or the state has approved the recipient's Request for Release of Funds (RROF) and the related certification from the responsible entity. In addition, until the RROF and the related certification have been approved, neither a recipient nor any participant in the development process may commit non-HUD funds on or undertake an activity or project under a program listed in 24 CFR 58.1(b) if the activity or project would have an adverse environmental impact or limit the choice of reasonable alternatives."

Granted By: Mark Johnston, Acting Assistant Secretary for Community Planning and Development.

Date Granted: August, 22, 2012.

Reason Waived: The project at issue was determined to be one that would further the HUD mission and advance HUD program goals to develop viable, quality communities and affordable housing. It was also determined that the grantee unknowingly violated the regulation, but that no HUD funds had been committed at the time of the violation. Based on the environmental assessments and the HUD field inspection, it was determined that granting the waiver would not result in any unmitigated, adverse environmental impact.

Contact: James Potter, Office of Environment and Energy, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW., Room 7248, Washington, DC 20410, telephone (202) 708–4225.

• *Regulation:* 24 CFR 91.15(a)(2).

Project/Activity: The City of East St. Louis, Illinois requested a waiver of 24 CFR 91.15(a)(2), in order to obtain an extension, for a period of 60 days, of the City's submission deadline for its Fiscal Year (FY) 2012 Annual Action Plan.

Nature of Requirements: The Consolidated Plan regulation at 24 CFR 91.15(a)(2) requires a participating jurisdiction to submit its Annual Action Plan no later than August 16 of the Federal fiscal year for which grant funds were appropriated.

Granted By: Mark Johnston, Acting Assistant Secretary for Community Planning and Development.

Date Granted: August 7, 2012.

Reasons Waived: The City of East St. Louis had relinquished its entitlement status under the Community Development Block Grant (CDBG) program and joined the St. Clair Urban County for FY 2012. Because the City relinquished its CDBG entitlement status after the September 30 statutory deadline for inclusion of CDBG entitlement grantees in the HOME Investment Partnerships Program (HOME) formula for the next fiscal year, the City was not considered part of the St. Clair County Urban County for purposes of allocation of FY 2012 HOME funds. The City did not understand that it remained a separate participating jurisdiction for the HOME program and, consequently, did not take the necessary steps to develop an Annual Action Plan for its FY 2012 HOME funds. By the time the City realized its predicament, the City could not meet the citizen participation requirements and submit its FY 2012 Annual Action Plan by the August 16, 2012, submission deadline. For these reasons, HUD granted the waiver.

Contact: Virginia Sardone, Office of Affordable Housing, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW., Room 7164, Washington, DC 20410, telephone (202) 708–2684.

• *Regulation:* 24 CFR 92.503(b)(3).

Project/Activity: Each of the following cities requested a waiver of the repayment provision at 24 CFR 92.503(b)(3) so that the city could repay its HOME investment trust fund local account and use the repaid funds for eligible affordable housing activities: Washington, DC, City of Durham, North Carolina, City of Rochester, New York and City of Utica, New York.

Nature of Requirements: The HOME funds repayment provision at 24 CFR 92.503(b)(3) states: "If the HOME funds were disbursed from the participating jurisdiction's HOME Investment Trust Fund Treasury account, they must be repaid to the Treasury account. If the HOME funds were disbursed from the participating jurisdiction's HOME Investment Trust Fund local account, they must be repaid to the local account."

Granted By: Mark Johnston, Acting Assistant Secretary for Community Planning and Development.

Date Granted: July through September, 2012.

Reasons Waived: Waivers were granted to permit the cities to repay their HOME investment trust fund local account to make the funds available for eligible affordable housing activities. The cities were obligated to repay HOME funds for projects that were terminated before completion to the HOME grant from which they were expended. If all or a portion of the total repayment was repaid to an expired account, the repayment would have been received by HUD but retained by the U.S. Treasury. As a result, the repaid funds would have no longer been available for the cities to use in eligible affordable housing activities. The waivers were granted to permit the cities' to repay their local HOME Investment Trust Fund accounts instead of their HOME Investment Trust Treasury accounts and make the repaid funds available for investment in additional HOME-eligible activities.

Contact: Virginia Sardone, Office of Affordable Housing, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW., Room 7164, Washington, DC 20410, telephone (202) 708–2684.

• *Regulation:* 24 CFR 570.308(a)(1).

Project/Activity: Because of the difficulties experienced by the village of Bolingbrook, Illinois ("the village"), with regard to its capacity to administer its CDBG program, the village received several findings. Therefore, the village and Will County, where the village is located, determined that permitting the county to administer the village's CDBG program would alleviate the village's difficulties in this regard. In September 2012, the village and county submitted a request to HUD to permit Bolingbrook to be included in Will County s CDBG program during FY 2013 and FY 2014 for the purpose of planning and implementing a joint housing and community development program.

Nature of Requirement: HUD's regulation at 24 CFR 570.308(a)(1) states that a joint request shall only be considered if submitted at the time an urban county is seeking a three

year qualification or requalification as an urban county. Will County re-qualified in FY 2011 for FYs 2012–2014, and will not re-qualify until FY 2014.

Granted By: Mark Johnston, Acting Assistant Secretary for Community Planning and Development.

Date Granted: September 24, 2012.

Reason Waived: 24 CFR 570.308(a)(1) was waived so that Will County and the village of Bolingbrook would be permitted to enter into a joint agreement for FY 2013 and FY 2014.

Contact: Gloria Coates, Office of Block Grant Assistance, Entitlement Communities Division, Office of Community and Planning Development, Department of Housing and Urban Development, 451 Seventh Street SW., Room 7282, Washington, DC 20410, telephone (202) 708–1577.

• *Regulation:* Section II.F. of the May 4, 2009, **Federal Register** notice, "Notice of Program Requirements for Community Development Block Grant Program Funding under the American Recovery and Reinvestment Act of 2009." Funding under this notice is referred to as CDBG–R funding.

Project/Activity: Recent natural disasters negatively affected some grantees' ability to complete CDBG–R funded activities, and thus their ability to expend all of their CDBG–R funds by the September 30 deadline for expending funds. Nineteen grantees in nine states received Major Disaster Declarations issued by the President since July 1, 2012, and had not drawn down 100 percent of their CDBG–R funds or had not completed their CDBG–R program activities. Completion of Wayne County, Michigan's CDBG–R funded activity was delayed when misunderstandings concerning the applicability of program requirements delayed processing of an amendment to the county's Action Plan, leaving insufficient time for the county to complete its activity.

Nature of Requirement: Title XII of Division A of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–005, approved February 17, 2009) (the Recovery Act) appropriated $1 billion to carry out the Community Development Block Grant (CDBG) program under Title I of the Housing and Community Development Act of 1974 (42 U.S.C. 5301, et seq.) on an expedited basis. HUD established the CDBG–R program requirements in a May 4, 2009 **Federal Register** notice. Section II.F. of that Notice required that grantees expend their entire allocation of CDBG–R funds by September 30, 2012. The Notice also specified that any funds not expended by September 30, 2012, will be recaptured by HUD and returned to the U.S. Treasury.

Granted By: Mark Johnston, Acting Assistant Secretary for Community Planning and Development.

Date Granted: September 28, 2012.

Reason Waived: The September 30, 2012 expenditure deadline in Section II.F. of the May 4, 2009, **Federal Register** notice was waived to allow the 19 grantees that suffered the effects of recent major disasters an additional 30 days to finish expending their CDBG–R funds. This same provision was waived to allow Wayne County, Michigan an additional 90 days to finish expending its CDBG–R funds.

Contact: Steve Johnson, Office of Block Grant Assistance, Entitlement Communities Division, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW., Room 7282, Washington, DC 20410, telephone (202) 708–1577.

• *Regulation:* Section II.H.3.F of the Neighborhood Stabilization Program (NSP) 3 Notice, published on October 19, 2010, at 75 FR 64333 (NSP3 Notice), in accordance with Title XII of Division A under the heading Community Planning and Development: Community Development Fund of the American Recovery and Reinvestment Act of 2009.

Project/Activity: The city of Dearborn, Michigan requested a waiver of the 10 percent demolition cap under NSP which restricts grantees from spending more than 10 percent of total grant funds on demolition activities. The city of Dearborn requested a waiver to spend $256,839 or approximately 25 percent of its NSP3 allocation on demolition of blighted structures.

Nature of Requirement: Section II.H.3.F of the NSP3 Notice provides that a grantee may not use more than ten percent of its grant for demolition activities.

Granted By: Mark Johnston, Acting Assistant Secretary for Community Planning and Development.

Date Granted: July 25, 2012.

Reason Waived: The City provided statistical data evidencing high vacancy and abandonment rates due to significant population and job loss. The City explained that there are a high number of properties requiring immediate demolition to remove safety hazards and the destabilizing influence of the blighted properties.

Contact: Jessie Handforth Kome, Deputy Director, Office of Block Grant Assistance, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW., Room 7286, Washington, DC 20410, telephone (202) 402–5539.

• *Regulation:* Section II.H.3.F of the Neighborhood Stabilization Program (NSP) 3 Notice, published on October 19, 2010, at 75 FR 64333 (NSP3 Notice), in accordance with Title XII of Division A under the heading Community Planning and Development: Community Development Fund of the American Recovery and Reinvestment Act of 2009.

Project/Activity: The city of Gary, Indiana requested a waiver of the 10 percent demolition cap under NSP which restricts grantees from spending more than 10 percent of total grant funds on demolition activities. The city of Gary requested a waiver to spend $815,358 or approximately thirty percent of its NSP3 allocation on demolition of blighted structures.

Nature of Requirement: Section II.H.3.F of the NSP3 Notice provides that a grantee may not use more than ten percent of its grant for demolition activities.

Granted By: Mark Johnston, Acting Assistant Secretary for Community Planning and Development.

Date Granted: August 7, 2012.

Reason Waived: The City provided statistical data evidencing high vacancy and abandonment rates due to significant population and job loss. With the additional funds, the City advised that it would target the University Park neighborhood where there are a high number of properties requiring immediate demolition to remove safety hazards and the destabilizing influence of the blighted properties.

Contact: Jessie Handforth Kome, Deputy Director, Office of Block Grant Assistance, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW., Room 7286, Washington, DC 20410, telephone (202) 402–5539.

• *Regulation:* Section II.H.3.F of the Neighborhood Stabilization Program (NSP) 3 Notice, published on October 19, 2010, at 75 FR 64333 (NSP3 Notice), in accordance with Title XII of Division A under the heading Community Planning and Development: Community Development Fund of the American Recovery and Reinvestment Act of 2009.

Project/Activity: The city of Houston, Texas requested a waiver of the 10 percent demolition cap under NSF which restricts grantees from spending more than 10 percent of total grant funds on demolition activities. The city of Houston requested a waiver to spend $1,000,000 or approximately 29 ½ percent of its NSP3 allocation on demolition of blighted structures.

Nature of Requirement: Section II.H.3.F of the NSP3 Notice provides that a grantee may not use more than ten percent of its grant for demolition activities.

Granted By: Mark Johnston, Acting Assistant Secretary for Community Planning and Development.

Date Granted: August 10, 2012.

Reason Waived: The City provided statistical data evidencing high numbers of blighted and condemned properties. The City explained that the ability to use additional NSP funds for demolition will allow for the removal of blighted housing units which will help stabilize neighborhoods by eliminating safety concerns, reducing crime, and increasing the feasibility for future development and community investment.

Contact: Jessie Handforth Kome, Deputy Director, Office of Block Grant Assistance, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW., Room 7286, Washington, DC 20410, telephone (202) 402–5539.

II. Regulatory Waivers Granted by the Office of Housing—Federal Housing Administration (FHA)

For further information about the following regulatory waivers, please see the name of the contact person that immediately follows the description of the waiver granted.

• *Regulation:* 24 CFR 203.43f(c)(i) and 24 CFR 203.43f (d)(ii).

Project/Activity: Title II manufactured homes located within a Federal Emergency Management Agency (FEMA) designated Special Flood Hazard Area (SFHA) in the State of Louisiana.

Nature of Requirement: The applicable regulations state that the finished grade beneath both new and existing manufactured

homes shall be at or above the 100 year return frequency flood elevation.

Granted By: Carol J. Galante, Acting Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: July 24, 2012.

Reason Waived: Failure to extend the waiver would interrupt the sale of manufactured housing in the State of Louisiana, which is located in a FEMA designated SFHA, as such homes would be forced to comply with a more onerous and costly flood hazard requirement or may not qualify for FHA insured financing without the waiver.

Contact: Peter Gillispie, Office of Single Family Program Development, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 9270, Washington, DC 20410, telephone (202) 402–3000.

• *Regulation:* 24 CFR 219.220(b) (1995 CFR edition).

Project/Activity: Asbury Harris Epworth Towers, Atlanta, Georgia—FHA Project Number 061–44803. The property consists of 160 one-bedroom units for the elderly and handicapped and is in dire need of rehabilitation. The owner is unable to rehabilitate the property and repay the Flexible Subsidy loan at the time the loan matures.

Nature of Requirement: HUD's regulation at 24 CFR 219.220(b), which governs the repayment of operating assistance provided under the Flexible Subsidy Program for Troubled Projects prior to May 1, 1996, states: "Assistance that has been paid to a project owner under this subpart must be repaid at the earlier of the expiration of the term of the mortgage, termination of these actions would typically terminate FHA involvement with the property, and the Flexible Subsidy loan would be repaid, in whole, at that time."

Granted by: Carol J. Galante, Acting Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: August 21, 2012.

Reason Waived: The owner requested and was granted waiver of the requirement to defer repayment of the Flexible Subsidy Operating Assistance Loan because the project does not have sufficient funds to repay the loan upon maturity. This waiver will allow the owner of Asbury Harris Epworth Towers to refinance their loan and address the health and safety issues at the property. There is an overwhelming demand for elderly affordable housing in Atlanta. This waiver will allow the project to be preserved as affordable housing for an additional 20 years through execution and recordation of a Rental Use Agreement.

Contact: Mark B. Van Kirk, Director, Office of Asset Management, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6160, Washington, DC 20410, telephone (202) 708–3730.

• *Regulation:* 24 CFR 219.220(b)(1995).

Project/Activity: Bethel Apartments, Alexandria, Louisiana—FHA Project Number 059–35027. The 90-unit project is in need of urgent repairs. The owner is unable to make the necessary repairs and repay the Flexible Subsidy Loan upon maturity.

Nature of Requirement: HUD's regulation at 24 CFR 219.220(b), which governs the repayment of operating assistance provided under the Flexible Subsidy Program for Troubled Projects prior to May 1, 1996, states: "Assistance that has been paid to a project owner under this subpart must be repaid at the earlier of the expiration of the term of the mortgage, termination of these actions would typically terminate FHA involvement with the property, and the Flexible Subsidy loan would be repaid, in whole, at that time."

Granted by: Carol J. Galante, Acting Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: August 21, 2012.

Reason Waived: The owner requested and was granted waiver of the requirement to defer repayment of the Flexible Subsidy Operating Assistance Loan because the owner had insufficient funds available to repay the loan upon maturity. It was determined that waiver of this regulation would allow for a refinance of the loan which will provide mortgage proceeds necessary for the recapitalization and substantial rehabilitation of the project and the preservation of the project's 90 units as affordable housing. The owner will be required to execute and record a Rental Use Agreement for the 40-year term of the re-amortized Flexible Subsidy Loan.

Contact: Mark B. Van Kirk, Director, Office of Asset Management, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6160, Washington, DC 20410, telephone (202) 708–3730.

• *Regulation:* 24 CFR 219.220(b)(1995).

Project/Activity: Westlake Christian Terrace East, Oakland, California—FHA Project Number 121–SH054. The 200-unit affordable housing project for the elderly is in dire need of redevelopment. The owner is unable to rehabilitate the property and repay the Flexible Subsidy Loan in full upon maturity.

Nature of Requirement: HUD's regulation at 24 CFR 219.220(b), which governs the repayment of operating assistance provided under the Flexible Subsidy Program for Troubled Projects prior to May 1, 1996, states: "Assistance that has been paid to a project owner under this subpart must be repaid at the earlier of the expiration of the term of the mortgage, termination of these actions would typically terminate FHA involvement with the property, and the Flexible Subsidy loan would be repaid, in whole, at that time."

Granted by: Carol J. Galante, Acting Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: August 31, 2012.

Reason Waived: The owner requested and was granted waiver of the requirement to defer repayment of the Flexible Subsidy Operating Assistance Loan because the owner had insufficient funds available to both repay the loan upon maturity and rehabilitate the property. It was determined that waiver of this regulation would allow refinancing to recapitalize the property and preserve the 200 units of much-needed affordable housing through execution and recordation of a Rental Use Agreement. The property will be preserved for a period of an additional 35 years as affordable housing.

Contact: Mark B. Van Kirk, Director, Office of Asset Management, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6160, Washington, DC 20410, telephone (202) 708–3730.

• *Regulation:* 24 CFR 219.220(b)(1995).

Project/Activity: Coronado Gardens Cooperative, Lansing, Michigan—FHA Project Number 047–44008. The 64-unit family project is in need of repair. The owner is unable to make the needed repairs and repay the Flexible Subsidy Operating Assistance Loans at maturity.

Nature of Requirement: HUD's regulation at 24 CFR 219.220(b), which governs the repayment of operating assistance provided under the Flexible Subsidy Program for Troubled Projects prior to May 1, 1996, states: "Assistance that has been paid to a project owner under this subpart must be repaid at the earlier of the expiration of the term of the mortgage, termination of these actions would typically terminate FHA involvement with the property, and the Flexible Subsidy loan would be repaid, in whole, at that time."

Granted by: Carol J. Galante, Acting Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: September 4, 2012.

Reason Waived: The owner requested and was granted waiver of the requirement to defer repayment of the Flexible Subsidy Operating Assistance Loan because the owner had insufficient funds available to repay the loan upon maturity. It was determined that waiver of this regulation was necessary for recapitalization of the project to permit needed repairs to be made at the property. The deferment will preserve this much-needed affordable housing for a period of an additional 35 years through execution and recordation of a Rental Use Agreement.

Contact: Mark B. Van Kirk, Director, Office of Asset Management, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6160, Washington, DC 20410, telephone (202) 708–3730.

• *Regulation:* 24 CFR 232.3.

Project/Activity: Autumn Leaves at Arlington (Autumn Leaves) is an assisted living facility and has a license for 43 beds in 34 units. Currently, Autumn Leaves operates 43 memory care beds. The project is located in Arlington, TX.

Nature of Requirement: HUD's regulation at 24 CFR 232.3 mandates that in a board and care home or assisted living facility, not less than one full bathroom must be provided for every four residents. Also, the bathroom cannot be accessed from a public corridor or area.

Granted By: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: August 1, 2012.

Reason Waived: HUD granted the waiver because the memory care residents of Autumn Leaves are assisted and supervised, while bathing. The bathing/shower rooms are specifically designed to provide enough space for staff to safely assist the residents.

Contact: Vance T. Morris, Special Assistant, Office of Healthcare Programs, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 9172 Washington, DC 20410, telephone (202) 402–2419.

• *Regulation:* 24 CFR 232.3.

Project/Activity: Century Assisted Living has a license for 26 Alzheimer units and operates in two separate buildings, Building A and Building B. The waiver is for Building A. The project is located in Carbondale, IL.

Noture of Requirement: HUD's regulation at 24 CFR 232.3 mandates in a board and care home or assisted living facility that the bathroom cannot be accessed from a public corridor or area.

Granted By: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: August 1, 2012.

Reoson Woived: HUD granted the waiver because it was determined that certain residents of Century Assisted Living's Building A are more acute and need assistance and supervision while bathing. Century Assisted Living has concluded that this arrangement is safer for the residents. In addition, there is insufficient space in Building A to convert its existing half bathroom rooms to full bathrooms.

Contact: Vance T. Morris, Special Assistant, Office of Healthcare Programs, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 9172, Washington, DC 20410, telephone (202) 402–2419.

• *Regulation:* 24 CFR 232.3.

Project/Activity: The Lodge at Eskaton Village (Eskaton Village) has a license for 74 beds in 64 units. Currently, Eskaton Village operates 40 assisted living units for 40 residents and 24 dementia care units for 24 residents.

Nature of Requirement: HUD's regulation at 24 CFR 232.3 mandates in a board and care home or assisted living facility that the bathroom cannot be accessed from a public corridor or area.

Granted By: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: August 1, 2012.

Reoson Woived: HUD granted the waiver on the basis that the residents of Eskaton Village's dementia care wing are fully assisted and supervised while bathing. For safety reasons, the 24 dementia care residents use two shower rooms and a tub room for bathing. This allows for staff to provide assistance to the residents. Eskaton Village also concluded that this arrangement is safer for the residents.

Contact: Vance T. Morris, Special Assistant, Office of Healthcare Programs, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 9172, Washington, DC 20410, telephone (202) 402–2419.

• *Regulotion:* 24 CFR 232.3.

Project/Activity: Country House—Dickinson (Country House) is an assisted living facility and has a license for 30 beds in 22 units. Currently, Country House serves Alzheimer Care residents. The project is located in Dickinson, North Dakota.

Noture of Requirement: HUD's regulation at 24 CFR 232.3 mandates in a board and care home or assisted living facility that the bathroom cannot be accessed from a public corridor or area.

Granted By: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: September 28, 2012.

Reason Waived: HUD granted the waiver on the basis that the Alzheimer Care residents of Country House all need assistance with bathing. The bathing/shower rooms provide enough space for staff to safely assist the residents. Country House has concluded that this arrangement is safer for the residents.

Contact: Vance T. Morris, Special Assistant, Office of Healthcare Programs, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 9172, Washington, DC 20410, telephone (202) 402–3000, telephone (202) 402–2419.

• *Regulation:* Mortgagee Letter 2011–22, Condominium Approval Process for Single Family Housing—Consolidation and Update of Approval Requirements.

Project/activity: Properties eligible for FHA-insured mortgages.

Nature of Requirement: Mortgagee Letter 2011–22 and the attached Condominium Project Approval and Processing Guide consolidated and updated the requirements and procedures that constitute the Condominium Approval Process.

Granted By: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: September 13, 2012.

Reason Woived: By Mortgagee Letter 2012–18, issued September 13, 2012, HUD waived certain provisions of Mortgagee Letter 2011–22 and put in place temporary condominium approval policy provisions. HUD determined that certain policy adjustments were temporarily needed to address current housing market conditions.

Contact: Joanne B. Kuczma, Director, Home Mortgage Insurance Division, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 9278, Washington, DC 20410–8000, telephone (202) 708–4308.

• *Regulotion:* 24 CFR 891.100(d).

Project/Activity: Renaissance Gardens, Baltimore, MD, Project Number: 052–EE065/MD06–S101–002.

Noture of Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advance funds prior to closing.

Gronted by: Carol J. Galante, Acting Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: July 12, 2012.

Reoson Woived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources.

Contact: Catherine M. Brennan, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6138, Washington, DC 20410, telephone (202) 708–3000.

• *Regulotion:* 24 CFR 891.100(d).

Project/Activity: Reliable Housing Apartments, Beaver Falls, PA, Project Number: 033–HD115/PA28–Q091–005.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advance funds prior to closing.

Gronted by: Carol J. Galante, Acting Assistant Secretary for Housing-Federal Housing Commissioner.

Date Gronted: July 17, 2012.

Reoson Woived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources.

Contoct: Catherine M. Brennan, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6138, Washington, DC 20410, telephone (202) 708–3000.

• *Regulotion:* 24 CFR 891.100(d).

Project/Activity: Ashlawn View Group Home, Danville, VA, Project Number: 051–HD147/VA36–Q091–003.

Noture of Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advance funds prior to closing.

Gronted by: Carol J. Galante, Acting Assistant Secretary for Housing-Federal Housing Commissioner.

Date Gronted: August 3, 2012.

Reason Waived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources.

Contact: Catherine M. Brennan, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6138, Washington, DC 20410, telephone (202) 708–3000.

• *Regulotion:* 24 CFR 891.100(d).

Project/Activity: Dogwood Manor Apartments, Oak Ridge, TN, Project Number: 087–EE073/TN37–S101–002.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advance funds prior to closing.

Gronted by: Carol J. Galante, Acting Assistant Secretary for Housing-Federal Housing Commissioner.

Dote Gronted: September 17, 2012.

Reason Woived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources.

Contact: Catherine M. Brennan, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6138, Washington, DC 20410, telephone (202) 708–3000.

• *Regulotion:* 24 CFR 891.100(d).

Project/Activity: Arlington II Nonprofit Housing Corporation, Baltimore, MD,

Project Number: 052–EE064/MD06–S101–001.

Nature af Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advance funds prior to closing.

Granted by: Carol J. Galante, Acting Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: September 17, 2012.

Reason Waived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources.

Contact: Catherine M. Brennan, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6138, Washington, DC 20410, telephone (202) 708–3000.

• *Regulatian:* 24 CFR 891.100(d) and 24 CFR 891.165.

Project/Activity: Hale Maunaloa Residence, Maunaloa, HI, Project Number: 140–HD034/HI10–Q091–001.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advance funds prior to closing. Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

Granted by: Carol J. Galante, Acting Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: September 11, 2012.

Reason Waived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources. Also, additional time was needed to review the project proposal, the drawings for accessibility compliance and the contract bidding requirements for the project to achieve an initial closing.

Contact: Catherine M. Brennan, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6138, Washington, DC 20410, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Roeser Haciendas Senior Housing, Phoenix, AZ,

Project Number: 123–EE107/AZ20–S081–001.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

Granted by: Carol J. Galante, Acting Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: July 12, 2012.

Reason Waived: Additional time was needed for the project to achieve initial closing.

Contact: Catherine M. Brennan, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6138, Washington, DC 20410, telephone (202) 708–3000.

• *Regulatian:* 24 CFR 891.165.

Project/Activity: Coretta Scott King Apartments, Brooklyn, NY, Project Number: 012–EE356/NY36–S071–002.

Nature af Requirement: Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

Granted by: Carol J. Galante, Acting Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: July 12, 2012.

Reason Waived: Additional time was needed to process and issue the firm commitment and for the project to reach an initial closing.

Cantact: Catherine M. Brennan, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6138, Washington, DC 20410, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Jubilee Station, Charleston, WV, Project Number: 045–HD045/WV15–Q091–002.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

Granted by: Carol J. Galante, Acting Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: July 18, 2012.

Reason Waived: Additional time was needed to issue the firm commitment.

Contact: Catherine M. Brennan, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6138, Washington, DC 20410, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Spruce Manor, Huntington, WV, Project Number: 045–HD044/WV15–Q091–001.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

Granted by: Carol J. Galante, Acting Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: August 3, 2012.

Reason Waived: Additional time was needed to reach initial closing.

Contact: Catherine M. Brennan, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6138, Washington, DC 20410, telephone (202) 708–3000.

• *Regulatian:* 24 CFR 891.165.

Project/Activity: Franklin Senior Housing, Inc., Franklin, WI, Project Number: 075–EE145/WI39–S091–003.

Nature af Requirement: Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

Granted by: Carol J. Galante, Acting Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: August 3, 2012.

Reasan Waived: Additional time was needed to reach initial closing.

Contact: Catherine M. Brennan, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6138, Washington, DC 20410, telephone (202) 708–3000.

• *Regulatian:* 24 CFR 891.165.

Project/Activity: Broadwater Place Apartments, St. Petersburg, FL, Project Number: 067–HD102/FL29–Q091–005.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

Granted by: Carol J. Galante, Acting Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: August 3, 2012.

Reason Waived: Additional time was needed to issue the firm commitment and for the project to be initially closed.

Contact: Catherine M. Brennan, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6138, Washington, DC 20410, telephone (202) 708–3000.

• *Regulatian:* 24 CFR 891.165.

Project/Activity: CPNJ Livingston Residence, Livingston, NJ, Project Number: 031–HD157/NJ39–Q081–003.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

Granted by: Carol J. Galante, Acting Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: August 3, 2012.

Reason Waived: Additional time was needed to reach initial closing.

Contact: Catherine M. Brennan, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6138, Washington, DC 20410, telephone (202) 708–3000.

• *Regulatian:* 24 CFR 891.165.

Project/Activity: Beechtree Commons II, Verona, PA, Project Number: 033–EE142/PA28–S091–005.

Nature of Requirement: Section 891.165 provides that the duration of the fund

reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

Granted by: Carol J. Galante, Acting Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: August 3, 2012.

Reason Waived: Additional time was needed to complete the review of the initial closing documents and for the project to reach an initial closing.

Contact: Catherine M. Brennan, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6138, Washington, DC 20410, telephone (202) 708–3000.

Regulation: 24 CFR 891.165.

Project/Activity: Silverwood Apartments, Tucson, AZ, Project Number: 123–EE113/AZ20–S091–004.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

Granted by: Carol J. Galante, Acting Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: August 3, 2012.

Reason Waived: Additional time was needed for the sponsor/owner to resolve issues raised by the City of Tucson regarding final plans and specifications requirements for a paved access and new easements for the project.

Contact: Catherine M. Brennan, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6138, Washington, DC 20410, telephone (202) 708–3000.

- *Regulation:* 24 CFR 891.165.

Project/Activity: Accorn Walk (Franklin Foundation), Kettering, OH,

Project Number: 046–EE101/OH10–S091–003.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

Granted by: Carol J. Galante, Acting Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: August 13, 2012.

Reason Waived: Additional time was needed for the sponsor/owner to obtain the proper zoning and site approval from the local authority.

Contact: Catherine M. Brennan, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6138, Washington, DC 20410, telephone (202) 708–3000.

- *Regulation:* 24 CFR 891.165.

Project/Activity: FSWP GL V, Leesburg, PA, Project Number: 033–HD112/PA28–Q091–002.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

Granted by: Carol J. Galante, Acting Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: August 13, 2012.

Reason Waived: Additional time was needed to reach initial closing.

Contact: Catherine M. Brennan, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6138, Washington, DC 20410, telephone (202) 708–3000.

- *Regulation:* 24 CFR 891.165.

Project/Activity: Mercy Auburn Senior Apartments, Auburn, CA, Project Number: 136–EE086/CA30–S091–003.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

Granted by: Carol J. Galante, Acting Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: August 13, 2012.

Reason Waived: Additional time was needed to reach initial closing.

Contact: Catherine M. Brennan, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6138, Washington, DC 20410, telephone (202) 708–3000.

- *Regulation:* 24 CFR 891.165.

Project/Activity: Advance Housing 2009, Lafayette, NJ, Project Number: 031–HD162/NJ39–Q091–003.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

Granted by: Carol J. Galante, Acting Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: August 20, 2012.

Reason Waived: Additional time was needed to reach an initial closing.

Contact: Catherine M. Brennan, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6138, Washington, DC 20410, telephone (202) 708–3000.

- *Regulation:* 24 CFR 891.165.

Project/Activity: The Village at Oasis Park II, Mesa, AZ, Project Number: 123–HD046/AZ20–Q091–002.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

Granted by: Carol J. Galante, Acting Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: August 20, 2012.

Reason Waived: Additional time was needed to reach initial closing and start construction.

Contact: Catherine M. Brennan, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6138, Washington, DC 20410, telephone (202) 708–3000.

- *Regulation:* 24 CFR 891.165.

Project/Activity: Tecumseh Road Senior Apartments, Dewitt, NY, Project Number: 014–EE282/NY06–S091–007.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

Granted by: Carol J. Galante, Acting Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: August 20, 2012.

Reason Waived: Additional time was needed to complete processing of the firm commitment application and for the project to be initially closed.

Contact: Catherine M. Brennan, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6138, Washington, DC 20410, telephone (202) 708–3000.

- *Regulation:* 24 CFR 891.165.

Project/Activity: Rockwood Center, Henrietta, NY, Project Number: 014–EE281/NY06–S091–006.

Granted by: Carol J. Galante, Acting Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: August 23, 2012.

Reason Waived: Additional time was needed for approval and processing requirements of the various funding sources of this mixed finance project.

Contact: Catherine M. Brennan, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6138, Washington, DC 20410, telephone (202) 708–3000.

- *Regulation:* 24 CFR 891.165.

Project/Activity: Bella Vista Apartments, Tucson, AZ, Project Number: 123–HD045/AZ20–Q091–001.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

Granted by: Carol J. Galante, Acting Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: August 23, 2012.

Reason Waived: Additional time was needed to review the firm commitment application, achieve initial closing and start construction.

Contact: Catherine M. Brennan, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6138, Washington, DC 20410, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Fairfield Commons I, Stamford, CT, Project Number: 017–HD042/CT26–Q091–001.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

Granted by: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: August 23, 2012.

Reason Waived: Additional time was needed for HUD to issue the firm commitment and for the project to achieve an initial closing.

Contact: Catherine M. Brennan, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6138, Washington, DC 20410, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Reliable Housing Apartments, Beaver Falls, PA, Project Number: 033–HD115/PA28–Q091–005.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

Granted by: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: September 4, 2012.

Reason Waived: Additional time was needed to issue the firm commitment, to review the initial closing documents and for the project to reach initial closing.

Contact: Catherine M. Brennan, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6138, Washington, DC 20410, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Mohouli Heights Senior Neighborhood, Hilo, HI, Project Number: 140–EE042/HI10–S091–001.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

Granted by: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: September 4, 2012.

Reason Waived: Additional time was needed to reach an initial closing.

Contact: Catherine M. Brennan, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6138, Washington, DC 20410, telephone (202) 708–3000.

• *Regulatian:* 24 CFR 891.165.

Project/Activity: Nativity B.V.M. Place, Philadelphia, PA, Project Number: 034–EE167/PA26–S091–005.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

Granted by: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: September 7, 2012.

Reason Waived: Additional time was needed for the sponsor/owner to resolve a zoning appeal and for the project to reach an initial closing.

Contact: Catherine M. Brennan, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6138, Washington, DC 20410, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Flagship City Apartments, Erie, PA, Project Number: 033–HD114/PA28–Q091–004.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

Granted by: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: September 7, 2012.

Reason Waived: Additional time was needed to issue the firm commitment, review the initial closing documents, and for the project to reach an initial closing.

Contact: Catherine M. Brennan, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6138, Washington, DC 20410, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: City of Utica Section 811 Project, Utica, NY, Project Number: 014–HD132/NY06–Q081–001.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

Granted by: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: September 11, 2012.

Reason Waived: Additional time was needed to complete the processing of the firm commitment application and for the project to reach an initial closing.

Contact: Catherine M. Brennan, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6138, Washington, DC 20410, telephone (202) 708–3000.

• *Regulatian:* 24 CFR 891.165.

Project/Activity: Community Options Hopewell, Inc., Hopewell Borough, NJ, Project Number: 035–HD073/NJ39–Q091–009.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

Granted by: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: September 11, 2012.

Reasan Waived: Additional time was needed to finalize the firm commitment application and for the project to reach an initial closing.

Contact: Catherine M. Brennan, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6138, Washington, DC 20410, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: The Woods of Crooked Creek Apartments, Indianapolis, IN, Project Number: 073–HD087/IN36–Q091–001.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

Granted by: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: September 28, 2012.

Reason Waived: Additional time was needed for the project to reach an initial closing.

Contact: Catherine M. Brennan, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6138, Washington, DC 20410, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Walnut Housing, West Seneca, NY, Project Number: 014–EE269/NY06–S081–001.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

Granted by: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: September 28, 2012.

Reason Waived: The project experienced significant delays due to local opposition causing the site to be changed twice.

Contact: Catherine M. Brennan, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room

6138, Washington, DC 20410, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Kenyon Terrace Apartments, South Kingstown, RI, Project Number: 016–HD063/RI43–Q091–006.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

Granted by: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: September 28, 2012.

Reason Waived: Additional time was needed for the firm commitment application to be submitted and reviewed, and for the project to achieve an initial closing.

Contact: Catherine M. Brennan, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6138, Washington, DC 20410, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.205.

Project/Activity: Beckley House Expansion, Canaan, CT, Project Number: 017–EE116/CT26–S101–004.

Nature of Requirement: Section 891.205 requires Section 202 project owners to be single-purpose private nonprofit organizations.

Granted by: Carol J. Galante, Acting Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: August 13, 2012.

Reason Waived: To allow the owner of another Section 202 project to also own this project. The projects are to be on the same site and time and cost savings are anticipated from not having to create a separate owner entity.

Contact: Catherine M. Brennan, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6138, Washington, DC 20410, telephone (202) 708–3000.

III. Regulatory Waivers Granted by the Office of Public and Indian Housing

For further information about the following regulatory waivers, please see the name of the contact person that immediately follows the description of the waiver granted.

• *Regulation:* 24 CFR 5.801(d)(1).

Project/Activity: Montana Department of Commerce, (MT901), Helena, MT.

Nature of Requirement: The regulation establishes certain reporting compliance dates. The audited financial statements are required to be submitted to the Real Estate Assessment Center (REAC) no later than nine months after the housing authority's (HA) fiscal year end (FYE), in accordance with HUD's Uniform Financial Reporting Rule.

Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: September 12, 2012.

Reason Waived: The housing authority (HA) contends that the audit was delayed because the HA's audited is completed through the State Legislative Audit Division. The State did not complete the audit before March 31, 2012, and as a result the HA did not have adequate time to enter the data into REAC's online system. The Section 8 waiver was granted and the additional time permitted the audit documentation to be adequately completed. The HA submitted the FYE June 30, 2011, audited financial information on the May 15, 2012, due date.

Contact: Johnson Abraham, Program Manager, NASS, Real Estate Assessment Center, Office of Public and Indian Housing, Department of Housing and Urban Development, 550 12th Street SW., Suite 100, Washington, DC 20410, telephone (202) 475–8583.

• *Regulation:* 24 CFR 5.801(d)(1).

Project/Activity: Fort Wayne Housing Authority, (IN003), Fort Wayne, IN.

Nature of Requirement: The regulation establishes certain reporting compliance dates. The audited financial statements are required to be submitted to the Real Estate Assessment Center (REAC) no later than nine months after the housing authority's (HA) fiscal year end (FYE), in accordance with the Single Audit Act and OMB Circular A–133.

Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: August 3, 2012.

Reason Waived: The housing authority (HA) contends that due to transitional difficulties when changing auditors, the audited financial statements could not be submitted by the deadline of March 31, 2012. The HA's original Independent Public Accountant (IPA) was replaced, with Board approval, and the newly hired IPA engagement letter was dated November 17, 2011. The waiver was granted and the additional time permitted the audit documentation for FYE June 30, 2011, to be adequately completed and entered into REAC's online system. The new dew date was set at June 24, 2012. The PHAS audited submission due date waiver is not applicable to Circular A–133 submissions to the Federal Audit Clearinghouse.

Contact: Johnson Abraham, Program Manager, NASS, Real Estate Assessment Center, Office of Public and Indian Housing, Department of Housing and Urban Development, 550 12th Street SW., Suite 100, Washington, DC 20410, telephone (202) 475–8583.

• *Regulation:* 24 CFR 5.801(d)(1).

Project/Activity: Madisonville Housing Authority, (TX245), Madisonville, TX.

Nature of Requirement: The regulation establishes certain reporting compliance dates. The audited financial statements are required to be submitted to the Real Estate Assessment Center (REAC) no later than nine months after the housing authority's (HA) fiscal year end (FYE), in accordance with the Single Audit Act and OMB Circular A–133.

Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: August 9, 2012.

Reason Waived: The housing authority (HA) contends that because their financial records were seized as a result of an ongoing HUD OIG investigation, the audit cannot be completed by their independent auditors. The waiver was granted and the additional time permitted the audit documentation to be adequately completed and entered into the online system. The HA agreed to submit its FYE September 30, 2011, audited information no later than October 31, 2012.

Contact: Johnson Abraham, Program Manager, NASS, Real Estate Assessment Center, Office of Public and Indian Housing, Department of Housing and Urban Development, 550 12th Street SW., Suite 100, Washington, DC 20410, telephone (202) 475–8583.

• *Regulation:* 24 CFR 5.801(d)(1).

Project/Activity: District of Columbia, (DC001), Washington, DC.

Nature of Requirement: The regulation establishes certain reporting compliance dates. The audited financial statements are required to be submitted to the Real Estate Assessment Center (REAC) no later than nine months after the housing authority's (HA) fiscal year end (FYE), in accordance with the Single Audit Act and OMB Circular A–133.

Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: August 30, 2012.

Reason Waived: The housing authority (HA) requested additional time to submit its audited financial requirements to allow the newly hired Deputy Assistant Director for Administration to address Independent Public Audit comments. The HA contends that the additional time was needed in order to complete analyses and revisions to comply with regulatory submission deadlines and Asset Management guidelines for Moving To Work agencies. The waiver was granted and the additional time permitted the HA, in conjunction with the auditor, to complete the audit for the FYE September 30, 2011. The HA agreed to submit its FYE September 30, 2011, audited financial information to the REAC no later than July 31, 2012. However, the PHAS audited submission due date waiver is not applicable to Circular A–133 submissions to the Federal Audit Clearinghouse.

Contact: Johnson Abraham, Program Manager, NASS, Real Estate Assessment Center, Office of Public and Indian Housing, Department of Housing and Urban Development, 550 12th Street SW., Suite 100, Washington, DC 20410, telephone (202) 475–8583.

• *Regulation:* 24 CFR 85.36(c).

Project/Activity: Housing Authority of the City of Shreveport, LA (HACS)

Nature of Requirement: HUD's regulation at 25 CFR 85.36(c) requires that procurement transactions will be conducted in a manner providing full and open competition consistent with the standards of Sec. 85.36.

Granted by: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: September 12, 2012.

Reason Waived: Good cause was found to grant an exception for HACS' processing of the Phase I contract. HACS sought to use its grant under the American Reinvestment and Recovery Act of 2009 (Recovery Act) to expeditiously to ensure the health and safety of its residents at Wilkinson Terrace. The housing authority explained its rationale for amending its Phase I contract in light of the exigency related to the funding and need for mold and mildew remediation at Wilkinson

Terrace. There had been no merging or supplanting of Recovery Act funds. The housing authority intended to award the Phase I contract under § 85.36 (c), but failed to complete the procurement in accordance with the Recovery Act procurement procedures and § 85.36. HACS agreed to ensure that the noncompetitive proposals process followed is captured clearly in its amended Capital Fund Stimulus Grant Procurement Policy. HACS also agreed to update its file to document why the contract was awarded noncompetitively, and make such documentation available upon request.

Contact: Dominique Blom, Deputy Assistant Secretary for the Office of Public Housing Investments, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4130, Washington, DC 20140, telephone (202) 402–4181.

• *Regulation:* 24 CFR 982.202(b)(1).

Project/Activity: New York City Housing Authority (NYCHA), New York, NY.

Nature of Requirement: HUD's regulation 24 CFR 982.202(b)(1) states that admission to the program may not be based on where the family lives before admission to the program

Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: September 21, 2012.

Reason Waived: The preference for families discharged from New York City Health and Hospitals Corporation (HHC) facilities addresses local housing needs and priorities—specifically the housing needs of these HHC residents who are in need of supportive services and in danger of becoming homeless without supportive services.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4216, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.503(b)(1).

Project/Activity: Virgin Islands Housing Authority (VIHA).

Nature of Requirement: HUD's regulation at 24 CFR 982.503(b)(1) states that the public housing agency may establish the payment standard amount for a unit size at any level between 90 percent and 110 percent of the published fair market rent (FMR) for that unit size.

Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: September 7, 2012.

Reason Waived: This waiver was granted because VIHA had been applying payment standards that were above previously approved exception payment standard amounts. To avoid the impact that a drastic cut in subsidy would have on assisted families, VIHA was given a limited time to approve payment standards above the basic range.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4216, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.503(c)(3).

Project/Activity: Dallas Housing Authority (DHA), Dallas TX.

Nature of Requirement: HUD's regulation at 24 CFR 982.503(c)(3) states that at the request of the public housing agency, an exception payment standard above 120 percent of the fair market rent (FMR) may be approved if, among other items, such approval is supported by statistically representative rental housing survey data to justify approval in accordance with the methodology described in 24 CFR 888.113.

Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: August 20, 2012.

Reason Waived: This waiver was granted based on proposed changes to the methodology for determining small area FMRs and the ZIP code level data used to support those calculations.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4216, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.503(c), 982.503(c)(4)(ii) and 982.503(c)(5).

Project/Activity: Mountrail County Housing Authority (MCHA), Mountrail County, ND.

Nature of Requirement: HUD's 24 CFR 982.503(c) establishes the methodology for establishing exception payment standards for an area. HUD's regulation at 24 CFR 503(c)(4)(ii) states that HUD will only approve an exception payment standard amount after six months from the date of HUD approval of an exception payment standard amount above 110 percent to 120 percent of the published fair market rent (FMR). HUD's regulation at 24 CFR 982.503(c)(5) states that the total population of a HUD-approved exception areas in an FMR area may not include more than 50 percent of the population of the FMR area.

Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: September 10, 2012.

Reason Waived: These waivers were granted because of a shock to the rental housing market in the MCHA FMR area caused by increased economic activity due to natural resource exploration.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4216, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.503(c), 982.503(c)(4)(ii) and 982.503(c)(5).

Project/Activity: Foster County Housing Authority (FCHA), Foster County, ND.

Nature of Requirement: HUD's regulation at 24 CFR 982.503(c) establishes the methodology for establishing exception payment standards for an area. HUD's regulation at 24 CFR 503(c)(4)(ii) states that HUD will only approve an exception payment standard amount after six months from the date of HUD approval of an exception payment standard amount above 110 percent to 120 percent of the published fair market rent (FMR). HUD's regulation 24 CFR 982.503(c)(5) states that the total population of a HUD-approved exception areas in an FMR area may not include more than 50 percent of the population of the FMR area.

Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: September 12, 2012.

Reason Waived: These waivers were granted because of a shock to the rental housing market in the FCHA FMR area caused by increased economic activity due to natural resource exploration.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4216, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.503(c), 982.503(c)(4)(ii) and 982.503(c)(5).

Project/Activity: Stutsman County Housing Authority (SCHA), Stutsman County, ND.

Nature of Requirement: HUD's regulation at 24 CFR 982.503(c) establishes the methodology for establishing exception payment standards for an area. HUD's regulation at 24 CFR 503(c)(4)(ii) states that HUD will only approve an exception payment standard amount after six months from the date of HUD approval of an exception payment standard amount above 110 percent to 120 percent of the published fair market rent (FMR). HUD's regulation at 24 CFR 982.503(c)(5) states that the total population of a HUD-approved exception areas in an FMR area may not include more than 50 percent of the population of the FMR area.

Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: September 12, 2012.

Reason Waived: These waivers were granted because of a shock to the rental housing market in the SCHA FMR area caused by increased economic activity due to natural resource exploration.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4216, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.503(c), 982.503(c)(4)(ii) and 982.503(c)(5).

Project/Activity: Susquehanna County Housing Authority (SCHA), Susquehanna County, PA.

Nature of Requirement: HUD's regulation at 24 CFR 982.503(c) establishes the methodology for establishing exception payment standards for an area. HUD's regulation at 24 CFR 503(c)(4)(ii) states that HUD will only approve an exception payment standard amount after six months from the date of HUD approval of an

exception payment standard amount above 110 percent to 120 percent of the published fair market rent (FMR). HUD's regulation at 24 CFR 982.503(c)(5) states that the total population of a HUD-approved exception areas in an FMR area may not include more than 50 percent of the population of the FMR area.

Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: September 15, 2012.

Reason Waived: These waivers were granted because of a shock to the rental housing market in the SCHA FMR area caused by increased economic activity due to natural resource exploration.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4216, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.503(c), 982.503(c)(4)(ii) and 982.503(c)(5).

Project/Activity: McHenry/Pierce County Housing Authority (MPCHA), Pierce County, ND. ND.

Nature of Requirement: HUD's regulation at 24 CFR 982.503(c) establishes the methodology for establishing exception payment standards for an area. HUD's regulation at 24 CFR 503(c)(4)(ii) states that HUD will only approve an exception payment standard amount after six months from the date of HUD approval of an exception payment standard amount above 110 percent to 120 percent of the published fair market rent (FMR). HUD's regulation at 24 CFR 982.503(c)(5) states that the total population of a HUD-approved exception areas in an FMR area may not include more than 50 percent of the population of the FMR area.

Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: September 28, 2012.

Reason Waived: These waivers were granted because of a shock to the rental housing market caused by increased economic activity in the MPCHA FMR area due to natural resource exploration.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4216, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.505(c)(3).

Project/Activity: St. Clair Shores Housing Commission (SCSHC), St. Clair Shores, MI.

Nature of Requirement: HUD's regulation at 24 CFR 982.505(c)(3) states that, if the amount on the payment standard schedule is decreased during the term of the housing assistance payments (HAP) contract, the lower payment standard amount generally must be used to calculate the monthly HAP for the family beginning on the effective date of the family's second regular reexamination following the effective date of the decrease.

Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: July 2, 2012.

Reason Waived: This waiver was granted because this cost-saving measure would enable the SCSHC to manage its Housing Choice Voucher program within allocated budget authority and avoid the termination of HAP contracts due to insufficient funding.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4216, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.505(c)(3).

Project/Activity: Town of Portsmouth Housing Commission (TPHC), Portsmouth, RI.

Nature of Requirement: HUD's regulation at 24 CFR 982.505(c)(3) states that, if the amount on the payment standard schedule is decreased during the term of the housing assistance payments (HAP) contract, the lower payment standard amount generally must be used to calculate the monthly HAP for the family beginning on the effective date of the family's second regular reexamination following the effective date of the decrease.

Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: July 2, 2012.

Reason Waived: This waiver was granted because this cost-saving measure would enable the TPHC to manage its Housing Choice Voucher program within allocated budget authority and avoid the termination of HAP contracts due to insufficient funding.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4216, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.505(c)(3).

Project/Activity: Housing Authority of Douglas County (HADC), Douglas County, OR.

Nature of Requirement: HUD's regulation at 24 CFR 982.505(c)(3) states that, if the amount on the payment standard schedule is decreased during the term of the housing assistance payments (HAP) contract, the lower payment standard amount generally must be used to calculate the monthly HAP for the family beginning on the effective date of the family's second regular reexamination following the effective date of the decrease.

Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: July 5, 2012.

Reason Waived: This waiver was granted because this cost-saving measure would enable the HADC to manage its Housing Choice Voucher program within allocated budget authority and avoid the termination of HAP contracts due to insufficient funding.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4216, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.505(c)(3).

Project/Activity: Madison County Housing Authority (MCHA), Madison County, NC.

Nature of Requirement: HUD's regulation at 24 CFR 982.505(c)(3) states that, if the amount on the payment standard schedule is decreased during the term of the housing assistance payments (HAP) contract, the lower payment standard amount generally must be used to calculate the monthly HAP for the family beginning on the effective date of the family's second regular reexamination following the effective date of the decrease.

Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: July 16, 2012.

Reason Waived: This waiver was granted because this cost-saving measure would enable the MCHA to manage its Housing Choice Voucher program within allocated budget authority and avoid the termination of HAP contracts due to insufficient funding.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4216, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.505(c)(3).

Project/Activity: Marshall County Housing Authority (MCHA), Marshall County, IN.

Nature of Requirement: HUD's regulation at 24 CFR 982.505(c)(3) states that, if the amount on the payment standard schedule is decreased during the term of the housing assistance payments (HAP) contract, the lower payment standard amount generally must be used to calculate the monthly HAP for the family beginning on the effective date of the family's second regular reexamination following the effective date of the decrease.

Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: July 16, 2012.

Reason Waived: This waiver was granted because this cost-saving measure would enable the MCHA to manage its Housing Choice Voucher program within allocated budget authority and avoid the termination of HAP contracts due to insufficient funding.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4216, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.505(c)(3).

Project/Activity: Smithfield Housing Authority (SHA), Smithfield, RI.

Nature of Requirement: HUD's regulation at 24 CFR 982.505(c)(3) states that, if the amount on the payment standard schedule is decreased during the term of the housing assistance payments (HAP) contract, the lower payment standard amount generally must be used to calculate the monthly HAP for the family beginning on the effective date of the family's second regular reexamination following the effective date of the decrease.

Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: July 16, 2012.

Reason Waived: This waiver was granted because this cost-saving measure would enable the SHA to manage its Housing Choice Voucher program within allocated budget authority and avoid the termination of HAP contracts due to insufficient funding.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4216, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.505(c)(3).

Project/Activity: Monroe County Housing Authority (MCHA), Monroe County, WI.

Nature of Requirement: HUD's regulation at 24 CFR 982.505(c)(3) states that, if the amount on the payment standard schedule is decreased during the term of the housing assistance payments (HAP) contract, the lower payment standard amount generally must be used to calculate the monthly HAP for the family beginning on the effective date of the family's second regular reexamination following the effective date of the decrease.

Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: July 17, 2012.

Reason Waived: This waiver was granted because this cost-saving measure would enable the MCHA to manage its Housing Choice Voucher program within allocated budget authority and avoid the termination of HAP contracts due to insufficient funding.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4216, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.505(c)(3).

Project/Activity: Delaware County Housing Authority (DCHA), Delaware County, IN.

Nature of Requirement: HUD's regulation at 24 CFR 982.505(c)(3) states that, if the amount on the payment standard schedule is decreased during the term of the housing assistance payments (HAP) contract, the lower payment standard amount generally must be used to calculate the monthly HAP for the family beginning on the effective date of the family's second regular reexamination following the effective date of the decrease.

Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: July 26, 2012.

Reason Waived: This waiver was granted because this cost-saving measure would enable the DCHA to manage its Housing Choice Voucher program within allocated budget authority and avoid the termination of HAP contracts due to insufficient funding.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4216, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.505(c)(3).

Project/Activity: Housing Authority of the City of Baird (HACB), Baird, TX.

Nature of Requirement: HUD's regulation at 24 CFR 982.505(c)(3) states that, if the amount on the payment standard schedule is decreased during the term of the housing assistance payments (HAP) contract, the lower payment standard amount generally must be used to calculate the monthly HAP for the family beginning on the effective date of the family's second regular reexamination following the effective date of the decrease.

Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: July 30, 2012.

Reason Waived: This waiver was granted because this cost-saving measure would enable the HACB to manage its Housing Choice Voucher program within allocated budget authority and avoid the termination of HAP contracts due to insufficient funding.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4216, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.505(c)(3).

Project/Activity: Norfolk Redevelopment and Housing Authority (NRHA), Norfolk, VA.

Nature of Requirement: HUD's regulation at 24 CFR 982.505(c)(3) states that, if the amount on the payment standard schedule is decreased during the term of the housing assistance payments (HAP) contract, the lower payment standard amount generally must be used to calculate the monthly HAP for the family beginning on the effective date of the family's second regular reexamination following the effective date of the decrease.

Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: August 14, 2012.

Reason Waived: This waiver was granted because this cost-saving measure would enable the NRHA to manage its Housing Choice Voucher program within allocated budget authority and avoid the termination of HAP contracts due to insufficient funding.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4216, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.505(c)(3).

Project/Activity: Brownsville Housing Authority (BHA), Brownsville, TN.

Nature of Requirement: HUD's regulation at 24 CFR 982.505(c)(3) states that, if the amount on the payment standard schedule is decreased during the term of the housing assistance payments (HAP) contract, the lower payment standard amount generally must be used to calculate the monthly HAP for the family beginning on the effective date of the family's second regular reexamination following the effective date of the decrease.

Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: August 30, 2012.

Reason Waived: This waiver was granted because this cost-saving measure would enable the BHA to manage its Housing Choice Voucher program within allocated budget authority and avoid the termination of HAP contracts due to insufficient funding.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4216, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.505(c)(3).

Project/Activity: Jackson County Housing Authority (JCHA), Jackson County, IL.

Nature of Requirement: HUD's regulation at 24 CFR 982.505(c)(3) states that, if the amount on the payment standard schedule is decreased during the term of the housing assistance payments (HAP) contract, the lower payment standard amount generally must be used to calculate the monthly HAP for the family beginning on the effective date of the family's second regular reexamination following the effective date of the decrease.

Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: September 7, 2012.

Reason Waived: This waiver was granted because this cost-saving measure would enable the JCHA to manage its Housing Choice Voucher program within allocated budget authority and avoid the termination of HAP contracts due to insufficient funding.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4216, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.505(c)(3).

Project/Activity: Williamston Housing Authority (WHA), Williamston, NC.

Nature of Requirement: HUD's regulation at 24 CFR 982.505(c)(3) states that, if the amount on the payment standard schedule is decreased during the term of the housing assistance payments (HAP) contract, the lower payment standard amount generally must be used to calculate the monthly HAP for the family beginning on the effective date of the family's second regular reexamination following the effective date of the decrease.

Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: September 26, 2012.

Reason Waived: This waiver was granted because this cost-saving measure would enable the WHA to manage its Housing Choice Voucher program within allocated budget authority and avoid the termination of HAP contracts due to insufficient funding.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4216, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.505(d).

Project/Activity: Willimantic Housing Authority (WHA), Willimantic, CT.

Nature of Requirement: HUD's regulation at 24 CFR 982.505(d) states that a public

housing agency may only approve a higher payment standard for a family as a reasonable accommodation if the higher payment standard is within the basic range of 90 to 110 percent of the fair market rent (FMR) for the unit size.

Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: August 3, 2012.

Reason Waived: The participant, who is disabled, required an exception payment standard to move to a wheelchair-accessible unit. To provide this reasonable accommodation so the client could move to an accessible unit and pay no more than 40 percent of her adjusted income toward the family share, the WHA was allowed to approve an exception payment standard that exceeded the basic range of 90 to 110 percent of the FMR.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4216, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.505(d).

Project/Activity: Little Rock Housing Authority (LRHA), Little Rock, AR.

Nature of Requirement: HUD's regulation at 24 CFR 982.505(d) states that a public housing agency may only approve a higher payment standard for a family as a reasonable accommodation if the higher payment standard is within the basic range of 90 to 110 percent of the fair market rent (FMR) for the unit size.

Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: August 20, 2012.

Reason Waived: The spouse of the head of household is disabled and the family required an exception payment standard to move to a new unit that met her health needs. To provide this reasonable accommodation so the client could be assisted in a new unit and pay no more than 40 percent of its adjusted income toward the family share, the LRHA was allowed to approve an exception payment standard that exceeded the basic range of 90 to 110 percent of the FMR.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4216, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.505(c)(3) and 982.517(d).

Project/Activity: Saginaw Housing Commission (SHC), Saginaw, MI.

Nature of Requirement: HUD's regulation at 24 CFR 982.505(c)(3) states that, if the amount on the payment standard schedule is decreased during the term of the housing assistance payments (HAP) contract, the lower payment standard amount generally must be used to calculate the monthly HAP for the family beginning on the effective date of the family's second regular reexamination following the effective date of the decrease. HUD's regulation at 24 CFR 982.517(d) requires a public housing agency (PHA) to use the appropriate utility allowance for the size of the dwelling unit actually leased by the family rather than the family unit size as determined by the PHA subsidy standards and specified on the voucher.

Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: August 3, 2012.

Reason Waived: These waivers were granted because these cost-saving measures would enable the SHC to manage its Housing Choice Voucher program within allocated budget authority and avoid the termination of HAP contracts due to insufficient funding.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4216, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.517(b).

Project/Activity: New York City Department of Housing Preservation and Development (NYCDHPD), New York, NY.

Nature of Requirement: HUD's regulation at 24 CFR 982.517(b) requires that utility allowance schedules must be determined based on the typical costs of utilities and services paid by energy conservative households using normal patterns of consumption for the community as a whole.

Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: July 26, 2012.

Reason Waived: This waiver was granted to allow NYCDHPD to establish project specific utility allowances at a sub-metered building to ensure the accuracy of typical cost and consumption data of utilities in determining the gross rent.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4216, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.517(d).

Project/Activity: Evanston Housing Authority (EHA), Evanston, WY.

Nature of Requirement: HUD's regulation at 24 CFR 982.517(d) requires a public housing agency (PHA) to use the appropriate utility allowance for the size of the dwelling unit actually leased by the family rather than the family unit size as determined by the PHA subsidy standards and specified on the voucher.

Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: September 10, 2012.

Reason Waived: This waiver was granted because this cost-saving measure would enable the EHA to manage its Housing Choice Voucher program within allocated budget authority and avoid the termination of HAP contracts due to insufficient funding.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4216, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.637(a)(2).

Project/Activity: Chicago Housing Authority (CHA), Chicago, IL.

Nature of Requirement: 24 CFR 982.637(a)(2) states that a public housing agency may not commence tenant-based rental assistance for occupancy of a new unit so long as any family member owns any title or other interest in the prior home.

Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: August 14, 2012.

Reason Waived: This waiver was granted due to safety concerns under the Violence Against Women Act and to allow the family to remain assisted.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4210, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 983.253(b).

Project/Activity: Louisiana Housing Authority (LHA), Baton Rouge, LA.

Nature of Requirement: HUD's regulation at 24 CFR 983.253(b) states that the project-based voucher (PBV) contract unit leased to each family must be appropriate for the size of the family under the public housing agency's subsidy standards.

Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: September 5, 2012.

Reason Waived: This waiver was extended to allow one-bedroom eligible families to lease two-bedroom units based on the continued need to house severely disabled households under the LHA's PBV permanent supportive housing program.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4210, Washington, DC 20410, telephone (202) 708–0477.

• *Regulation:* 24 CFR 984.303(d).

Project/Activity: Vermont State Housing Authority (VSHA), Montpelier, VT.

Nature of Requirement: HUD's regulation at 24 CFR 984.303(d) limits the extension of a family self-sufficiency (FSS) contract by a public housing agency to two years beyond the initial five-year term of a new unit so long as any family member owns any title or other interest in the prior home.

Granted By: Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing.

Date Granted: July 26, 2012.

Reason Waived: This waiver was granted due to allow the FSS participant to complete her education and employment goals. An additional two years was granted.

Contact: Laure Rawson, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and

Urban Development, 451 Seventh Street SW., Room 4210, Washington, DC 20410, telephone (202) 708–0477.

[FR Doc. 2012–29128 Filed 12–4–12; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AA–9660, AA–9662; LLAK–944000–L14100000–HY0000–P]

Alaska Native Claims Selection

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of decision approving lands for conveyance.

SUMMARY: As required by 43 CFR 2650.7(d), notice is hereby given that the Bureau of Land Management (BLM) will issue an appealable decision to Calista Corporation. The decision will approve conveyance of only the surface estate in certain lands pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601, *et seq*). The lands are located west of Newtok, Alaska, and contain 0.16 acres. Notice of the decision will also be published four times in the *Anchorage Daily News*.

DATES: Any party claiming a property interest in the lands affected by the decision may appeal the decision within the following time limits:

1. Unknown parties, parties unable to be located after reasonable efforts have been expended to locate, parties who fail or refuse to sign their return receipt, and parties who receive a copy of the decision by regular mail which is not certified, return receipt requested, shall have until January 4, 2013 to file an appeal.

2. Parties receiving service of the decision by certified mail shall have 30 days from the date of receipt to file an appeal.

3. Notices of appeal transmitted by electronic means, such as facsimile or email, will not be accepted as timely filed.

Parties who do not file an appeal in accordance with the requirements of 43 CFR part 4, subpart E, shall be deemed to have waived their rights.

ADDRESSES: A copy of the decision may be obtained from: Bureau of Land Management, Alaska State Office, 222 West Seventh Avenue, #13, Anchorage, Alaska 99513–7504.

FOR FURTHER INFORMATION CONTACT: The BLM by phone at 907–271–5960 or by email at *ak.blm.conveyance@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 BLM during normal business hours. In addition, the FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the BLM. The BLM will reply during normal business hours.

Dina L. Torres,

Land Transfer Resolution Specialist, Branch of Alaska Land Transfer.

[FR Doc. 2012–29383 Filed 12–4–12; 8:45 a.m.]

BILLING CODE 4310–JA–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AA–10282, AA–10291, AA–10292, AA–10369; LLAK–944000–L14100000–HY0000–P]

Alaska Native Claims Selection

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of decision approving lands for conveyance.

SUMMARY: As required by 43 CFR 2650.7(d), notice is hereby given that the Bureau of Land Management (BLM) will issue an appealable decision to Calista Corporation. The decision will approve conveyance of the surface and subsurface estates in certain lands pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601, *et seq*). The lands are located south of Napaskiak, Alaska, and contain 6.71 acres. Notice of the decision will also be published four times in the *Anchorage Daily News*.

DATES: Any party claiming a property interest in the lands affected by the decision may appeal the decision within the following time limits:

1. Unknown parties, parties unable to be located after reasonable efforts have been expended to locate, parties who fail or refuse to sign their return receipt, and parties who receive a copy of the decision by regular mail which is not certified, return receipt requested, shall have until January 4, 2013 to file an appeal.

2. Parties receiving service of the decision by certified mail shall have 30 days from the date of receipt to file an appeal.

3. Notices of appeal transmitted by electronic means, such as facsimile or email, will not be accepted as timely filed.

Parties who do not file an appeal in accordance with the requirements of 43 CFR part 4, subpart E, shall be deemed to have waived their rights.

ADDRESSES: A copy of the decision may be obtained from: Bureau of Land Management, Alaska State Office, 222 West Seventh Avenue, #13, Anchorage, Alaska 99513–7504.

FOR FURTHER INFORMATION CONTACT: The BLM by phone at 907–271–5960 or by email at *ak.blm.conveyance@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 BLM during normal business hours. In addition, the FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the BLM. The BLM will reply during normal business hours.

Dina L. Torres,

Land Transfer Resolution Specialist, Branch of Alaska Land Transfer.

[FR Doc. 2012–29379 Filed 12–4–12; 8:45 a.m.]

BILLING CODE 4310–JA–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[F–14933–A, F–14933–A2; LLAK965000–L14100000–KC0000–P]

Alaska Native Claims Selection

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Decision Approving Lands for Conveyance.

SUMMARY: As required by 43 CFR 2650.7(d), notice is hereby given that the Bureau of Land Management (BLM) will issue an appealable decision to Swan Lake Corporation. The decision approves the surface estate in the lands described below for conveyance pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601, *et seq*). The subsurface estate in these lands will be conveyed to Calista Corporation when the surface estate is conveyed to Swan Lake Corporation. The lands are in the vicinity of Sheldon Point, Alaska, and are located in:

Lot 4, U.S. Survey No. 10505, Alaska.
Containing 21.70 acres.

Seward Meridian, Alaska

T. 26 N., R. 84 W.,
Secs. 22 and 23.
Containing approximately 75 acres.

T. 27 N., R. 84 W.,
Secs. 5 to 8, inclusive;
Secs. 17 and 18.
Containing 3,092.42 acres.

T. 26 N., R. 85 W.,
Secs. 2 to 10, inclusive.
Containing 4,969.01 acres.

T. 28 N., R. 85 W.,

Secs. 8, 17 and 18.

Containing 898.04 acres.

T. 27 N., R. 86 W.,

Sec. 35.

Containing approximately 304.98 acres.

Aggregating approximately 9,361 acres.

Notice of the decision will also be published four times in the *Anchorage Daily News.*

DATES: Any party claiming a property interest in the lands affected by the decision may appeal the decision within the following time limits:

1. Unknown parties, parties unable to be located after reasonable efforts have been expended to locate, parties who fail or refuse to sign their return receipt, and parties who receive a copy of the decision by regular mail which is not certified, return receipt requested, shall have until January 4, 2013 to file an appeal.

2. Parties receiving service of the decision by certified mail shall have 30 days from the date of receipt to file an appeal.

3. Notices of appeal transmitted by electronic means, such as facsimile or email will not be accepted as timely filed.

Parties who do not file an appeal in accordance with the requirements of 43 CFR part 4, subpart E, shall be deemed to have waived their rights.

ADDRESSES: A copy of the decision may be obtained from: Bureau of Land Management, Alaska State Office, 222 West Seventh Avenue, #13, Anchorage, AK 99513–7504.

FOR FURTHER INFORMATION CONTACT: The BLM by phone at 907–271–5960 or by email at *ak.blm.conveyance@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 BLM during normal business hours. In addition, the FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the BLM. The BLM will reply during normal business hours.

Judy A. Kelley,

Land Law Examiner, Land Transfer Adjudication 965 Branch.

[FR Doc. 2012–29380 Filed 12–4–12; 8:45 am]

BILLING CODE 4310–JA–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 731–TA–1105–1106 (Review)]

Lemon Juice From Argentina and Mexico; Scheduling of Full Five-Year Reviews Concerning the Suspended Investigations on Lemon Juice From Argentina and Mexico.

AGENCY: International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice of the scheduling of full reviews pursuant to section 751(c)(5) of the Tariff Act of 1930 (19 U.S.C. 1675(c)(5)) (the Act) to determine whether termination of the suspended investigations on lemon juice from Argentina and Mexico would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time. For further information concerning the conduct of these reviews and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A, D, E, and F (19 CFR part 207).

DATES: *Effective Date:* November 28, 2012.

FOR FURTHER INFORMATION CONTACT: Amy Sherman (202–205–3289), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*http://www.usitc.gov*). The public record for these reviews may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background.—On November 5, 2012, the Commission determined that responses to its notice of institution of the subject five-year reviews were such that full reviews pursuant to section 751(c)(5) of the Act should proceed (77 FR 67833, November 14, 2012). A record of the Commissioners' votes, the Commission's statement on adequacy, and any individual Commissioner's statements are available from the Office of the Secretary and at the Commission's Web site.

Participation in the reviews and public service list.—Persons, including industrial users of the subject merchandise and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in these reviews as parties must file an entry of appearance with the Secretary to the Commission, as provided in section 201.11 of the Commission's rules, by 45 days after publication of this notice. A party that filed a notice of appearance following publication of the Commission's notice of institution of the reviews need not file an additional notice of appearance. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the reviews.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and BPI service list.—Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in these reviews available to authorized applicants under the APO issued in the reviews, provided that the application is made by 45 days after publication of this notice. Authorized applicants must represent interested parties, as defined by 19 U.S.C. 1677(9), who are parties to the reviews. A party granted access to BPI following publication of the Commission's notice of institution of the reviews need not reapply for such access. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Staff report.—The prehearing staff report in the reviews will be placed in the nonpublic record on April 26, 2013, and a public version will be issued thereafter, pursuant to section 207.64 of the Commission's rules.

Hearing.—The Commission will hold a hearing in connection with the reviews beginning at 9:30 a.m. on May 16, 2013, at the U.S. International Trade Commission Building. Requests to appear at the hearing should be filed in writing with the Secretary to the Commission on or before May 10, 2013. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the hearing. All parties and nonparties desiring to appear at the hearing and make oral presentations should attend a prehearing conference to be held at 9:30 a.m. on May 14, 2013, at the U.S. International Trade Commission Building. Oral testimony and written materials to be submitted at

the public hearing are governed by sections 201.6(b)(2), 201.13(f), 207.24, and 207.66 of the Commission's rules. Parties must submit any request to present a portion of their hearing testimony *in camera* no later than 7 business days prior to the date of the hearing.

Written submissions.—Each party to the reviews may submit a prehearing brief to the Commission. Prehearing briefs must conform with the provisions of section 207.65 of the Commission's rules; the deadline for filing is May 7, 2013. Parties may also file written testimony in connection with their presentation at the hearing, as provided in section 207.24 of the Commission's rules, and posthearing briefs, which must conform with the provisions of section 207.67 of the Commission's rules. The deadline for filing posthearing briefs is May 28, 2013; witness testimony must be filed no later than three days before the hearing. In addition, any person who has not entered an appearance as a party to the reviews may submit a written statement of information pertinent to the subject of the reviews on or before May 28, 2013. On June 28, 2013, the Commission will make available to parties all information on which they have not had an opportunity to comment. Parties may submit final comments on this information on or before July 2, 2013, but such final comments must not contain new factual information and must otherwise comply with section 207.68 of the Commission's rules. All written submissions must conform with the provisions of section 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. Please be aware that the Commission's rules with respect to electronic filing have been amended. The amendments took effect on November 7, 2011. See 76 FR 61937 (Oct. 6, 2011) and the newly revised Commission's Handbook on E-Filing, available on the Commission's Web site at *http://edis.usitc.gov*.

Additional written submissions to the Commission, including requests pursuant to section 201.12 of the Commission's rules, shall not be accepted unless good cause is shown for accepting such submissions, or unless the submission is pursuant to a specific request by a Commissioner or Commission staff.

In accordance with sections 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the reviews must be served on all other parties to the reviews (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Authority: These reviews are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.62 of the Commission's rules.

By order of the Commission.

Issued: November 29, 2012.

Lisa R. Barton,

Acting Secretary to the Commission.

[FR Doc. 2012–29263 Filed 12–4–12; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–893 (Second Review)]

Honey From China; Determination

On the basis of the record [1] developed in the subject five-year review, the United States International Trade Commission (Commission) determines, pursuant to section 751(c) of the Tariff Act of 1930 (19 U.S.C. 1675(c)), that revocation of the antidumping duty order on honey from China would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.

Background

The Commission instituted this review on July 2, 2012 (77 FR 39257) and determined on October 5, 2012 that it would conduct an expedited review (77 FR 65204, October 25, 2012).

The Commission transmitted its determination in this review to the Secretary of Commerce on November 29, 2012. The views of the Commission are contained in USITC Publication 4364 (November 2012), entitled *Honey from China: Investigation No. 731–TA–893 (Second Review)*.

By order of the Commission.

Issued: November 29, 2012.

Lisa R. Barton,

Acting Secretary to the Commission.

[FR Doc. 2012–29290 Filed 12–4–12; 8:45 am]

BILLING CODE 7020–02–P

[1] The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–790]

Certain Coenzyme Q10 Products and Methods of Making Same; Commission Determination (1) To Review and Affirm With Respect To Two Issues, (2) To Review and Vacate With Respect To One Issue, and (3) Not To Review the Remainder of the Final Initial Determination of the Administrative Law Judge; Termination of the Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined the following: (1) To review and affirm (a) the finding that Mitsubishi Gas Chemical Co., Inc. ("MGC") does not satisfy the 70 mole % limitation, and (b) the claim construction of "inert gas atmosphere" with respect to the asserted claims of U.S. Patent No. 7,910,340 ("the '340 patent"); (2) to review and vacate the finding that certain asserted claims of the '340 patent are not invalid under the new matter prohibition of 35 U.S.C. 132; and (3) not to review the remainder of the final initial determination of the administrative law judge ("ALJ") in the above-captioned investigation. This action terminates the investigation.

FOR FURTHER INFORMATION CONTACT: James A. Worth, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–3065. 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 19, 2011, based on a complaint filed on June 17, 2011, by Kaneka Corp.

of Osaka, Japan ("Kaneka"), and supplemented on June 24 and 27, 2011. 76 FR 42729 (July 19, 2011). The complaint alleged violations of Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, in the sale for importation, importation, or sale after importation into the United States of certain coenzyme Q10 products by reason of infringement of certain claims of the '340 patent. The Commission's notice of investigation named as respondents Zhejiang Medicine Co., Ltd. of Zhejiang, China; ZMC–USA, LLC of The Woodlands, Texas; Xiamen Kingdomway Group Co. of Xiamen, China; Pacific Rainbow International Inc. of City of Industry, California; MGC of Tokyo, Japan; Maypro Industries, Inc. of Purchase, New York ("Maypro Inc."); and Shenzhou Biology & Technology Co., Ltd. of Beijing, China.

On January 12, 2012, the Commission issued notice of its determination not to review an ID granting a motion to amend the complaint and notice of investigation to add a new respondent, Mitsubishi Gas Chemical America, Inc. of New York, New York and to replace respondent Maypro Inc. with Maypro Industries, LLC of Purchase, New York.

An evidentiary hearing was held from July 9–13, 2012.

On September 27, 2012, the presiding ALJ (Judge Rogers) issued a final initial determination ("final ID" or "ID") finding no violation of section 337. The ALJ also issued a recommended determination on remedy and bonding.

Specifically, the ALJ found that the imported products were not shown to be manufactured by processes covered by the asserted claims. The ALJ found that Kaneka satisfied the economic prong of the domestic industry requirement but failed to satisfy the technical prong of the domestic industry requirement. The ALJ found that the asserted claims were not shown to be invalid.

On October 10, 2012, Kaneka filed a petition for review of the final ID. The Respondents and the Commission investigative attorney ("IA") filed contingent petitions for review. On October 18, 2012, each party filed a response (with Kaneka filing separate responses to the Respondents and the IA).

Having reviewed the final ID, the petitions for review, and the record in this investigation, the Commission has determined the following: (1) To review and affirm (a) the finding that MGC does not satisfy the 70 mole % limitation, and (b) the claim construction of "inert gas atmosphere" with respect to the asserted claims of the '340 patent; (2) to review and vacate the finding that the asserted claims of the '340 patent are not invalid under the new matter prohibition of 35 U.S.C. § 132; and (3) not to review the remainder of the final initial determination of the ALJ, including the ALJ's finding that certain asserted claims of '340 patent are not invalid under 35 U.S.C. 112. This action terminates the investigation.

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of section 210.42(h) of the Commission's Rules of Practice and Procedure (19 CFR 210.42(h)).

By order of the Commission.
Issued: November 29, 2012.

Lisa R. Barton,

Acting Secretary to the Commission.

[FR Doc. 2012–29311 Filed 12–4–12; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Decree under the Comprehensive Environmental Response, Compensation and Liability Act and Proposed Stipulated Judgment and Permanent Injunction Under the Resource Conservation and Recovery Act

On November 28, 2012, the Department of Justice lodged a proposed Consent Decree and Stipulated Judgment and Permanent Injunction with the United States District Court for the District of Utah in the lawsuit entitled *United States* v. *Parish Chemical Company and Uintah Pharmaceutical Corporation,* Civil Action No. 09–804.

This action involves the claim of the United States under Section 107(a) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. 9607(a), for reimbursement of its unreimbursed response costs ("CERCLA Claim") incurred in response to releases and/or threatened releases of hazardous substances at the Parish Chemical Company ("PCC") chemical manufacturing facility located at 145 N. Geneva Road, Vineyard Utah ("PCC Facility"). This action also involves multiple claims of the United States under the Resource Conservation and Recovery Act, as amended, 42 U.S.C. 6901 *et seq.* ("RCRA"), to obtain injunctive relief and civil penalties ("RCRA Claims") for multiple violations of RCRA at the PCC Facility. The Consent Decree provides for the entry of a judgment in the amount of $908,348.57 against the Defendants, and obligates the Defendants to transfer possession of the PCC facility into a trust to resolve the United States' CERCLA Claim. The Stipulated Judgment and Permanent Injunction provide for a $100,000 civil penalty to be adjudged against PCC, and the entry of a permanent injunction against PCC to resolve the United States' RCRA Claims.

The publication of this notice opens a period for public comment on the proposed Consent Decree and Stipulated Judgment and Permanent Injunction. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States* versus *Parish Chemical Company and Uintah Pharmaceutical Corporation,* Civil Action No. 09–804., D.J. Ref. No. 90–11–2–1215/1. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

To submit comments:	*Send them to:*
By e-mail	*pubcomment-ees.enrd@usdoj.gov.*
By mail	Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

During the public comment period, the proposed Consent Decree and Stipulated Judgment and Permanent Injunction may be examined and downloaded at this Justice Department Web site: *http://www.usdoj.gov/enrd/Consent_Decrees.html.* We will provide a paper copy of the proposed Consent Decree and Stipulated Judgment and Permanent Injunction upon written request and payment of reproduction costs. Please mail your request and payment to:

Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Please enclose a check or money order for $13.75 (25 cents per page reproduction cost) payable to the United States Treasury.

Robert Brook,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2012–29265 Filed 12–4–12; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 11–73]

Jeffery J. Becker, D.D.S., and Jeffery J. Becker, D.D.S., Affordable Care Decision and Order

On December 22, 2011, Chief Administrative Law Judge John J. Mulrooney, II, (hereinafter, ALJ), issued the attached Recommended Decision.[1] Respondent filed Exceptions to the ALJ's Decision, and the Government filed a Response to Respondent's Exceptions.

Having reviewed the record in its entirety, including Respondent's Exceptions, I have decided to adopt the ALJ's recommended rulings, factual findings, legal conclusions and decision except as discussed below. A discussion of Respondent's Exceptions follows.

Respondent's Exceptions

In his Exceptions, Respondent raises five main contentions. Having considered his Exceptions, and finding one of them to be of merit, I nonetheless conclude that the record supports the ALJ's recommended order of revocation.

Exception 1—Respondent's Violation of the Separate Registration Requirement Does Not Support the Revocation of His Registration

The evidence shows that Respondent maintains a dental practice at two offices, which are located in Norwalk and Avon, Ohio, each of which is open two days a week. However, Respondent holds a registration only for the Norwalk office, even though the evidence shows that he routinely performs procedures, which require that he administer controlled substances to his patients, at both offices.

Under 21 U.S.C. 822(e), "[a] separate registration shall be required at each principal place of business or professional practice where the applicant manufactures, distributes, or dispenses controlled substances or list I chemicals." *See also* 21 CFR 1301.12(a). While, by regulation, DEA has exempted several categories of locations from the registration requirement, with respect to practitioners, the exemption is limited to "[a]n office used by a practitioner * * * where controlled substances are prescribed but neither administered nor otherwise dispensed as a regular part of the professional practice of the practitioner at such office, *and* where no supplies of controlled substances are maintained." 21 CFR 1301.12(b)(3) (emphasis added).

Respondent does not dispute that "he dispensed controlled substances at his unregistered Avon office," Resp. Exc. at 11, and he admitted in his testimony that he had continued to do so up until the date of the hearing. Tr. 764–65. Respondent maintains, however, that upon being informed during the December 2009 DEA inspection that he could not store controlled substances at the Avon office, he discontinued storing controlled substances there. Resp. Exc. at 11. As for why he did not cease administering controlled substances at his Avon office, Respondent contends that he "believed that the critical issue was where the controlled substances were 'stored' as opposed to 'administered.'" *Id.* (quoting Tr. 764–65).

To buttress the latter contention, Respondent cites the testimony of the Government's Expert witness, a D.D.S., whose practice is limited to providing intravenous (IV) sedation services for the patients of other dentists "throughout the Dayton-Cincinnati area," as well as at a local hospital. GX 14; Tr. 23–24. In particular, Respondent notes that the Government's Expert testified that he has only one registration, and that he does not obtain registrations for the numerous offices of other dentists at which he provides anesthesia to patients. Tr. 103. Citing the Government's Expert testimony that he is an expert on the state and federal regulations pertaining to controlled substances, as well as that he also teaches IV sedation and the standards of the dental profession to other dental practitioners in Ohio, Respondent asserts that revoking his registration cannot be reconciled with the Expert's testimony that a registration is only necessary "where you order your drugs, store your drugs and keep the records of disposal and usage." Tr. 103; Resp. Exc. at 13.

While Respondent now concedes that both his belief and that of the Expert were mistaken, he contends that the Expert's testimony "support[s] the reasonableness of [his] mistake in fact relating to the regulatory requirements."[2] Resp. Exc. at 13. According to Respondent, his violations of the CSA were the "result of his confusion and apparent misunderstanding of the law." *Id.* However, Respondent then contends that "it is difficult to comprehend a situation that would be more confusing to a respondent than to sit in a courtroom and hear testimony of the Government's expert advocating the very position for which [his] registration is in jeopardy." *Id.* at 13–14. Thus, Respondent argues that the ALJ's findings that he "flagrantly" violated the law and that he has failed to acknowledge wrongdoing and establish his future compliance are unsupported by the record and that the recommended sanction of revocation is unwarranted. *Id.* at 14.

The argument is not persuasive because the determination of the meaning of the CSA and Agency regulations is not within the proper role of expert witnesses. Rather, it is a function vested in the Agency and the Federal Courts. *See Chevron* v. *NRDC,* 467 U.S. 837 (1984). Most importantly, Respondent cannot credibly claim to have been confused as to the requirement that he obtain a separate registration for his Avon practice as both the Act itself and its implementing regulations provide clear notice as to what is required. *See United States* v. *Clinical Leasing Serv., Inc.*, 925 F.2d 120, 123 (5th Cir. 1991) ("A physician of ordinary means and intelligence would understand that the federal registration provisions apply to *each* important or consequential place of business where the physician distribute controlled substances. It is sufficiently clear that the application of the provisions is not limited to *a single* important or consequential place of business where controlled substances are distributed.").

As set forth above, the CSA's registration provision states in relevant part that "[a] separate registration shall be required *at each principal place* of business or professional practice where the applicant manufactures, distributes, or *dispenses* controlled substances." 21 U.S.C. 822(e) (emphasis added). Likewise, the CSA defines the term dispense to "mean[] to deliver a controlled substances to an ultimate user * * * by * * * a practitioner, including the * * * administering of a controlled substance." *Id.* § 802(10). Thus, the statute provides clear notice that it is the activity of *dispensing,* which includes the administration of controlled substances, itself, which triggers the requirement, in the case of a practitioner, of obtaining a separate registration for a principal place of professional practice. *See* 21 U.S.C. 822(e). And to similar effect, the text of 21 CFR 1301.12(b)(3), which uses the conjunction "and," makes clear that the exemption from registration for a practitioner's office obtains only when

[1] All citations to the ALJ's Recommended Decision are to the slip opinion as originally issued.

[2] Of course, this is not a mistake of fact at all as Respondent then states that his violations were caused in part by his "apparent misunderstanding of the law." Resp. Exc. 13.

two conditions are met: (1) That the practitioner only engages in the prescribing of controlled substances and "neither administer[s] nor otherwise dispense[s]" at the office, and (2) that the practitioner does not maintain any supplies of controlled substances at the office.

To the extent Respondent suggests that the Expert's testimony establishes that there is widespread confusion among practitioners as to the scope of the registration requirements, the argument is unavailing. The clarity of the Act and the Agency's regulations is not determined by whether there are even a substantial number of members of the dental profession in Ohio who are confused as to the scope of the registration requirements. Rather, it is determined by assessing whether the text of the Act and regulations provide fair notice such that a person of ordinary intelligence can understand when a separate registration is required. *See FCC* v. *Fox Television Stations, Inc.*, 132 S.Ct. 2307, 2310 (2012) (quoting *United States* v. *Williams*, 553 U.S. 285, 304 (2008)). The Act and regulations pass this test with flying colors.

There is likewise no merit to Respondent's contention that the Government's position is "irreconcilable" with the Expert's acknowledgement that he does not hold registrations at each of the numerous offices where he administers controlled substances. Resp. Exc. at 12–13. The CSA's registration requirement applies only to "each *principal* place of * * * professional practice * * * where controlled substances are * * * dispensed by a person." 21 CFR 1301.12(a) (emphasis added). While the record establishes that the Government's Expert travels to numerous offices of other dentists to provide anesthesia services for their patients, he does so on an apparently as-needed and random basis, and there is no evidence that he maintains a place of professional practice, let alone a principal one, at any of these locations. Nor is there any evidence as to whether the dentists who call on him to provide anesthesia to their patients themselves have DEA registrations. *See* 21 CFR 1301.22(b).

By contrast, the evidence shows that Respondent maintains two offices, at which he regularly both sees and administers controlled substances in the course of treating patients. Notwithstanding that the word "principal" ordinarily means the "most important, consequential, or influential," *Webster's Third New International Dictionary* 1802 (1993), or the "main, prominent" or "leading," *see Hertz Corp.* v. *Friend*, 130 S.Ct. 1181, 1192 (2010) (quoting 12 Oxford English Dictionary 495 (2d ed. 1989)), by inserting the word "each" into the statutory text, Congress clearly was aware that practitioners frequently maintain multiple places of professional practice and manifested its intent that such an office be registered if the practitioner administers controlled substances at the location. Any other interpretation would undermine Congress' purpose of requiring registration to ensure that those locations at which controlled substance activities take place have adequate security and procedures in place to prevent the diversion of drugs from their legitimate use.

Nor is there any merit to Respondent's contention that the ALJ erred in finding that he "flagrantly" violated the registration provision. Resp. Exc. at 14. Even if at the time of the December 2009 inspection, the Agency's Investigator told him only that he could not store controlled substances at his Avon office and did not mention that he was also prohibited from administering drugs at this location because it was not registered, subsequently, the Show Cause Order specifically cited 21 CFR 1301.12, the provision which makes plain that he was required to hold a registration at this Office. ALJ Ex. 1, at 2. Moreover, in its Pre-Hearing Statement, the Government provided notice that it intended to establish that Respondent's Avon office "is not registered with DEA to handle controlled substances[,]" and that "DEA learned that Respondent administered controlled substances to patients from his Avon dental practice." ALJ Ex. 5, at 7. Yet even after being provided with notice that the Government was alleging that he was in violation of the registration provision, Respondent acknowledged that he had administered controlled substances at his Avon office as recently as the week before the hearing. Tr. 764–65. This is more than enough to establish that Respondent flagrantly violated the statute, and in the absence of mitigating evidence, it is sufficiently egregious to support the revocation of his registration.

Exception 2—Respondent's Violation of 21 CFR 1301.75(b) Does Not Support the Revocation of His Registration

Respondent also argues that the evidence pertaining to the storage of controlled substances at his Avon location in violation of 21 CFR 1301.75 does not "reflect an intentional disregard for security," and that the ALJ ignored evidence of steps he took to comply when the adequacy of security was questioned by a State Board Inspector. Resp. Exc. at 17. However, while the ALJ found that Respondent violated 21 CFR 1301.75(b) by leaving controlled substances (unattended) in open storage bins in the sterilization room at the Avon office (rather than keeping them in a securely-locked and substantially-constructed cabinet), there is also credible evidence that Respondent had changed his storage practices at the time of the December 2009 DEA inspection and that he was then in compliance with the above regulation. *See* Tr. 595. The ALJ did not, however, discuss this evidence in his decision. Had Respondent's violations of 21 CFR 1301.75 been the only allegations sustained on the record, they would not support the sanction recommended by the ALJ. However, as explained above, they are not the only violations proved.

Exception 3—The Provisions of 21 CFR 1307.21(a) Are Not Mandatory, Are Void for Vagueness, and Are Inapplicable in Light of State Regulation

As noted above, the record shows that Respondent administered controlled substances intravenously to patients and that he disposed of the excess drug by squirting it down the sink. Respondent did not, however, notify the Agency of this practice and did not complete DEA Form 41 for these disposals.[3] The Government thus alleges that Respondent violated 21 CFR 1307.21(a), because he "did not provide prior notification to DEA of such disposal as required by" this regulation. ALJ Ex. 1, at 2.

[3] Other evidence of record relevant to the issue includes an affidavit of Dr. Joel Weaver, a dentist anesthesiologist and Professor Emeritus at The Ohio State University Medical Center, who has practiced for thirty-five years. RX J, at 1. In his affidavit, Dr. Weaver stated that "[t]he standard practice among dentists in Ohio and most likely in most states is for the dentist to log the dose of the drug taken from his inventory, record the dose given to the patient in the patient sedation/anesthesia record and record any 'wasted' dose in either the drug log, the patient's record or both as soon as the case is concluded." *Id.* at 2. He also explained that "[t]he 'wasted' drug is typically squirted into the sink * * *, into the trash or sharps container, or into the soil of potted plants as a source of nitrogen-containing fertilizer." *Id.*

According to Dr. Weaver, in titrating the dose of sedation for each patient, "there is often some amount of drug remaining in syringes since the dose is individualized for each patient and [the] length of the operation[,] and cannot be predicted." *Id.* He then explained that "[t]he safest and most convenient method of disposing of these drugs is immediate disposal and then placing the contaminated syringes in a sharps container." *Id.* Dr. Weaver further stated that in Ohio alone, there are approximately 500 dentists who are licensed to perform intravenous sedation and that each of these physicians could perform twenty sedation procedures each day for a total of 10,000 procedures each day. *Id.*

While Respondent admits that he disposed of controlled substances in this manner, he argues that the regulation does not set forth mandatory procedures for disposing of controlled substances. Resp. Exc. at 18–19. Alternatively, he argues that the regulation "is void for vagueness," *id.* at 19, and that the regulation, when coupled with the instructions provided on DEA Form 41, create "an alarming morass of confusion" as to what it requires. *Id.* at 21. As support for his contention, Respondent points to the testimony of the Government's Expert that, he too, disposes of a drug, in excess of what he administered to a patient, by squirting it down the sink, and does so without obtaining permission from the Agency. *Id.* at 22–23. Respondent further points to the testimony of an Agency Investigator that "a large portion" of the practices he has inspected dispose of excess drugs by squirting them into either the sink or toilet.[4] *Id.* at 24 (quoting Tr. 631).

Responding to Respondent's contention that the regulation does not provide fair notice, the Government argues that the various cases he relies on "are applicable to criminal or civil proceeding[s], but inapplicable to regulated persons subject to the licensing requirement set forth by an administrative agency or provision of the Administrative Procedures [sic] Act." Gov. Resp. to Exceptions, at 6–7. However, contrary to the Government's understanding, just last term the Supreme Court invalidated an FCC order finding various broadcasters liable for violating that Agency's indecency policy, because the FCC failed to provide fair notice that their conduct would be deemed a violation. *FCC* v. *Fox Television Stations, Inc.*, 132 S.Ct. 2307 (2012). In *FCC* v. *Fox*, the Court reiterated that the "requirement of clarity in regulation is essential to the protections provided by the Due Process Clause," and that a "punishment fails to comply with due process if the statute or regulation under which it is obtained 'fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.' " *Id.* (quoting *United States* v. *Williams*, 553 U.S. 285, 304 (2008)).

While *FCC* v. *Fox* involved the imposition of a monetary penalty, it hardly broke new ground. *See General Electric Co.* v. *EPA*, 53 F.3d 1324, 1328–29 (D.C. Cir. 1995); *Diamond Roofing Co.* v. *OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976) Nor is there any no doubt that the Government's obligation to provide "fair notice" of what conduct is prohibited applies to licensing proceedings as well. Indeed, this has been the law for more than forty years. *See Trinity Broadcasting of Florida, Inc.*, v. *FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000); *Radio Athens, Inc.*, v. *FCC*, 401 F.2d 398, 404 (D.C. Cir. 1968). Thus, in *Trinity Broadcasting*, the D.C. Circuit recognized that the denial of an application to renew a license is "a severe penalty," and "held that 'in the absence of notice—for example, where the regulation is not sufficiently clear to warn a party about what is expected of it—an agency may not deprive a party of property by imposing civil or criminal liability.' " *Id.* (quoting *G.E.* v. *EPA*, 53 F.3d at 1328–29). Accordingly, if the regulation (or other pronouncements interpreting it) do not provide "fair notice" of what is required, Respondent cannot be deemed to have violated it.

The starting point for resolving these contentions is, of course, the language of the regulation. The regulation, which was one of the original regulations promulgated by DEA's predecessor, the Bureau of Narcotics and Dangerous Drugs, *see* 36 FR 7802 (1971) (then codified at 21 CFR 307.21), provides, in relevant part, that:

> (a) Any person in possession of any controlled substance and desiring or required to dispose of such substance *may request assistance* from the Special Agent in Charge of the Administration in the area in which the person is located *for authority* and instructions to dispose of such substance. The request should be made as follows:
>
> (1) If the person is a registrant, he/she shall list the controlled substance or substances which he/she desires to dispose of on DEA Form 41, and submit three copies of that form to the Special Agent in Charge in his/her area[.]

21 CFR 1307.21(a) (emphasis added).[5]

The ALJ rejected Respondent's contention that the regulation does not impose a mandatory requirement of notification, reasoning that its language "[n]ecessarily * * * implies that a person who does not request assistance to dispose of a controlled substance does not have authority to dispose of such substance. This is a classic example of permissive language which 'plainly carr[ies] a restrictive meaning.' " Order Regarding Respondent's Multiple Motions For Appropriate Relief (ALJ Ex. 25), at 10 (quoting *Forest Grove School Dist.* v. *T.A.*, 557 U.S. 230, 254 n.1 (2009) (Souter, J., dissenting)). The ALJ further reasoned that "[u]nder a plain reading of the regulation, a registrant is not required to dispose of controlled substances, but once he or she elects to do so, such disposal may not be made without authorization from the specified DEA official." *Id.* at 11.

I conclude, however, that the regulation's text does not provide sufficient clarity to conclude that it provides a mandatory procedure which must be followed in all instances in which a person seeks to dispose of a controlled substance rather than simply a mechanism by which a person who requires assistance to dispose of a controlled substance can obtain such assistance. Moreover, while the ALJ's interpretation might be permissible, it rests on the unsupported premise that authority must always be obtained to lawfully dispose of a controlled substance. However, neither the Government, nor the ALJ, undertook to analyze the CSA and explain why this conclusion is required.

Significantly, unlike most (if not all) other DEA regulations which are indisputably mandatory, the relevant text uses the word "may" rather than "shall" to modify the words "request assistance." As the Supreme Court has explained, "[t]he word 'may' customarily connotes discretion," and this is particularly true where, as here, an enactment also uses the word "shall." *Jama* v. *ICE*, 543 U.S. 335, 346 (2005). Likewise, the phrase's use of the words "request assistance" rather than "request authority," notwithstanding that obtaining authority may well be the ultimate purpose of the procedure provided in the regulation (at least in

[4] Respondent also contends that the regulation "is inapplicable in light of" an Ohio Board of Pharmacy regulation governing the disposal of controlled substances. *Id.* at 24–25. In light of my disposition of this Exception, I conclude that it is not necessary to address this contention.

[5] The regulation also provides that:

> (b) The Special Agent in Charge shall authorize and instruct the applicant to dispose of the controlled substance in one of the following manners:
>
> (1) By transfer to person registered under the Act and authorized to possess the substance;
>
> (2) By delivery to an agent of the Administration or to the nearest office of the Administration;
>
> (3) By destruction in the presence of an agent of the Administration or other authorized person; or
>
> (4) By such other means as the Special Agent in Charge may determine to assure that the substance does not become available to unauthorized persons.

21 CFR 1307.21(b). In addition, subsection c of the regulation provides that:

> [i]n the event that a registrant is regularly required to dispose of controlled substances, the Special Agent in Charge may authorize the registrant to dispose of such substances, in accordance with paragraph (b) of this section, without prior approval of the Administration in each instance, on the condition that the registrant keep records of such disposals and file periodic reports with the Special Agent In Charge summarizing the disposals made by the registrant.

Id. § 1307.21(c).

some cases), is hardly the language of a mandatory requirement or command.

Thus, while on its face, section 1307.21(a) is broad in scope as it applies to all persons (and not only registrants) as well as all means of disposal, it is far from clear why a person, like Respondent, who disposes of a controlled substance by squirting or flushing it down the drain, would necessarily need any assistance to do so. Nor, even assuming that there are circumstances in which a person is required to obtain authority from DEA to dispose of a controlled substance (*i.e.*, because the person lacks authority to distribute the drug to another), is it clear why a person, who disposes of a controlled substance in the manner Respondent did, requires authority from DEA to do so. Thus, while it is clearly reasonable to construe the regulation as providing a mandatory procedure for disposing of controlled substances where a person must distribute the controlled substances to another person—because other provisions of the CSA make clear that a person cannot lawfully distribute a controlled substance without the required registration—that does not mean that the regulation provides fair notice that it is mandatory when applied to other circumstances.

Indeed, the regulation's use of the word "may" rather than "shall" itself suggests that there are circumstances in which authority from DEA is not required to dispose of a controlled substance.[6] So too, that the regulation "shall not be construed as affecting or altering in any way the disposal of controlled substances through procedures provided in laws and regulations adopted by any State," 21 CFR 1307.21(d), raises the question of whether its procedures are still mandatory if one disposes of controlled substance in compliance with state law (and thus has authority) without engaging in a distribution.

In its pleadings, the Government acknowledges that "the administrative case law is relatively silent on the requirements of a registrant under 21 CFR 1307.21." Gov. Resp. to Respondent's Motion to Exclude Paragraph 7 of the Order to Show Cause (ALJ Ex. 17), at 2. Indeed, while this regulation has been in existence for more than forty years, the Government points to no case in which a person, whether a practitioner or ultimate user, has been either criminally or administratively prosecuted for destroying a controlled substance, without notifying the Agency, which he/she lawfully possessed and retained possession of during the destruction process.[7] Nor does the Government cite to either an interpretive rule or guidance document it has issued explaining that this regulation requires all persons, including practitioners, to first obtain authority from the Agency before they destroy a controlled substance of which they retain possession.[8] Finally, even in this litigation, the Government does not explain why a person, who destroys controlled substances which they lawfully possess and which they do not distribute to another, nonetheless requires either "assistance" or "authority" to do so.

Notably, the CSA itself contains no provision explicitly prohibiting or regulating (other than through recordkeeping) the destruction of controlled substances. Moreover, in enacting the Secure and Responsible Drug Disposal Act of 2010, which amended the CSA, Congress found that "take-back programs often cannot dispose of the * * * controlled substance medications * * * because Federal law does not permit take-back programs to accept controlled substances unless they get specific permission from [DEA] and arrange for full-time law enforcement officers to receive the controlled substances directly from the member of the public who seeks to dispose of them." Secure and Responsible Drug Disposal Act of 2010, Public Law 111–273, § 2(4)(B), 124 Stat. 2858, 2859 (2010). Yet Congress further found that:

> Individuals seeking to reduce the amount of unwanted controlled substances in their household consequently have few disposal options beyond discarding or flushing the substances which may not be appropriate means of disposing of such substances. Drug take-back programs are also a convenient and effective means for individuals in various communities to reduce the introduction of some potentially harmful substances into the environment, particularly into water.

Id. § 2(4)(C). Of significance, while Congress noted the lack of legal authority for take-back programs to accept controlled substances without Agency permission, it made no similar observation that those individuals who dispose of their controlled substances by discarding or flushing them also lack legal authority to do so.[9]

To be sure, because of their role in the closed system of distribution, the CSA imposes requirements on registrants which are not imposed on ultimate users, and the Act generally limits the authorized activities of practitioners to the dispensing of controlled substances and prohibits them from distributing a controlled substance. Yet the Government offers no argument that squirting the small amount of excess medication, which has been drawn into a syringe but not administered to a patient, into a sink or toilet and flushing it, constitutes a distribution within the

[6] The regulation's use of the permissive word "may" cannot be reasonably attributed to the fact that the regulation provides a procedure that applies whether a person is merely "*desiring* * * * to dispose of a controlled substance," or is "*required* to dispose of a controlled substance." 21 CFR 1307.21(a) (emphasis added). Surely, no one "desiring * * * to dispose of a controlled substance" would object if the regulation stated that he "shall request assistance" to do so. *Id.*

[7] The only case cited by the Government involved an entity, which was "in the business of receiving salvage or undeliverable merchandise from common carriers," and which sought a DEA registration as a distributor. *Associated Pharmaceutical Group, Inc.*, 58 FR 58181 (1993). Notably, the entity was unregistered and could not lawfully possess controlled substances. *Id.* at 58183. The Order's brief discussion of 21 CFR 1307.21 simply recounted the advice given the entity by a DEA Investigator that the regulation "requires that it seek DEA authorization for disposal or destruction of controlled substances that it was retaining in its possession," *id.* at 58181, as well as in a letter which advised it "that all unclaimed controlled substances in [its] possession would have to be disposed of according to 21 CFR 1307.21." *Id.* at 58182.

[8] At the time of the regulation's promulgation, DEA did not recognize reverse distributors as a category of registrant and the regulations only authorized a person to distribute (without being registered to distribute) "that substance to the person from whom he obtained it or to the manufacturer of the substance." 21 CFR 307.12 (1971).

[9] Consistent with this understanding, in several other pronouncements, including guidelines developed by the FDA in conjunction with the Office of National Drug Control Policy (ONDCP), which discuss the proper method of disposing of prescription drugs including controlled substances, not once has the Federal Government explained that a person must first obtain permission from DEA to dispose of a controlled substance if he destroys it himself. See ONDCP, *Epidemic: Responding to America's Prescription Drug Abuse Crisis* 7–8 (2011). Moreover, while the Guidelines instruct that drugs should be flushed "down the toilet only if the accompanying patient information specifically instructs it is safe to do so," ONDCP, Press Release, *Federal Government Issues New Guidelines For Proper Disposal of Prescription Drugs* (Feb. 20, 2007), the FDA has determined, with respect to a number of controlled substances, that flushing them down the toilet or sink is appropriate and that "any potential risk to people and the environment from flushing [these drugs] is outweighed by the real possibility of life-threatening risks from accidental ingestion of these medicines." U.S. Food and Drug Administration, *Disposal of Unused Medicines: What You Should Know* 1 (Jan. 2012). *See also* U.S. Food and Drug Administration, *How to Dispose of Unused Medicines* 2 (April 2011) (noting that the disposal instructions on some drugs may contain "instructions to flush down the toilet, * * * because FDA * * * has determined this method to be the most appropriate route of disposal that presents the least risk to safety" and that "[d]rugs such as powerful narcotic pain relievers and other controlled substances carry instruction for flushing to reduce the danger of unintentional use or overdose and illegal abuse").

To make clear, whether flushing the drugs which Respondent used in the procedures he performed creates environmental harms is an issue for other agencies.

meaning of the CSA, or is otherwise prohibited by the Act.[10] Indeed, disposing of the excess amount of a controlled substance, pursuant to the administration of the drug to a patient in the course of professional practice and in this manner, would seem to be a necessary incident of administering the drug and within the scope of a practitioner's authorized activities.

I therefore conclude that the use of the phrase "may request assistance" in the relevant language of the regulation creates an ambiguity as to whether it is permissive or mandatory in all instances in which a person disposes of a controlled substance. Because the Government points to no provision of the CSA which prohibits this method of disposal or otherwise requires that a practitioner obtain authority to dispose of controlled substances in all circumstances, and because notwithstanding that the regulation has been in existence for more than forty years, the Government has not published any administrative interpretation holding that disposal in this manner violates the Act or requires authority from the Agency, I hold that the Government has not provided fair notice that Respondent's conduct was prohibited.[11] Accordingly, this conduct cannot be used as a basis for finding a violation of the CSA.[12]

[10] To further demonstrate the lack of clear notice provided by the Government's proposed reading of the regulations, apparently even if a registrant wants to distribute a controlled substance to a reverse distributor, it must request authority to do so under 21 CFR 1307.21(a). Yet under a separate regulation, a practitioner is authorized to "distribute (without being registered to distribute)" a controlled substance to "[a] reverse distributor who is registered to receive such controlled substances." 21 CFR 1307.11(a). Thus, this provision would seem to grant authority to a practitioner to dispose of his excess controlled substances by shipping them to a reverse distributor who destroys them. However, no guidance from the Agency explains whether a practitioner who disposes of his controlled substances in this manner (and who seemingly has been granted authority by this regulation to do so) is nonetheless required to comply with section 1307.21.

[11] My holding that the regulation is ambiguous as applied to practitioners engaged in this manner of disposal does not preclude the Agency from issuing an interpretative rule clearly explaining the scope of the regulation and attempting to provide a reasoned basis for applying the regulation to this conduct.

[12] The ALJ also noted that even after Respondent was advised by the Agency's Investigator that he was in violation of 21 CFR 1307.21, he continued to engage in the same conduct. While this conduct is disturbing, I do not rely on it given the absence of any published order, interpretive rule, or guidance document holding or explaining that the Agency deems such conduct to be a violation. In any event, given the evidence that Respondent continued to violate the registration requirement and did so even after being served with the Show Cause Order, this conduct is, by itself, sufficiently egregious to support the revocation of his registration.

Exception 4—The ALJ's Recommended Decision Is Arbitrary and Capricious and Unsupported By Law

Respondent also takes exception to the ALJ's factual findings, legal conclusions, and recommended sanction, contending that they are "arbitrary, capricious and unsupported by law." Resp. Exc. at 27. However, with the exception of the ALJ's legal conclusions pertaining to the alleged violations of 21 CFR 1307.21, I find that the ALJ's findings of fact and legal conclusions are supported by substantial evidence. Based on the ALJ's findings that: (1) Respondent violated the separate registration requirement by failing to register his Avon practice, notwithstanding that he regularly administered controlled substances at this office, *see* ALJ at 37; (2) even after he was on notice that he was in violation of this provision, he continued to violate the Act and was still doing so the week before the hearing, *see id.* (citing Tr. 660 & 764); (3) Respondent failed to maintain proper records in that he was missing purchase records as well as order forms (DEA 222) for the schedule II controlled substances he purchased, *see id.* at 39–40; and (4) Respondent failed to properly secure the controlled substance he took to his Avon office, *see id.* at 38–39; I conclude that the ALJ's finding that Respondent has committed acts which render his registration inconsistent with the public interest is supported by substantial evidence and that the Government has satisfied its *prima facie* burden. *See id.*

While I acknowledge that Respondent produced evidence that he has changed his storage practices at his Avon office, he has offered no evidence that he has applied for a registration for the Avon office, nor provided any evidence to support a finding that he has addressed the serious recordkeeping violations proven on this record. Moreover, even to this day, Respondent does not accept responsibility for his violations of the registration requirement; instead, he argues—notwithstanding that the Agency's regulation is clear on its face—that because others violate the same regulation, his violations should be excused. Exacerbating this violation, Respondent continued to administer controlled substance at his Avon office in violation of the registration requirement even after being told by the DI that he was in violation and even after being served with the Show Cause Order. Accordingly, I agree with the ALJ's conclusion that Respondent has not rebutted the Government's *prima facie* case and will order that Respondent's registration be revoked and that any pending applications be denied.[13]

The Government also argues that Respondent's contention that the regulation does not provide fair notice should be rejected because he did not seek "agency guidance regarding the issue." Gov. Resp. to Exceptions at 7. Contrary to the Government's understanding, the Due Process Clause places the burden on the Government to provide fair notice of what its regulation requires and not on Respondent to seek clarification of the regulation's ambiguity.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f) and 824(a), as well as 28 CFR 0.100(b), I order that DEA Certificates of Registration Numbers FB2238865 and BB0569775, issued to Jeffery J. Becker, D.D.S., be, and they hereby are, revoked. I further order that any pending application of Jeffery J. Becker, D.D.S., to renew or modify any of the above registrations, be, and it hereby is, denied. This Order is effective January 4, 2013.

Dated: November 16, 2012.

Michele M. Leonhart,

Administrator.

Robert Walker, Esq., for the Government
Frank Recker, Esq., & Todd Newkirk, Esq., for the Respondent

Recommended Rulings, Findings of Fact, Conclusions of Law, and Decision of the Administrative Law Judge

Chief Administrative Law Judge John J. Mulrooney, II. On July 28, 2011, the Deputy Assistant Administrator of the Drug Enforcement Administration (DEA or Government), issued an Order to Show Cause (OSC) seeking the revocation of DEA Certificates of

[13] I have considered Respondent's contention that the recommended sanction "is a significant departure from prior agency decisions and * * * is without justification in fact." Resp. Exc. at 29. However, as the ALJ explained, in *Daniel Koller*, 71 FR 66975 (2006), I revoked the registration of a practitioner who engaged in similar misconduct. ALJ at 44. In his Exceptions, Respondent totally ignores *Koller*. Accordingly, I reject Respondent's Exception.

Respondent also contends that because an Agency Investigator approved his application for a Milwaukee registration when she knew that another Agency Investigator had requested the issuance of an Order to Show Cause, the Agency has "voluntarily and intentionally" waived its right to revoke his Milwaukee registration. Resp. Exc., at 25–26. Respondent, however, produced no evidence that he entered into an agreement with the Agency pursuant to which the Agency agreed that it would not seek to revoke this registration. In addition, even if the Investigator's decision to approve his registration was deemed to constitute a voluntary and intentional act of waiver (itself a dubious conclusion), DEA has not delegated the authority to waive prosecution to field investigators. *See* 28 CFR 0.104. Rather, that authority remains vested in the Deputy Assistant Administrator of the Office of Diversion Control. I thus reject the contention. It is further noted that Respondent does not claim that the Government is estopped from proceeding against his Milwaukee registration.

Registration (COR), Number BB0569775,[1] and Number FB2238865,[2] of Jeffrey J. Becker, D.D.S. (Respondent), as a practitioner, pursuant to 21 U.S.C. 824(a) (2006 & Supp. III 2010), and denial of a pending application for renewal of Respondent's DEA COR, Number BB0569775, pursuant to 21 U.S.C. 823(f) (2006). The OSC alleges that the Respondent's continued enjoyment of the privileges vested in his COR registrations is inconsistent with the public interest, as that term is used in 21 U.S.C. 823(f). On August 25, 2011, the Respondent, through counsel, timely requested a hearing, which was conducted in Arlington, Virginia on November 8–9, 2011.

The issue ultimately to be adjudicated by the Administrator, with the assistance of this recommended decision, is whether the record as a whole establishes, by substantial evidence, that the Respondent's CORs should be revoked[3] as inconsistent with the public interest, as that term is used in 21 U.S.C. 823(f) and 824(a).

After carefully considering the testimony elicited at the hearing, the admitted exhibits, the arguments of counsel, and the record as a whole, I have set forth my recommended findings of fact and conclusions of law below.

The Allegations

The OSC issued by the Government contends that revocation of the Respondent's CORs is appropriate because: (1) The Respondent has practiced dentistry from a location in Avon, Ohio without obtaining a DEA COR to handle controlled substances at that location;[4] (2) the Respondent "maintained * * * controlled substances at an unregistered [location] in violation [of] 21 U.S.C. 822(e);" (3) the Respondent "maintained controlled substances in an unsecured area in violation of 21 CFR § 1301.75(b);" (4) "sometime in 2009 [the Respondent] distributed controlled substances * * * to an unregistered location in violation of 21 CFR § 1307.11;" (5) an accountability audit of the Respondent's "handling of fentanyl, diazepam and midazolam * * * revealed shortages of fentanyl and midazolam and an overage of diazepam;" and (6) the Respondent disposed of controlled substances but "did not provide prior notification to DEA of such disposal as required by 21 CFR § 1307.21(a)." ALJ Ex. 1 at 1–2.

The Stipulations of Fact

The Government and the Respondent, through counsel, have entered into stipulations regarding the following matters:

(1) The Respondent is registered with DEA as a practitioner in Schedules II–V under DEA registration number BB0569775 at 282 Benedict Avenue, Suite C, Box 22, Norwalk, Ohio 44857. While this registration reflects an expiration date of July 31, 2011, the Respondent timely submitted an application for renewal of registration on June 3, 2011.

(2) The Respondent is also registered with DEA as a practitioner in Schedules II–V under DEA registration number FB2238865 at Affordable Care, 6015 West Forest Home Avenue, Milwaukee, Wisconsin 53220. This registration expires by its terms on July 31, 2013.[5]

(3) Fentanyl is a Schedule II controlled substance pursuant to 21 CFR 1308.12(c)(9) (2011).

(4) Diazepam is a Schedule IV controlled substance pursuant to 21 CFR 1308.14(c)(14) (2011).

(5) Lorazepam is a Schedule IV controlled substance pursuant to 21 CFR 1308.14(c)(28) (2011).

(6) Versed is a brand name for a product containing midazolam, a Schedule IV controlled substance pursuant to 21 CFR 1308.14(c)(35) (2011).

The Evidence

The Government presented the testimony of Diversion Investigator (DI) Scott Brinks. Tr 428. DI Brinks testified that he has been employed as a DI in the Cleveland, Ohio, field office for just over ten years, Tr. 429, and that, during this time, he has been a part of at least a hundred investigations relating to practitioners. Tr. 431.

DI Brinks testified that, sometime prior to December of 2009, he was contacted by Investigator Flugge of the Ohio Dental Board (Board), who informed DI Brinks that "he had some drug related problems with [Respondent]." Tr. 433. After the conversation with Investigator Flugge, DI Brinks ran a query on the Respondent in the ARCOS[6] and RICS[7] databases. Tr. 433–436. Although Brinks ascertained from the Internet that the Respondent maintained a practice in Avon, Ohio, the RICS database query did not indicate that the Respondent had a COR for the Avon location. Tr. 435–36.

On the morning of December 21, 2009, DI Brinks met Investigator Flugge at a McDonalds across the street from the Respondent's practice in Norwalk, Ohio. Tr. 432. At this meeting, Investigator Flugge gave DI Brinks the Board's investigative file on the Respondent, including "an anonymous complaint [and] a complaint by Rebecca Crockett." Tr. 433. Investigator Flugge also "gave * * * a brief overview of the [the Board's] investigation and why he was referring [the matter]." Tr. 433. However, "Investigator Flugge said he did not want to come along because of [the Respondent's] relationship with the [B]oard." Tr. 438. When asked to clarify this remark, DI Brinks explained Investigator Flugge's reluctance to join the investigation "had to do with some hearing that [the] Respondent had went to." Tr. 438–40.[8]

After meeting with Investigator Flugge, DI Brinks and a second DI drove across the street to the Respondent's office. Tr. 438. Upon entering the office, the DIs identified themselves, and presented the Respondent with a DEA Form 82, Notice of Inspection of Controlled Premises, which the

[1] The registered address under this registration is in Norwalk, Ohio. Gov't Ex. 1.

[2] The registered address under this registration is in Milwaukee, Wisconsin. Gov't Ex. 2.

[3] The Respondent has timely submitted an application for renewal of COR #BB0569775 (Norwalk) which was scheduled to expire under its own terms on July 31, 2011. Thus, by operation of law, this COR has been extended and remains in full force and effect until a final Agency order is issued in this case. 5 U.S.C. 558(c); 21 CFR 1301.36(i).

[4] This allegation does not aver that controlled substances are maintained, administered or dispensed at the Avon office. *See* 21 CFR 1301.12.

[5] The Respondent makes much of the granting of the Milwaukee registration, arguing that "[i]f the DEA felt that the Respondent's continued registration was inconsistent with the public interest, they could have * * * at least denied the Respondent's application for his Wisconsin registration." Resp't Posth'g Brf., at 18. It is unclear on what legal authority this contention rests, but the DEA has considered the application of waiver in situations where, as here, the agency granted and then sought to revoke a license based on information available at the time the license was granted. *James Dell Potter, M.D.*, 49 FR 9970, 9971 (1984). In *Potter*, the DEA granted a license to the Respondent, notwithstanding information on the application referencing a felony conviction. Sometime later, the Agency rejected the respondent's argument that the granting of the application waived the Agency's right to seek revocation, holding that the doctrine of waiver requires a "voluntary and intentional abandonment of known right." Thus, where the granting of a license is "inadvertent and * * * unintentional[,]" there can be no waiver. Here, as in *Potter*, there is no evidence that would support an election by the Agency to voluntarily and intentionally abandon a known right. Accordingly, application of waiver is unwarranted.

[6] The Automation of Reports and Consolidated Orders System (ARCOS) database tracks the course of distributions of controlled substances "from the manufacturer down to the final seller." Tr. 434.

[7] DI Brinks explained the RICS system maintains a wide variety of information on DEA registrants. Tr. 436.

[8] DI Brinks reasonably explained that the motivation for the referral by Investigator Flugge did not matter to him because he "ha[d] an allegation of a controlled-substance-related problem, so [he was] required to investigate that." Tr. 439.

Respondent reviewed and signed.[9] Tr. 438; Gov't Ex. 7. DI Brinks also requested that the Respondent provide "all DEA Form 222s for the purchases of Schedule II controlled Substances, his purchase records for Schedule III–V [controlled substances, and] his dispensing records for Schedules II–V [controlled substances.]" Tr. 442. DI Brinks also requested "any DEA form 41s * * * Destruction of Controlled Substances, and any DEA Form 106, the Theft and Losses of Controlled Substances, and then [Respondent's biennial] inventory." Tr. 443. DI Brinks testified that, during their conversations,[10] he found the Respondent to be "very nervous and his hands were shaking." [11] Tr. 442, 624.

The Respondent was able to produce only three controlled substance order forms (DEA Form 222) that related to a two-year period of practice, but even that modest number had one that did not contain all the information required. Tr. 444, 446–48, 639–40. When he realized he was unable to supply more than three Form 222s, the Respondent contacted his controlled substance supplier and had company purchase records faxed to his office for Brinks to review. Tr. 444, 638. The Respondent did provide his dispensing logs, Tr. 563, but no controlled substance destruction forms (DEA Form 41) or controlled substance theft/loss reports (DEA Form 106).[12] Tr. 443, 448–49.

After using the forms provided to conduct an audit that Brinks characterized as "extremely short on * * * midazolam and * * * fentanyl," the DIs asked the Respondent if he had a way of justifying the shortages. Tr. 451. The Respondent responded that he had records and controlled substances at an office in Avon. Tr. 451. After completing their inspection of the Norwalk Office, the DIs traveled to the Respondent's (unregistered) office at Avon, where they found additional files and three-fourths of a bottle of fentanyl.[13] Tr. 452.

During the inspection of the Respondent's dispensing logs, DI Brinks "observed * * * that [Respondent] had provided large quantities of midazolam." Tr. 455.[14] DI Brinks testified that he became concerned "as soon as I started seeing 70 and * * * 100 [miligrams administered]." [15] Tr. 457. DI Brinks asked Peg Herner, a dental assistant at Respondent's office, about doses of the medication that the DI divined were excessive, and was told that "I just write down what [the Respondent] tells me to write down." Tr. 456. After consulting with Ms. Herner, DI Brinks asked the Respondent about the midazolam prescribing, and the Respondent told him that the patients "build up a tolerance." Tr. 457–58. At some point during this conversation, DI Brinks questioned the Respondent about whether he was abusing controlled substances, and the Respondent twice volunteered to show the DIs his arms. Tr. 460, 621. When the Respondent pulled up the sleeves of his lab coat, DI Brinks observed three or four small "poke marks" on the left arm, but no bruising or scarring. Tr. 460–62. Respondent said that the marks were caused by dental students he allowed to practice IV techniques in a sedation class he taught at Case Western Reserve School of Dentistry on Fridays. Tr. 462. The following day, the DIs went to Case Western Reserve. Tr. 596. During their visit the DIs encountered the Respondent and, at the request of officials at the university,[16] he invoked his right to an attorney. Tr. 596.

As a result of his visit to the Respondent's practice, DI Brinks concluded that Respondent violated the DEA's regulations by failing to have a registration for his Avon Office. Tr. 640. DI Brinks also concluded that Respondent had violated DEA regulations by failing to maintain purchase records, and by failing to maintain accurate dispensing records. Tr. 639–40. It was Brinks' recollection that he informed the Respondent of "some of the record keeping issues [and] the storing controlled substances at an unregistered location." Tr. 597–598. Brinks characterized the Respondent as "cooperative" during the investigation. Tr. 603, 637.

Brinks also discovered evidence that unused controlled substances that were left over in hypodermic needles at the conclusion of dental procedures conducted at the Respondent's practice were being disposed of by squirting them down the sink. Brinks explained that practitioners are not routinely provided with written guidance by the local DEA office on the issue of waste procedures authorized by the regulations,[17] and although there are options for compliance (utilization of DEA-registered reverse distributors, Ohio Pharmacy Board assistance, and providing medications directly to DEA),[18] "a large portion" of the practitioners he has inspected over the course of his career dispose of residual controlled substance medication from hypodermic needles by squirting it "either down the sink or the toilet." Tr. 631.

During his testimony, DI Brinks attempted to explain the results of his drug audit. Apart from individual doses of medications reflected in the medication logs which, based on his experience, he concluded were high, Brinks' testimony regarding his audit was confusing, inconsistent, and unreliable. Brinks was unable to explain the data that he had collected and compiled. Brinks had processed his findings into a multicolor chart which he designed to compare the Respondent's levels of midazolam dispensing at his private practices with levels he dispensed at Case Western University School of Dentistry and the U.S. Food and Drug Administration (FDA) recommended maximum dosages. Tr. 464–77. When the numbers on his proposed chart could not be reconciled with the raw data he claimed to have based it on, the witness acknowledged that he really had no idea what the chart (he created) signified.[19] Tr. 475. The data in Brink's audit computation chart suffered from like blunders and was similarly excluded. Gov't Ex. 8 (ID); Tr. 478–90. An overnight break in the proceedings afforded the DI the opportunity to make revisions on his initial, ill-fated computation chart,[20] but there were issues with the revised version as well. Gov't Ex. 16; Tr. 583–

[9] Inexplicably, despite the details he provided about his visit to the Respondent's office, when asked about his recollection of the event, DI Brinks stated that he could "vaguely recall walking in there * * *." Tr. 590.

[10] DI Brinks indicated that no recording devices were employed during the inspection. Tr. 442, 594. The Respondent testified that he believed that his conversation with Brinks was recorded. Tr. 781–82.

[11] On cross-examination DI Brinks conceded that, while other practitioners have appeared nervous during his investigations, he had "not seen somebody shake like that in my experience." Tr. 624–25.

[12] The Government's theory on noting the absence of theft/loss forms was rooted in its concept that its audit demonstrated losses that should have been noted by such documentation. As discussed in some detail, *infra*, the quality of the audit results presented by the Government in these proceedings renders the presence or absence of theft/loss forms largely irrelevant here.

[13] Brinks testified that the Avon practice is not a location that is registered as a COR address that would be subject to an inspection, and accordingly, the DIs remained in the Respondent's waiting area, and were presented with the fentanyl and records by the Respondent after he went into the practice portion of the office by himself. Tr. 452–53.

[14] DI Brinks clarified that "I know from experience * * * what midazolam should be, what should be given before surgery." Tr. 455.

[15] In his experience, DI Brinks had never "seen anything close to 70 milligrams [administered] in one visit in one patient." Tr. 456–57.

[16] Tr. 707.

[17] Tr. 630.

[18] Tr. 630–33.

[19] Inasmuch as a sufficient foundation for admission could not be established, the proposed exhibit was excluded from the record upon a timely, cogent and correct objection. Gov't Ex. 9 (ID).

[20] Tr. 488–90.

89, 610, 612–17. The DI's initial computation chart was ultimately received into evidence at the behest of the Respondent. Resp't Ex. M. Given the confusing nature of the Government's presentation and the surprise nature of its revised audit results (generated during the proceedings) the revised document, Gov't Ex. 16, was not considered to establish its purported results in these proceedings.

DI Brinks presented testimony that was detailed, plausible, and generally credible. Ironically, the candor with which this witness addressed some profound preparation errors actually enhanced his credibility, even to the extent that it compromised his testimony's effectiveness. The errata that marred the Government's evidence regarding the audit of the Respondent's practice, although certainly the product of self-inflicted wounds, did not bear the indicia of any form of intentional malice toward the Respondent. Interestingly however, they were clearly also not the result of a rush to justice. DI Brinks testified that, after completing his investigation sometime in March 2010, the investigation (and the collected data) lay dormant for sixteen (16) months until approximately July of 2011, when this matter was initiated.[21] Tr. 599. During this time of investigative inaction, the Respondent applied for, and on September 14, 2010 received, the COR for his dental office in Milwaukee, Wisconsin. Tr. 601; Gov't Exs. 2,3. That registration is also the subject of these proceedings. ALJ Ex. 1.

The Government also presented the testimony of Lili C. Reitz, the Executive Director of the Ohio State Dental Board, the agency who referred this matter to DEA. Ms. Reitz holds a law degree from the Cleveland Marshall College of Law and formerly worked as an Assistant Attorney General with the Ohio Attorney General's Office.[22] During her testimony, Ms. Reitz explained the permitting requirements for conscious sedation versus general anesthesia for dentists in Ohio, and testified that a records check she conducted informed that the Respondent possesses the former permit, but not the latter. Tr. 374–83, 421.

Ms. Reitz also provided some background regarding the manner in which the Ohio Dental Board executes its mandate to investigate complaints of wrongdoing related to its licensed dentists. Tr. 384–85, 388. Ms. Reitz testified that she supervises a 15-person office that investigates 500 to 1,000 complaints per year against the state's 7,000 dentists. *Id.* Furthermore, Reitz discussed her agency's practice of sharing information with other law enforcement and regulatory authorities, including DEA. Tr. 390–91.

Regarding the Respondent, Ms. Reitz testified to the results of the Ohio Dental Board's investigation into Respondent's practice that commenced upon the receipt of an anonymous complaint alleging that the Respondent was using controlled substances from his practice at home.[23] Tr. 397–399. As a result of the complaint, the Ohio Dental Board sent two of its investigators to the Respondent's practice to conduct an infection control evaluation.[24] Tr. 400. The Respondent was not at the Norwalk office, so the Board investigators met him at his Avon location. Tr. 401. The report of the Board's investigators (which Reitz read from with no apparent knowledge beyond the four corners of the document) indicated, *inter alia,* that they found an unsecured plastic bin in the Respondent's office containing medications, including fentanyl and Valium. Tr. 401–03. According to Ms. Reitz, a complaint was subsequently filed by Ms. Crockett that strongly resembled the anonymous complaint previously received regarding the Respondent's alleged drug use. Tr. 405–06. Based on the information they had at the time, the investigators interviewed Ms. Crockett, and the matter remains under investigation. Tr. 408–12.

Ms. Reitz's testimony was sufficiently detailed, consistent, and plausible to be afforded credibility,[25] but the weight of her testimony regarding the Board's investigation of the Respondent is diminished by the reality that she was doing no more than relating the results of a report prepared by her subordinates, and admitted that she knew nothing more than (and could provide no insight beyond) the words on the page of her investigators' report. Tr. 401–03. Thus, it would be unreasonable to afford her testimony in this regard greater weight than if the report upon which she so heavily depended (and which was her constant companion on the stand) was admitted and considered without her appearance.[26]

The Government also presented affidavits and testimony from three individuals who were employed at the Respondent's dental practice during the events that form the basis of its current revocation actions. The first of these former employees was Rebecca Crockett.[27] Ms. Crockett testified that at the outset of her employment at the Respondent's practice she was charged with the responsibility of maintaining drug logs completed on patients during procedures, and with alerting the Respondent when sedation medication stocks were dwindling to a level where more needed to be ordered. Tr. 154, 182, 196; *see also* Gov't Ex. 12 at 2. Crockett recalled no occasion during her tenure as the drug-log custodian when controlled substances were missing or unaccounted for,[28] but did recall that Rebecca Tetzloff, an employee who subsequently assumed responsibility for the drug log, approached her with concerns about missing medication. *Id.* Crockett testified that the Respondent maintained two Ohio offices; one at Norwalk and another at Avon, and that she worked at both locations (which were each open two days per week) and observed the Respondent transport controlled substances to and from both practice locations. Tr. 154–58. The controlled substances (lorazepam, diazepam, and fentanyl) were transported on a cart that was loaded at the Norwalk office and driven to the Avon office. Tr. 157, 186–88, 197. According to Crockett, controlled substances were routinely stored in both the Norwalk and the Avon offices. Tr. 156–57, 186–88, 197–98. Crockett stated that because the daily preparations in the Avon office were frequently done in a hurry, controlled substances were routinely left unsecured on top of a sterilization room counter. Tr. 158. The sterilization room at the Avon office although not locked, was located in an inner, treatment area of the practice, to the rear of front reception desk, and was separated from the patient waiting room

[21] Brinks testified that he was working on another investigation. Tr. 633–35.

[22] Ms. Reitz's resume was received into evidence. Gov't Ex. 5.

[23] There was also testimony that in November of 2008 the Board and the Respondent entered into a consent agreement related to an issue that has no logical nexus to any issue germane to these proceedings. Tr. 391–92, 394–96.

[24] Reitz testified that an infection control evaluation examines issues related to sterilization, infection control, and licensing. Tr. 400.

[25] The Respondent's theory that the Board's investigation was the result of bad blood that had its genesis in Reitz's disagreement in the Respondent's support for state legislation regarding the conduct of Board proceedings and a potential lawsuit was not sufficiently developed on this record to affect Ms. Reitz credibility. Tr. 414–17.

[26] Although the Respondent, through counsel, noticed his intention to call the Ohio Dental Board's case investigator as a witness (ALJ Exs. 10, 12), the unrefuted testimony of record establishes that he refused to tender the required witness fee to the investigator. Tr. 417–21; 21 U.S.C. 876; Fed. R. Civ. P. 45; 28 CFR 76.25. Thus, the decision by the Respondent's counsel to forego the opportunity to cross-examine the investigator bears the hallmarks of a tactical election.

[27] Ms. Crockett's affidavit was received into evidence. Gov't Ex. 12.

[28] Gov't Ex. 12 at 2.

by some form of controlled-access door.[29] Tr. 158–60, 210.

Crockett testified that she and other employees noticed marks on the Respondent's upper extremities that they feared may have indicated IV drug use on his part, and observed behavior on the part of the Respondent that they communally deemed to be overly erratic, moody, and emotional. Tr. 164–67. After discussing these observations amongst themselves, they met with him as a group (in what some of their number termed an "intervention") and received his assurance that he was "getting help" for what ailed him. Tr. 164–67, 181, 202–03; Gov't Ex. 12 at 2–3. The Respondent did not share with the group what help he was getting or what it was for. *Id.* Crockett related a 2009 incident where she believed that the Respondent appeared to be intoxicated and/or disoriented at the outset of a procedure[30] and raised the issue with the office manager, Christina Painley. Tr. 172–73, 202.

Ms. Crockett testified that she voluntarily elected not to return to her position at the Respondent's practice at the conclusion of a period of maternity leave,[31] due to her concerns regarding her safety brought about by the Respondent's animated, angry outbursts, as well as concerns she had for the Respondent's patients, based on her suspicion that the Respondent was abusing sedation controlled substances maintained in the office. Gov't Ex. 12 at 3; Tr. 167–69, 174, 190. Crockett related that subsequent to her departure from the Respondent's employment she filed for unemployment benefits and sent a letter to the Ohio Dental Board outlining her suspicions regarding the Respondent's drug abuse. Tr. 177, 206–07. Ms. Crockett testified that her letter to the Dental Board was motivated by her concern for the safety of both the Respondent and his patients. Tr. 177–79.

Ms. Crockett's testimony was sufficiently detailed, internally consistent, and plausible to be relied upon as credible in this recommended decision. No persuasive reason for her to fabricate evidence against the Respondent has been offered into, or is supported by, the current record.

The Government also presented the testimony and affidavit[32] of former employee Rebecca Tetzloff, who worked on the Respondent's staff from March 2008 through October 2009. Gov't Ex. 10 at 1. Like Ms. Crockett, Ms. Tetzloff testified that she worked at both the Norwalk and Avon offices of the Respondent's practice, transported controlled substances to the Avon office, and that the Respondent routinely administered and stored controlled substances at the Avon office. Tr. 221, 223–27; Gov't Ex. 10 at 2. In fact, Ms. Tetzloff testified that she actually maintained a log recording controlled substances stored at Avon. Tr. 225–26. According to Tetzloff, before the Ohio Dental Board insisted on the installation of a safe, controlled substances were routinely kept at Avon in an intermittently-locked filing cabinet in an arrangement that frequently yielded ready access to the keys that could lock (or unlock) it. Tr. 227–32.

Consistent with Crockett's testimony, Tetzloff recollected that when controlled substances were unpacked at the Avon office, they were left unsecured in the "rush, rush, rush" of setting up equipment at the outset of the day. Tr. 233. According to Tetzloff, the controlled substances (midazolam, diazepam, and fentanyl) would be transported to Avon in a bin on a cart and left on a counter in the sterilization room. Tr. 233–36.

At some point during her employment at the Respondent's practice, Tetzloff was charged with the responsibility of accounting for the controlled substances used and on-hand in the practice. Gov't Ex. 10 at 2. In the discharge of these duties, Ms. Tetzloff became concerned about an apparent spike in the level at which office supplies were requiring replacement, and began having trouble reconciling the quantities of medications on hand. Tr. 237; Gov't Ex. 10 at 2. Ms. Tetzloff tacitly acknowledged that this was a rather unscientific process where, by the mere act of counting vials of medication, she would somehow divine whether too many vials had been used based on her expectation of how many vials should have been present, with no appreciable expertise to appraise how many vials were used on the procedures performed. Tr. 282–84, 291, 295, 307, 314–15. Tetzloff recalled that on one occasion when she called the Respondent while he was at his teaching position at Case Western Reserve University and asked him about a particular controlled substance deficit, he informed her that he had taken the medication with him. Tr. 237–38; Gov't Ex. 10 at 2–3. On another occasion, upon her arrival at the Norwalk office one morning, Tetzloff discovered a vial of diazepam sitting unsecured on top of the office safe. Tr. 241. When queried on the issue of why a controlled substance was left out in the open in that fashion, the Respondent's answer was merely to acknowledge what Tetzloff perceived with her own eyes, without any attempt at explanation. Tr. 241–42. When Tetzloff's suspicions grew, and she became increasingly concerned that medications were not being effectively locked up in the Norwalk office, she sought the advice of an attorney, who assisted her in drafting a letter raising her concerns to the Respondent and seeking discharge from her duties related to the accounting of office controlled subsances. Tr. 238, 243–47, 296–97. Tetzloff credibly testified that she presented the letter[33] to the Respondent and a member of his staff. Tr. 247–48; Gov't Ex. 10 at 3–4.

Tetzloff also related her recollection of marks on the Respondent's upper extremities which she felt were suspiciously reminiscent of track marks,[34] as well as bouts of animated anger bursts, "irritability,"[35] and essentially erratic behavior[36] during the work day on the Respondent's part,[37] all of which culminated in a staff meeting on a Friday when no patient appointments were scheduled ("the intervention"), wherein the Respondent

[29] Notwithstanding some initial confusion on this issue, Tr. 160, 199, the witness ultimately and credibly testified that the patients waiting to be seen were maintained on the other side of a door that led to the waiting room. Tr. 200–01, 208–09.

[30] Of particular concern to Crockett during this episode was the Respondent's action in removing a hypodermic needle cap with his mouth. Tr. 173, 201–02.

[31] Although the witness's affidavit fixes her resignation in June 2009, Gov't Ex. 12 at 3, Crockett credibly testified that her decision in this regard was made in September 2009, while still out on maternity leave following the birth of her son. Tr. 191, 194–95.

[32] Gov't Ex. 10.

[33] Gov't Ex. 11.

[34] Ms. Tetzloff did not deem the Respondent's explanation that his large dogs caused the marks by scratching his arms to be particularly credible. Tr. 253–55.

[35] Tr. 276–77.

[36] Tetzloff also related an incident wherein, on some date that she was unable to recall, she observed an uncapped hypodermic needle on the floor of the van used by the Respondent and other employees to transport medications and supplies between the Norwalk and Avon offices. Tr. 268–272, 308–10. The evidence of record indicates that the van routinely carried practice supplies, including hypodermic needles, and also supports the proposition that there were routinely multiple operators of the van. Tr. 269, 795–99. Accordingly, the evidence does not impact upon any issue that must be decided in these proceedings and was not considered in this recommended decision. The same can be said of an alleged episode of what Tetzloff perceived as erratic driving on the Respondent's part. Tr. 272–74, 625–26, 799–801. These incidents, at least to the extent they have been developed in the current record, simply have no bearing on any issues properly before this tribunal.

[37] Ms. Tetzloff acknowledged that although the Respondent was "a demanding employer," that he is not the only dentist she knows of who possesses that trait. Tr. 288.

assured all present that he was seeking (unspecified) help that was related, Tetzloff thought, to a depression condition. Tr. 223, 249–32, 255–60, 263, 285, 298; Gov't Ex. 10 at 4. According to Tetzloff, the Respondent took a week-long vacation immediately after the meeting. Tr. 252.

On the issue of disposal, Tetzloff recalled routinely squirting controlled substances remaining in hypodermic needles at the conclusion of procedures into the sink. Tr. 305.

Ms. Tetzloff, like Ms. Crockett, testified that she cared about the Respondent, describing him as "a good surgeon" and "a very good boss." Tr. 278. Ms. Tetzloff's testimony was sufficiently detailed, internally consistent, and plausible to be relied upon as credible in this recommended decision. No persuasive reason for her to fabricate evidence against the Respondent has been offered into, or is supported by, the current record.

The final former employee presented by the Government in its case-in-chief was Dr. Brian Toth, D.D.S.[38] Like the Respondent, Dr Toth, is a DEA registrant and a licensed Ohio dentist in good standing. Gov't Exs. 4, 13; Tr. 320–21, 337, 344. Although Dr. Toth's affidavit states that he "worked at [Respondent's] Norwalk and Avon dental offices from January 2009 through January 2010," Gov't Ex. 13, at ¶ 2, during his testimony he agreed that the period of his employment could have been from April 2009 through February 2010. Tr. 336.

Also in his affidavit, Dr. Toth asserts that, "[f]rom my observations, I believe that [Respondent] has injected himself with fentanyl and Versed (midazolam). I base my belief on my training as well as my observations of [Respondent's] erratic and aggressive behavior, red eyes, mood swings, anger, frustration, and lack of care while treating patients." Gov't Ex. 13, at ¶ 2. The affidavit also identifies the following as alleged indices of drug abuse: (1) Respondent's physical assault of Christina Painley; (2) track marks on Respondent's arms;[39] (3) "meth bugs," described as "scratching, and sores about the wrists, arms, and head;"[40] (4) an incident on a undated Friday[41] morning where Dr. Toth observed Respondent enter the Norwalk dental office, appearing "[d]isheveled, out of sorts, [and] wobbly,"[42] in "pajamas and flip flops," and walk in the general direction of the office drug safe stating that he needed antibiotics for a cold.[43] Gov't Ex. 13, at ¶¶ 3–4; Tr. 327–28. Toth, like other witnesses, testified that the Respondent was prone to "drastic mood swings" and "erratic behavior." Tr. 332.

Toth's affidavit also described a post-DEA inspection restaurant interaction wherein the Respondent purportedly confessed to Toth that he was taking Valium[44] as a sleep aid, and subsequently told him that adjustments were being made to office controlled substance records to shield the losses from DEA scrutiny. Gov't Ex. 13 at 3. When pressed on the issue, however, Dr. Toth was not at all clear on whether the incident happened before or after DEA's involvement in the case. Tr. 353–56.

Dr. Toth testified that he is a recovering alcoholic and cocaine addict, and that he has been "clean and sober" since 2006. Tr. 322–23. Notwithstanding the witness's unambiguous assurance of his uninterrupted recovery and sobriety, when confronted with documentation concerning his April 2011 convictions for disorderly conduct/intoxication and marijuana possession,[45] Dr. Toth conceded that he had been arrested and pled guilty to those offenses. Tr. 337–44, 346.

The issue of Dr. Toth's success at his substance abuse recovery efforts (at least on the present record) is, without question, a collateral issue. However, when Dr. Toth volunteered, under oath, that he had been clean and sober since 2006, and then grudgingly acknowledged marijuana and alcohol-related convictions seven months prior to the commencement of the hearing, he deprived his own testimony of any measure of credibility in these proceedings.[46] Simply stated, Dr. Toth is not a person who is willing to provide candid and truthful testimony under oath, and in those instances where his account conflicts with other credible evidence of record it cannot be believed. Thus, his testimony cannot be afforded weight in supporting a substantial-evidence finding by this recommended decision and ultimately, by the Agency. Furthermore, inasmuch as he was unable to supply virtually any temporal details of the factual events he described, and his purported observation of a "disheveled" and "wobbly" Respondent standing in his own office, on some unspecified date, headed in the general direction in his office where controlled substances were stored, would (even if deemed credible) shed no light on anything that must be decided in this case, the absence of his testimony here will be of no moment.

The Government also presented the testimony and written report,[47] of Daniel Becker, D.D.S. Dr. Becker,[48] currently serves as an Associate Director of Education in the General Dental Practice Department at Miami Valley Hospital, in Dayton, Ohio, is an Associate Editor of Anesthesia Progress for the American Dental Society of Anesthesiology, and also serves as an Adjunct Professor of Life and Health Sciences at Sinclair Community College in Dayton, Ohio. Gov't Ex. 14. Additionally, Dr. Becker is the Chairman of the Human Patient Simulation Training Subcommittee at the American Dental Society of Anesthesiology. *Id.* Dr. Becker also testified that he teaches intravenous sedation techniques to dental residents, and is actively engaged in the practice of IV sedation to patients at numerous dental practices in Ohio. Tr. 32. Dr. Becker was received without objection as an expert in the practice of general dentistry in regards to pharmacology, sedation, and anesthesia. Tr. 29–30.

In his testimony, Dr. Becker (like Ms. Reitz) explained that in Ohio there are two varieties of dental sedation that are sanctioned by state law, with separate practitioner permits specified for each type. A "conscious sedation permit," is required to sedate a patient to a depth where the patient is capable of being aroused, that is capable of responding to verbal commands. Tr. 41, 71. A "deep

[38] An affidavit executed by Dr. Toth was received into evidence. Gov't Ex. 13.

[39] In his testimony, Dr. Toth opined that the marks on the Respondent's arm bore the appearance of IV drug abuse, not the marks of a teacher allowing students to practice IV insertion techniques. Tr. 326. In view of the absence of any foundation for Dr. Toth's expertise in this area, this testimony has been afforded no weight in this recommended decision.

[40] Dr. Toth testified that he has never tried methamphetamine. Tr. 347–48. In view of the absence of any foundation for Dr. Toth's expertise in this area beyond spending time at a rehabilitation clinic related to other substances, Tr. 326–27, this testimony has been afforded no weight in this recommended decision.

[41] Though Dr. Toth's identified the incident as occurring on a Saturday morning, during the administrative hearing he clarified that the incident occurred on a Friday. Tr. 327, 361–62.

[42] Tr. 330.

[43] Dr. Toth found this explanation implausible because "antibiotics are not used to treat colds," and because "the Norwalk office did not store antibiotics in the drug safe." Gov't Ex. 13, at ¶ 4.

[44] Valium is a brand of diazepam tablets. *See* 6–V Attorneys' Dictionary of Medicine V–121686.

[45] Resp't Exs. K, L.

[46] In like fashion, when cross-examined about (mostly irrelevant) statements he purportedly placed on a Facebook page, Dr. Toth initially denied having such a page during the relevant period, and then conceded that he did. Tr. 347–50. In this manner, Toth once again managed to morph irrelevant matter (the arguably unsavory comments he posted on his Facebook page) into a relevant issue (his disinclination to provide accurate testimony under oath).

[47] Gov't Ex. 15.

[48] This Dr. Becker is not related to the Respondent.

sedation/general anesthesia permit," in contrast, is required to sedate a patient to unconsciousness. Tr. 42. A conscious sedation permit may be obtained by a dentist after the completion of a course on the subject, while a deep sedation/general anesthesia permit requires the successful completion of a year-long residency. Tr. 41–42, 44–45. Becker testified that where general anesthesia is utilized,[49] additional personnel and monitoring equipment normally will be required. Gov't Ex. 15 at 1; Tr. 62–64, 85–86.

At the Government's request, Dr. Becker reviewed forty-three records of IV sedation[50] that had been administered by the Respondent and found all but one of the records were below "the standard of practice" because they did not reflect current vital signs or actual time at the time the medications were administered. Gov't Ex. 15 at 1. Dr. Becker's report further identified 17 patient charts which he found to be "egregious." *Id.* The report also sets forth Becker's expert opinion that the doses recorded in the charts he reviewed were sufficiently high that, at least in his view, monitoring, staff, equipment, and general anesthesia training beyond what was apparent in the reviewed documents would have been required. *Id.* Becker noted that despite what he characterized as "staggering doses," the records he evaluated reflected only four occasions where reversal drugs were administered, and that the records reflected none of the complications such as hypotension or respiratory arrest that he would have expected to encounter with doses at those levels. *Id.* At 2. In Becker's opinion, "[t]his raises a question as to whether these doses were actually administered [because] [f]ollowing these dosages, serious complications would most surely have been encountered." *Id.*

According to Dr. Becker, in most cases where midazolam is used for conscious sedation, the required level of sedation could be obtained by 10 mgs or less, but that more midazolam might be needed for a longer appointment.[51] Tr. 58–60. Dr. Becker further testified that a patient's resistance to midazolam could alter the amount of drug necessary to achieve the desired sedation. For example, Dr. Becker opined that for a "fairly resistant" patient, twenty to thirty milligrams of midazolam might be necessary for a 3–4 hour procedure, and that there are some patients who are simply not sedatable with this medication.[52] In Becker's opinion, however, those cases that require the higher doses and demonstrate resistance are rare. Tr. 60–61. Midazolam, according to Dr. Becker, is administered in one-to-two milligram increments to achieve the desired level of sedation. Tr. 62. A five-miligram increment would cause a patient to lose consciousness, which in turn risks throat obstruction and breathing impairment. Tr. 62. Becker explained that it is for these reasons that procedures where general anesthesia is employed require additional staffing (of at least one additional person) during the procedures to monitor the patient breathing and EKG[53] via precordial stethoscope or capnography. Gov't Ex. 15 at 1; Tr. 62–64, 85–86.

Dr. Becker identified seventeen records of Respondent's sedation dispensing that he characterized as egregiously below the expected standard of care. Gov't Ex. 15 at 1. Among these seventeen records are instances where: (1) A patient was administered 55 mgs of midazolam and 200 micrograms of Fentanyl over a span of 15 minutes; (2) a patient was administered 40 mgs of midazolam, 40 mgs of Diazepam and 100 mcgs of fentanyl over a span of approximately 15 minutes; (3) a patient was administered 30 mgs of midazolam, 10 mgs of diazepam and 100 mcgs of fentanyl over a span of approximately a minute; and (3) a patient was administered 100 mgs of midazolam, 70 mgs of diazepam and 200 mcgs of fentanyl over a time span of approximately 90 minutes. *Id.* In his report and his testimony, Becker affirms that the medications in these doses would have rendered the patients unconscious. *Id.* at 1; Tr. 79, 84–85, 87–89. Becker's view is that sedation to unconsciousness was not an intent supported by the records he reviewed, as evidenced by the lack of additional professional monitoring staff, and would have required the deep sedation/general anesthesia permit that the Respondent does not possess. Tr. 85–86; Gov't Ex. 15 at 1.

Dr. Becker testified that, absent some type of resistance to midazolam, the doses identified in his expert report would "predictably" produce unconsciousness." Tr. 84. However, Dr. Becker noted that such resistance, while possible, is "rare," and that over thirty years of practice he had not seen as many resistant patients as Respondent's patient records appeared to contain during a relatively brief period. Gov't Ex. 15 at Tr. 84–85. Assuming that not all the patients in the charts analyzed were resistant, Dr. Becker testified that the sedation records reflected a treatment regime below the standard of care for moderate sedation. Becker opined that there were simply too many patients receiving deep-sedation levels of medication during the time he analyzed Respondent's records to attribute that number to medication resistance. Tr. 84–85. Although Becker identified four occasions where medication reversal drugs were administered by the Respondent, the records shed no light on whether that was done pursuant to persistent somnolence or some other complication. Tr. 112–13. Finally, Dr. Becker provided his conclusion that based on the likelihood of widespread unconsciousness among the patients, the Respondent's lack of training and certification in general anesthesia, the lack of complications documented in the record regarding breathing obstruction, he entertains serious questions as to whether the amounts of controlled substances documented in the sedation reports were actually administered to the enumerated patients. Tr. 90–92. In Becker's view, since these high levels of medications were unlikely to have been administered to this number of patients without evidence of adverse effect, either the sedation records he reviewed were simply erroneous, or the medications listed in those records were not administered as documented and something else became of them. Tr. 93. Dr. Becker testified that the "staggering" doses of controlled substances reflected as administered in the sedation records he reviewed support his conclusion that the Respondent's handling of controlled substances was "below the standard of practice." Tr. 94–95.

[49] Dr. Becker testified that sedation in excess of conscious sedation is generally utilized in cases involving special needs, such as physically or mentally handicapped patients. Tr. 76.

[50] Dr. Becker testified that it was common practice among dentists to have these records completed by staff members during dental procedures. Tr. 146–47. This is consonant with the testimony of Ms. Crockett that office staff merely acted as a scrivener with regard the document, entering the numbers dictated by the Respondent. Tr. 183–85.

[51] Dr. Becker's difference of professional opinion with the Respondent's practice regarding the relative merits of combining midazolam and diazepam versus increasing the doses of those respective medications, Tr. 77–78, 731–32, 735; Gov't Ex. 15 at 1, does not provide any insight on the issue of diversion risk or whether the Respondent's continued DEA registration is inconsistent with the public interest, and has played no part in this recommended decision. *See Gonzales* v. *Oregon*, 546 U.S. 243, 274 (2006).

[52] Dr. Becker testified that the sedation logs reflect medication given, but ordinarily do not reflect any rationale for higher-than-normal doses of sedation medication or sufficient data from which that decision could be extrapolated. Tr. 66–67, 74, 76–77.

[53] During his testimony, the Respondent stated that his patients were routinely monitored by EKG and pulse oximeter. Tr. 736.

At one point during his testimony, Dr. Becker conceded that on one occasion medication was drawn for a patient[54] who did not appear for treatment, and the medication was disposed of. Tr. 115–17. In an unfortunate choice of words employed during his re-evaluation of whether the record relating to the drawn and discarded medication was comparable to the other records he characterized as "egregious," Dr. Becker stated that although he still found the practice of drawing sedation medication prior to patient arrival "strange," "odd," and "funny," he believed that he "should be punished" for his initial characterization. Tr. 117–23. Nonetheless, Dr. Becker stated that the practice of drawing medication prior to the arrival of a patient did not impact on documentation obligations, and did not fall below an acceptable level of practice. Tr. 145, 123.

On the issue of the "track marks" that were purportedly seen on the Respondent's arms by his staff, Dr. Becker acknowledged that, as part of his teaching responsibilities, he instructs students on establishing IV access. Tr. 33. Consistent with the position taken by the Respondent, Dr. Becker testified that he does allow patients to practice IV insertion on himself, including on the backs of his hands. Tr. 33–34, 135. Becker conceded that some days the practice attempts by his students have him resembling a "pin cushion,"[55] but he described the needle punctures routinely made on arms by the relatively small needles handled by students in his class, which in his view, "generally [does not] leave much of a mark." Tr. 34. Dr. Becker also explained that a "difficult attempt" by a less skilled individual can result in a hematoma, or bruise. Tr. 34–35. Dr. Becker testified that the scars generally referred to as "track marks" are the product of repeated attempts into the same veins by habitual drug abusers. Tr. 37–38. According to Dr. Becker, those experienced teachers who allow their students to practice venipuncture on them in class minimize the risk of scarring by requiring their students to avoid repeated attempts at the same location. Tr. 37–38. It is Dr. Becker's opinion that poorly-done clinical attempts at IV insertions by students are more likely than drug use to produce bruising. Tr. 39. A bruise left by an improper IV insertion could last for "several" days. Tr. 40.

Notwithstanding the Government's posture that the Respondent has violated the regulations by squirting controlled substances remaining in the hypodermic needles after procedures into the sink, Becker (the Government's own expert) testified that this is his practice as well. Tr. 55–58, 100–01. Furthermore, Dr. Becker expressed agreement with the Respondent's expert that the DEA regulations on disposal are unclear. Tr. 105.

On the issue of whether the observations of the Respondent's moodiness, grouchiness, and erratic behavior support the concerns of his former employees that he was abusing the controlled substances acquired for procedures in his practice, Dr. Becker testified that an individual under the influence of midazolam would likely exhibit symptoms of lethargy or calming. Tr. 69, 71. Thus, none of the characteristics highlighted by the Respondent's former employees in their testimony or during the "intervention" conducted in his office support an inference that the Respondent was abusing the controlled-substance medications he employed to sedate his patients.

Dr. Becker was by no means an ideal expert witness. He was vague about the method that his "most egregious" list of cases were selected, and retreated from his designation of one case as egregious by the flip remark that he "should be punished"[56] for his initial opinion in this regard. Still, his testimony was sufficiently authoritative, consistent, and reasonable that it will be credited and afforded significant weight in this recommended decision.

The Respondent's case-in-chief consisted of his own testimony and an affidavit from Dr. Joel Weaver, D.D.S., Ph.D., an individual he previously noticed as an expert witness. The affidavit executed by Dr. Weaver was admitted on motion and without Government objection during the hearing. Resp't Ex. J.

According to his curriculum vitae, Dr. Weaver served from 1981–2006, as a professor in the Department of Anesthesiology at the Ohio State University. Resp't Ex. G, at 1. He holds a Bachelors of Science from Ohio Northern University and a D.D.S., from the Ohio State University College of Dentistry. Resp't Ex. G, at 1. Additionally, Dr. Weaver has completed residencies at the Ohio State University in both Anesthesiology and in Ambulatory General Anesthesia and Sedation. *Id.* Dr. Weaver also holds a Ph.D. in pharmacology from the Ohio State University, and has been previously certified as a pharmacist in Ohio.[57] Resp't Ex. G.

In his affidavit, Dr. Weaver described what he characterized as a "concern * * * as to the proper procedure to dispose of injectable drugs remaining when perhaps 5 [milliliters' (ML)] is drawn into a syringe but only 4 ML is actually injected into the patient's [intravenous (IV)]." Resp't Ex. J at ¶ 2. Although Dr. Weaver's report did not address a practitioner's obligation to comply with regulatory requirements under 21 CFR 1307.21,[58] after providing some anecdotal evidence relative to logistical concerns attendant upon disposal issues, his affidavit set forth his view that:

[t]he standard practice among dentists in Ohio * * * is for the dentist to log the dose of the drug taken from his inventory, record the dose given to the patient in the patient sedation/anesthesia record and record any "wasted" doses in either the drug log, the patient's anesthesia record or both as soon as the case is concluded. The "wasted" drug is typically squirted into the sink (no longer politically correct because of community water trace contamination), into the trash or sharps container, or into the soil of potted plants as a source of nitrogen-containing

[54] The Respondent testified that this patient did not appear for her appointment. Tr. 784–85.

[55] Tr. 135.

[56] Tr. 117–23.

[57] Although initially noticed as an expert witness by the Respondent, Dr. Weaver was never called as a witness at the hearing. the Respondent's counsel, citing a logistical issue, represented that Dr. Weaver was unavailable, and that this information only became available to counsel on the eve of the commencement of the hearing. Tr. 9. Accepting counsel's representation of late notice of Dr. Weaver's availability, it is not insignificant that no continuance request or other accommodation (such as video teleconferencing) was requested by the Respondent to facilitate the witness's testimony. A perhaps unintended consequence of what may well have been a tactical decision on the part of the Respondent and his counsel, is that Dr. Weaver was never offered or accepted as an expert in anything during the proceedings. Confounding the issue further, the Government's expert, Dr. Becker, conceded that Dr. Weaver is "well more experienced" than he is in terms of both training and experience. Tr. 106. DEA's regulations comport with the generally reasonable notion that information received through affidavit must be weighted consistent with the opposing party's lack of cross examination ability. 21 CFR 1316.58 ("Affidavits admitted into evidence shall be considered in light of the lack of opportunity for cross-examination in determining the weight to be attached to the statements made therein.") Accordingly, as the record now stands, the Government's expert testified that Dr. Weaver is a superior expert, but no one has offered him to the tribunal as such, and the Government, by surprise at the outset of the hearing, has not been afforded any manner of cross-examination. Still, the Government consented to the admission of Dr. Weaver's affidavit, and did not make any attempts to compel his appearance by process.

[58] The obligation to interpret the law and regulations falls squarely within the purview of this tribunal initially, and then secondarily with the Agency. Dr. Weaver's purported legal analysis of the regulations and DEA's interpretation of the applicable requirements has been accepted into evidence without objection as part of the affidavit he prepared, but cannot control the legal analysis employed by this recommended decision.

fertilizer. Some practitioners have a witness initial the record of "wasted drug."

Resp't Ex. J, at ¶ 5.

Dr. Weaver also provided his opinion regarding what he characterized as "mobile sedation and anesthesia practitioners." Resp't Ex. J, at ¶ 9. In essence, the practice of mobile sedation and anesthesia is where a practitioner has "one permanent office address where they do business and that is where they are registered for their DEA license. They order, receive, and securely store controlled substances at that single address and maintain all drugs logs and patient records at that one office location." Resp't Ex. J, at ¶ 10. The practitioner will then administer the drugs at various dental and medical offices where anesthesia or sedation might be required. *Id.* In any year, a mobile anesthesiologist "may service more than 50–100 offices." *Id.* In light of the foregoing, Dr. Weaver opines that "[i]t would be impractical if not impossible for the anesthesiologist or other healthcare worker to have a separate DEA license for every location they service so long as the drugs and records are not stored at those multiple locations but rather at their single office location." *Id.*, at ¶ 11. Inasmuch as the Government has not alleged that the Respondent was required to obtain a COR to take controlled substances to varying locations and return and store them as required, Dr. Weaver's endorsement of such a procedure adds nothing here. The Respondent is alleged to have administered and stored controlled substances at an unregistered permanent private practice, a scenario which Dr. Weaver, even if assumed competent to express a view on a this issue of law, did not address.

While Dr. Weaver's qualifications are doubtless impressive, even setting aside the absence of any foundational predicate for the presentation of expert opinion, his affidavit provides no expert opinion that sheds light on any issue that must be decided by this recommended decision. However, his *observation* that his experience that Ohio practitioners routinely dispose of small amounts of residual controlled substance by squirting into drains all over the state is consistent with the testimony provided by the Government's expert, its investigator, and its lay witnesses, and will be credited in these proceedings. Weaver's opinion concerning the wisdom or logistical practicalities of the relevant DEA regulations regarding the authorized manner of controlled substance disposal have been afforded no weight whatsoever.

The Respondent testified on his own behalf at the hearing. According to the Respondent, he holds a Bachelor of Arts from the University of Toledo and a D.D.S. from the Ohio State University.[59] The Respondent also holds a certificate in periodontics from the Case Western Reserve University School of Dentistry, a certificate in Zygoma Implant placement from the Northwestern School of Dentistry and a IV certification from the University of Southern California School of Dentistry, and from 1996 through the present he has maintained a private practice in Norwalk and Avon, Ohio.[60] *Id.* Respondent testified that he limits his dental practice to the field of periodontics, "which involves bone grafting, dental implants [and] gum and bone surgery." Tr. 656. The Respondent testified that because many of his patients "are very apprehensive in regards to that type of procedure," IV sedation is a "critical component" of his practice. TR. 660.

The Respondent testified that his practice is "all referral-based," and he receives referrals of patients who require treatment "that's a little bit more advanced" and who sometimes present "very difficult cases." Tr. 657–58. When asked to explain what he meant by "very difficult cases" and "more advanced" treatment, the Respondent clarified that he was referring to the fact that there was a limited number of periodontics specialists in the geographic area of his practice, and these were patients who required treatment in that specialty. Tr. 658. The Respondent stated that there was also a limited number of dentists in his geographic area who practiced conscious-sedation dentistry. Tr. 659. Thus, from the Respondent's testimony it is clear that it was not that periodontists were referring difficult patients to him who were difficult to anesthetize, but that dentists were referring patients his way who simply needed periodontic treatment or desired conscious sedation within the Respondent's geographic area. Tr. 749. Thus, the Respondent's assertion that higher doses are required because he is a specialist is a *non sequitur.*

The Respondent subsequently diminished his credibility even further on the issue of patient resistance. When asked about Dr. Becker's assertion that the sedation logs from the Respondent's practice that he examined had more allegedly sedation-resistant patients than he had encountered in his thirty years of practice, the Respondent stated that Becker's opinion was borne of the fact he is a "general dentist," and not a specialist, such as the Respondent. Tr. 748–49. The problem here is that Dr. Becker (whom the Respondent acknowledges knowing on a professional basis even before the proceedings began),[61] testified that his entire practice is focused on the administration of conscious sedation to patients for other practitioners. Tr. 23. Again, the Respondent seeks to confuse the difference between the specialization required to perform periodontic dental work with some special expertise in hard-to-sedate patients.[62]

When queried on the issue of whether his doses were high compared to other practitioners, the Respondent acknowledged that his former instructor, and the author of the textbook he uses in connection with his teaching responsibilities, suggests that the range of acceptable midazolam doses of 2.5 to 7.5 milligrams. Tr. 732–33. The Respondent even acknowledged that one patient received 70 milligrams of the medication during a procedure, an amount that the even the Respondent characterized as "a large amount." Tr. 743, 745. Another 100 milligram dosage was also acknowledged as "high" by the Respondent. Tr. 754. The Respondent also agreed with the Government's expert that his sedation records reflected "a high proportion of [sedation-] resistant patients." Tr. 734. The explanation that the Respondent volunteered for this phenomenon served him worse than if he had remained silent on the point. The Respondent stated:

> *Like I had stated earlier,* I am a specialist, all right. I get cases sent to me that a lot of other people cannot handle, and so that is not unusual. I've got a lot of medically compromised patients that do come in the door for services, because other general practitioners are not comfortable handling those patients.

Tr. 734 (emphasis supplied). While it is unquestionably true (as acknowledged elsewhere in this recommended decision) that decisions regarding

[59] The Respondent's CV was received into evidence. Resp't Ex. E.

[60] The Respondent testified that he also owns a dental clinic at his registered location in Milwaukee, but does not practice IV sedation at that location. Tr. 661–64; *see also* Gov't Ex. 2.

[61] Tr. 747–48.

[62] Even temporarily suspending for a moment the undisputed reality that the Government's expert practices exclusively in the area of conscious sedation for dentists and sees all manner of patients, had the Respondent taken the view that the seemingly high doses were attributable to nothing more than a simple difference of opinion between professionals his position would have been likely more effective, and certainly less revealing on the issue of credibility than the analytical red herring of widespread resistance.

medical care which are unrelated to the issue of diversion are beyond the jurisdiction of DEA,[63] the Respondent attempted to explain the high (by his own admission) doses he administered by positing that *as he had explained earlier,* because he was a specialist he utilized higher levels of medication on his patients, which tended present more difficult cases. *Id.* Even a cursory review of what he had "stated earlier" in his testimony reveals that he gets periodontic referrals because there are not many periodontists near him, not that he gets unsedatable patients who must routinely be sedated with copious amounts of controlled substances. Tr. 749. His testimony in this regard was misleading. The Respondent was attempting to blur the line of his specialization in periodontics and conscious sedation with a hypothetical expert practitioner who is routinely sought by others in his field to consciously sedate patients who had been previously found difficult to sedate. This attempt to muddle the record did not enhance his credibility and has drawn attention to an issue that might otherwise have lived in benign, analytical obscurity.

The Respondent, the holder of an Ohio-issued conscious sedation permit, testified that he monitors his IV sedation patients "under an EKG strip, as well as a pulse oximeter," and he unambiguously stated that among the sedation records reviewed by the Government's expert, Dr. Becker, all patients remained conscious during the sedation employed in the procedures. Tr. 736–37. In fact, the Respondent followed up this response with an unsolicited, detailed explanation of the reasons he is confident that all patients were conscious. Tr. 737–38. The Respondent declared that "if you were to ask my staff, they'll tell you nobody has ever been out of consciousness in my office." Tr. 755. When pressed on the issue of the level of medication of one patient in particular, the Respondent replied:

> This patient, I can't tell you if this person was on a Fentanyl patch, which might require more medications. I can't tell you if this patient has had multiple IVs at other locations. Multiple occasions of having drugs such as benzodiazepines in your body, you develop a cellular adaption, all right. What happens is your metabolism becomes a tolerance to that, and so what happens, it takes more of the drug to get the same type of effect that you did maybe from the first time that you ever used that drug. So I have—based on not having the medical history from the patient's chart here, I can't answer anything else other than that. This patient is not dead.

Tr. 742. One problematic aspect of the Respondent's explanation is that as the custodian of his own patient charts, contrary to his testimony, he is the one person who actually could have authoritatively and conclusively divined all these factors about these patients, but chose not to do so. Tr. 746, 749–51, 807. Another possible explanation offered by the Respondent is that some of his patients were well-to-do, elective surgery veterans who may have had sedation for other elective surgeries in the past. Tr. 750–51. Yet another possible explanation offered by the Respondent is that some of his patients may have had histories of drug abuse that they were reluctant to share.[64] Tr. 758. The Respondent's election to spin all manner of hypothetical contingency to provide potential explanations for the dosing levels is a tacit acknowledgement that his dosing levels were so high that they actually did require additional explanation; a proposition that he eventually conceded. Tr. 750. The point is hammered home by the Respondent's terse conclusory assurance that the patient did not expire as a result of his sedation procedures. *Id.* If, as it seems from the Respondent's lengthy diatribe on the subject, the only possible explanation in the high dosage levels lies in extraordinary contingencies, it would seem reasonable that these contingencies would be at his disposal to produce. Another problematic issue is that the sedation logs associated with these high-dose patients note no current medications in the block designated for that purpose. Tr. 742, 747, 758. This is another example of the Respondent's answer raising the relative importance of an inquiry that easily could have remained in the shadows.

The Respondent's account of DI Brinks' May 2009 visit to his Norwalk office was generally consistent with Brinks' version. Tr. 671–79. It was the Respondent's recollection that when Brinks suggested his own drug use as a source for shortages,[65] he not only offered his arm for inspection, but also offered to submit to a urinalysis.[66] Tr. 676–79. Consistent with Brinks' testimony, the Respondent recalled volunteering during the visit that he also was operating a practice in the Avon, Ohio [67] where controlled substances were stored and dispensed. Tr. 677–78.

The Respondent provided additional insights into potential distractors that existed at the time of the DEA inspection, such as his heavy patient traffic on the day of the visit and his high level of other professional commitments during that period in his career. Tr. 664–67, 676. Of even greater import, was the Respondent's account of his treatment for a mental health issue during this time. The Respondent initially sought treatment from his physician, progressed through a therapist, and ultimately sought the aid of a psychiatrist. Tr. 686–88, 726–28. The Respondent recounted various medications prescribed to address his mental health symptoms, and how, in March-April 2009, one attempted course of prescribed Lamictal landed him in the Cleveland Clinic to address a medication-caused decompensation. Tr. 686–89. This setback resulted in the Respondent taking a week off from work. Tr. 689–90. The Respondent also discussed the frustrations associated with the trials of psychiatric medication and side-effects that included concentration diminishment and mood lability. Tr. 689–92. The Respondent recalled the Friday morning meeting that his staff has euphemistically dubbed an "intervention." Tr. 786. According to the Respondent, the term "intervention" was not utilized, suspicions of drug abuse on his part were never discussed, and the meeting was a vehicle to notify that staff that he would be out of the office for a week, a necessity precipitated by his adverse reaction to Lamictal. Tr. 786–87. The Respondent described how his professional commitments caused stress that, at least in his view, contributed to his mental health difficulties, and that some of this was ameliorated when he retreated from his teaching responsibilities at Case Western in 2010. Tr. 690–91.

The Respondent commendably took the evidence of what his former staff members considered erratic behavior head on, and acknowledged that he is "a

[63] *See Gonzales* v. *Oregon,* 546 U.S. 243, 274 (2006).

[64] In response to a series of leading questions posed by his counsel, the Respondent also suggested that obesity, age, and past surgical history could also be contributing factors to the high dosage levels that the Respondent was routinely using on his patients. Tr. 805–06. The Respondent also mentioned diabetes and smoking. Tr. 806. Informative as this list may have been, the record contains no evidence that so much as a single patient described in the sedation logs was impacted by any of these factors.

[65] The Respondent also recalled that DI Brinks similarly accused his office manager of abusing controlled substances that were not accounted for in the paperwork presented. Tr. 679–80.

[66] The Respondent testified that he has been randomly drug tested about once a year by Fisher Titus Hospital without positive results. Tr. 709, 730, 761–62.

[67] The Respondent testified that separate controlled substance sedation logs were maintained at the Avon office. Tr. 694.

very hard person to work for," and that he has thrown surgical instruments in the past, and has yelled at more than one employee during his career as a dentist. Tr. 790–92. On the subject of his late morning arrival and puncture wounds on the tops of his hands on a day where he was not teaching at Case Western, the Respondent offered no explanation, other than his assertion that he is "a picker," who picks at the skin on his head, and that he has a playful, large Newfoundland dog. Tr. 792–94.

Regarding the allegations that controlled substances were periodically unsecured at the Avon office, the Respondent testified that it was the practice of his office to transport controlled substances to the Avon Office in a bin about the size of a shoe box. Tr. 768–69. The bin was taken into the sterilization room of the Avon Office by a cart, and staff members were "supposed to put [the controlled substances] on [the Respondent's] desk [where] they get locked." Tr. 768–69. Despite this policy, the Respondent did not dispute that controlled substances were left on the counter, or that they may have been left on the counter when the Ohio Dental Board investigators conducted their inspection. Tr. 770, 772–74. However, the Respondent claimed that "at some point [the drugs] would have gotten to my office." Tr. 770.

Although the Respondent acknowledged that he teaches his students to simultaneously record amounts of controlled substances utilized during conscious sedation procedures on the form designed for that purpose, his own practice was to write the administered doses on a paper towel and transfer those numbers to the sedation logs later. Tr. 680–84. Curiously, the Respondent's testimony diverged from that of his testifying staff members to the extent that they were unambiguous and unanimous in their assertion that when completing sedation logs they acted as scriveners, merely recording the amounts of medication that the Respondent called out.[68] The Respondent, for his part, claims that the staff members independently divined the medication amounts by their own examination of the syringes while the procedures were in progress and entered those values onto the sedation logs without his input. Tr. 695–97, 743. But in earlier testimony, when describing his paper-towel procedure, he employed the word "we" when describing the manner in which the amounts were recorded. Tr. 680–84. If a staff member were the sole individual charged with monitoring and entering the amounts, it is unlikely that the Respondent would use the word "we." Based on the Respondent's testimony that it was his practice to maintain a contemporaneous record of administered medication on a paper towel that was then routinely discarded, and the absence of any conceivable motivation on the part of the staff members to fabricate such a seemingly innocuous detail (at least to them) of standard operating procedure, coupled with what appeared to be genuine confusion (not defensiveness) in their demeanor when asked about the subject, the Respondent's account of this process is less credible than the account of his former employees. The Government's expert, Dr. Becker, testified that in an office setting, auxiliaries of the practitioner routinely make these entries in the sedation logs, but he did not indicate whether it was based exclusively on the word of the practitioner or on their own personal observations. Tr. 146–47. The credible evidence supports the testimony supplied by Crockett and Tetzloff that they were tasked with recording the amounts of medication dictated by the Respondent.

The sedation logs that were noticed and initially provided by the Respondent was another aspect of this case that did not reflect well on his credibility. The Respondent testified that separate logs were generated and maintained at Norwalk and Avon,[69] but a consolidated version was provided to the tribunal. Resp't Ex. A (ID). Whether the Respondent's account of who completed the sedation logs or the account provided by his former employees is credited, no one who testified at the hearing suggested that multiple pages of entries were simultaneously prepared or maintained, yet the version of the logs initially provided by the Respondent was so replete with duplication that a modified version with the duplications culled out was prepared by his counsel after the commencement of the hearing. Resp't Ex. A–1; Tr. 703–05, 713–14. Additionally, although the sedation log pages contained an internal capacity to designate them as belonging to Norwalk, Avon, or another office, the pages provided did not designate any location. Resp't Ex. A–1; Tr. 756–57. The Respondent testified that as a result of Brinks' visit, he took the sedation logs and the medication from Avon to Norwalk, but when pressed on why there were so many duplicates among the sedation log pages, the Respondent stated that his office staff (specifically, "the front desk people")[70] prepared the logs and that he "rel[ied] on other people to help [him] me try to keep track of this." Tr. 697–700. Since DEA already knew the Respondent kept two sets of logs, consolidating them into one, disorganized version would accomplish no reasonable purpose. Puzzlingly, the Respondent's counsel then attempted to shift responsibility for the duplicates to staff at his law office. Tr. 701. It would simply make no sense that the clerical staff at counsel's office would spontaneously supplement the sedation logs provided by their client with multiple copies of randomly selected pages. Likewise, the fact that the version brought to the hearing had entries that were not initially presented to DI Brinks, and those additions are not readily apparent from the documents,[71] also casts doubt on their reliability. Paradoxically, the Respondent's version of who bears the responsibility of a plethora of duplicate records is the more plausible account, although it reflects poorly on his credibility, his recordkeeping, or both. In an acknowledgement of this reality, the Respondent ultimately conceded that the responsibility of the preparation of the logs as they were provided "falls to [him]." Tr. 703.

During his testimony, when the Respondent was asked to provide an account of what is required of a registrant "[b]ased on what you've learned" from DI Brinks' testimony, he replied as follows:

> I understand what [Brinks is] saying that every syringe I've got left over, I guess I've got to package it up and send it to either the Pharmacy Board or have the Pharmacy Board come or send it to [Brinks'] office in Cleveland, as I understand it now."

Tr. 709. Thus, by the Respondent's account, he has first learned of his disposal obligations as a registrant as he sat at his own revocation hearing and *guesses* that he is required to send it to an appropriate place for disposal. *See also,* Tr. 776. Remarkably, although served in August 2010 with an OSC which alleges, *inter alia,* that he has been improperly disposing of controlled substance without notifying DEA, the Respondent testified that his practice has not altered the manner in which it has been disposing of residual controlled substances (*to wit,* by squirting it down the drain without DEA approval), and did so as recently as the

[68] In addition to the testimony of Tetzloff and Crockett, this version of events is consistent with the account provided by another employee, Peg Herner, in her conversation with DI Brinks. Tr. 456.

[69] Tr. 694.

[70] Tr. 703.

[71] Tr. 591–92.

week before the hearing. Tr. 762–64, 777–78. More remarkable still, is the Respondent's testimony that, although he has stopped storing controlled substances at Avon, he continues to administer controlled substances there, despite the fact that it has never been a registered COR location. Tr. 764–66. When asked why he has persisted in this conduct, notwithstanding the current charges, the Respondent explained that he finds proper disposal "to be very laborious." Tr. 775–76. Respondent also testified that every dentist he knows disposes of substances in a similar way and that, therefore he "didn't know if that [regulation] really pertained to me." Tr. 780–81.

The issue of the Respondent's credibility was a mixed bag. As discussed at length, supra, the Respondent's answers were intermittently inconsistent, implausible, and periodically lacking in detail. There were some issues, such as his background, education, and mental health issues, where his testimony had sufficient indicia of reliability to be credited, and there were other matters, several of which were in conflict with other evidence, where his version of events must be found to be less than completely credible.

Additional facts required for a resolution of the issues in this matter are set forth below.

The Analysis

Pursuant to 21 U.S.C. 824(a)(4) (2006), the Administrator[72] is permitted to revoke a COR if persuaded that the registrant "has committed such acts as would render * * * registration under section 823 * * * inconsistent with the public interest * * *." The following factors have been provided by Congress in determining "the public interest":

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The [registrant's] experience in dispensing, or conducting research with respect to controlled substances.

(3) The [registrant's] conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.

(4) Compliance with applicable State, Federal or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety. 21 U.S.C. 823(f) (2006 & Supp. III 2010).

"[T]hese factors are considered in the disjunctive." *Robert A. Leslie, M.D.*, 68 FR 15227, 15230 (2003). Any one or a combination of factors may be relied upon, and when exercising authority as an impartial adjudicator, the Administrator may properly give each factor whatever weight she deems appropriate in determining whether a registration should be rejected. *Morall* v. *DEA*, 412 F.3d 165, 173–74 (D.C. Cir. 2005); *JLB, Inc., d/b/a Boyd Drugs*, 53 FR 43945, 43947 (1988); *David E. Trawick, D.D.S.*, 53 FR 5326, 5327 (1988); *see also Joy's Ideas*, 70 FR 33195, 33197 (2005); *David H. Gillis, M.D.*, 58 FR 37507, 37508 (1993); *Henry J. Schwarz, Jr., M.D.*, 54 FR 16422, 16424 (1989). Moreover, the Administrator is "not required to make findings as to all of the factors * * *." *Hoxie* v. *DEA*, 419 F.3d 477, 482 (6th Cir. 2005); *see also Morall*, 412 F.3d at 173–74. The Administrator is not required to discuss consideration of each factor in equal detail, or even every factor in any given level of detail. *Trawick* v. *DEA*, 861 F.2d 72, 76 (4th Cir. 1988) (the Administrator's obligation to explain the decision rationale may be satisfied even if only minimal consideration is given to the relevant factors and remand is required only when it is unclear whether the relevant factors were considered at all). The balancing of the public interest factors "is not a contest in which score is kept; the Agency is not required to mechanically count up the factors and determine how many favor the Government and how many favor the registrant. Rather, it is an inquiry which focuses on protecting the public interest * * *." *Jayam Krishna-Iyer, M.D.*, 74 FR 459, 462 (2009).

In an action to revoke a registrant's COR, the DEA has the burden of proving that the requirements for revocation are satisfied. 21 CFR 1301.44(e) (2011). The Government may sustain its burden by showing that the Respondent has committed acts inconsistent with the public interest.[73] *Jeri Hassman, M.D.*, 75 FR 8194, 8235–36 (2010). Once DEA has made its *prima facie* case for revocation of the registrant's COR, the burden of production then shifts to the Respondent to present sufficient mitigating evidence to assure the Administrator that he or she can be entrusted with the responsibility commensurate with such a registration and that revocation is not appropriate. *Steven M. Abbadessa, D.O.*, 74 FR 10077, 10078, 10081 (2009); *Medicine Shoppe-Jonesborough*, 73 FR 364, 387 (2008); *Samuel S. Jackson, D.D.S.*, 72 FR 23848, 23853 (2007); *Morall*, 412 F.3d at 174; *Humphreys* v. *DEA*, 96 F.3d 658, 661 (3d Cir. 1996); *Shatz* v. *U.S. Dept. of Justice*, 873 F.2d 1089, 1091 (8th Cir. 1989); *Thomas E. Johnston*, 45 FR 72311, 72312 (1980). Further, "to rebut the Government's *prima facie* case, [the Respondent] is required not only to accept responsibility for [the established] misconduct, but also to demonstrate what corrective measures [have been] undertaken to prevent the reoccurrence of similar acts." *Jeri Hassman, M.D.*, 75 FR at 8236. Normal hardships to the practitioner and even to the surrounding community that are attendant upon the lack of registration are not relevant considerations. *Linda Sue Cheek, M.D.*, 76 FR 66972, 66973 (2011); *Abbadessa*, 74 FR at 10078; *see also Gregory D. Owens, D.D.S.*, 74 FR 36751, 36757 (2009).

While the burden of proof at this administrative hearing level is a preponderance-of-the-evidence standard, *see Steadman* v. *SEC*, 450 U.S. 91, 100–01 (1981), the Administrator's factual findings will be sustained on review to the extent they are supported by "substantial evidence." *Hoxie*, 419 F.3d at 481. And while "the possibility of drawing two inconsistent conclusions from the evidence" does not limit the Administrator's ability to find facts on either side of the contested issues in the case. *Shatz*, 873 F.2d at 1092; *Trawick*, 861 F.2d at 77, all "important aspect[s] of the problem," such as a Respondent's defense or explanation that runs counter to the Government's evidence, must be considered. *Wedgewood Vill. Pharmacy* v. *DEA*, 509 F.3d 541, 549 (D.C. Cir. 2007); *Humphreys*, 96 F.3d at 663. The ultimate disposition of the case must be in accordance with the weight of the evidence, not simply supported by enough evidence to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. *Steadman*, 450 U.S. at 99 (internal quotation marks omitted).

Regarding the exercise of discretionary authority, the courts have recognized that gross deviations from past agency precedent must be adequately supported, *Morall*, 412 F.3d at 183, but mere unevenness in

[72] This authority has been delegated pursuant to 28 CFR 0.100(b) and 0.104 (2010).

[73] The Agency's conclusion that past performance is the best predictor of future performance has been sustained on review in the courts, *Alra Labs.* v. *DEA*, 54 F.3d 450, 452 (7th Cir. 1995), as has the Agency's consistent policy of strongly weighing whether a registrant who has committed acts inconsistent with the public interest has accepted responsibility and demonstrated that he or she will not engage in future misconduct. *Hoxie*, 419 F.3d at 483; *Ronald Lynch, M.D.*, 75 FR 78745, 78749 (2010) (Respondent's attempts to minimize misconduct held to undermine acceptance of responsibility); *George Mathew, M.D.*, 75 FR 66138, 66140, 66145, 66148 (2010); *East Main Street Pharmacy*, 75 FR 66149, 66165 (2010); *George C. Aycock, M.D.*, 74 FR 17529, 17543 (2009); *Abbadessa*, 74 FR at 10078; *Krishna-Iyer*, 74 FR at 463; *Medicine Shoppe*, 73 FR at 387.

application does not, standing alone, render a particular discretionary action unwarranted. *Chein* v. *DEA*, 533 F.3d 828, 835 (D.C. Cir. 2008) (citing *Butz* v. *Glover Livestock Comm. Co.*, 411 U.S. 182, 188 (1973)), *cert. denied*, __ U.S. __, 129 S. Ct. 1033, 1033 (2009). It is well-settled that since the Administrative Law Judge has had the opportunity to observe the demeanor and conduct of hearing witnesses, the factual findings set forth in this recommended decision are entitled to significant deference, *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 496 (1951), and that this recommended decision constitutes an important part of the record that must be considered in the Administrator's decision, *Morall*, 412 F.3d at 179. However, any recommendations set forth herein regarding the exercise of discretion are by no means binding on the Administrator and do not limit the exercise of that discretion. 5 U.S.C. 557(b) (2006); *River Forest Pharmacy, Inc.* v. *DEA*, 501 F.2d 1202; 1206 (7th Cir. 1974); *Attorney General's Manual on the Administrative Procedure Act* 8 (1947).

Factors 1 and 3: The Recommendation of the Appropriate State Licensing Board or Professional Disciplinary Authority; and Any Conviction Record Under Federal or State Laws Relating to the Manufacture, Distribution, or Dispensing of Controlled Substances

In this case, it is undisputed that the Respondent holds a valid and current state license to practice medicine in Ohio. Although the Government introduced evidence that the Ohio Dental Board has previously placed the Respondent's state medical privileges on a period of suspension that was completed without complication, the matter was unrelated to the Respondent's obligations as a DEA registrant and not relevant here. Tr. 391–92, 394–96; *see Judulang* v. *Holder*, 132 S.Ct. 476, 556 U.S. ____ (2011) (invalidating Board of Immigration Appeals decision making practice where the "rule [was] unmoored from the purposes and concerns of the immigration laws."). Although Ms. Reitz, from the Ohio Dental Board, testified that there is an ongoing Board investigation into matters in common with these proceedings,[74] the record contains no evidence of a recommendation regarding the Respondent's medical privileges related to these issues by any cognizant state licensing board or professional disciplinary authority. The fact that an investigation by state authorities is pending is neither supportive of revocation nor antithetical to it. That a state has not acted against a registrant's medical license is not dispositive in this administrative determination as to whether continuation of a registration is consistent with the public interest. *Patrick W. Stodola, M.D.*, 74 FR 20727, 20730 (2009); *Jayam Krishna-Iyer*, 74 FR at 461. It is well-established Agency precedent that a "state license is a necessary, but not a sufficient condition for registration." *Leslie*, 68 FR at 15230; *John H. Kennedy, M.D.*, 71 FR 35705, 35708 (2006). Even the reinstatement of a state medical license does not affect the DEA's independent responsibility to determine whether a registration is in the public interest. *Mortimer B. Levin, D.O.*, 55 FR 9209, 8210 (1990). The ultimate responsibility to determine whether a registration is consistent with the public interest has been delegated exclusively to the DEA, not to entities within state government. *Edmund Chein, M.D.*, 72 FR 6580, 6590 (2007), *aff'd*, *Chein* v. *DEA*, 533 F.3d 828 (D.C. Cir. 2008), *cert. denied*, __ U.S. __, 129 S. Ct. 1033 (2009). Congress vested authority to enforce the CSA in the Attorney General, not state officials. *Stodola*, 74 FR at 20375. While Respondent contends that the lack of board action weighs against revocation, Resp't Brief at 15, Agency precedent establishes that, where the record contains no evidence of a recommendation by a state licensing board, such absence does not weigh for or against a determination as to whether continuation of the Respondent's DEA certification is consistent with the public interest. *See Ronie Dreszer, M.D.*, 76 FR 19434, 19444 (2011) ("[T]he fact that the record contains no evidence of a recommendation by a state licensing board does not weigh for or against a determination as to whether continuation of the Respondent's DEA certification is consistent with the public interest."). Accordingly, Factor One does not weigh for or against revocation in this matter. *Id.*

Regarding the third factor (convictions relating to the manufacture, distribution, or dispensing of controlled substances), the record in this case does not contain evidence that the Respondent has been convicted of a crime related to the manufacture, distribution, or dispensing of controlled substances. DEA administrative proceedings are non-punitive and "a remedial measure, based upon the public interest and the necessity to protect the public from those individuals who have misused controlled substances or their DEA COR, and who have not presented sufficient mitigating evidence to assure the [Administrator] that they can be trusted with the responsibility carried by such a registration." *Jackson*, 72 FR at 23853; *Leo R. Miller, M.D.*, 53 FR 21931, 21932 (1988). Where evidence in a particular case reflects that the Respondent has acquired convictions relating to the manufacture, distribution, or dispensing of controlled substances, those convictions must be carefully examined and weighed in the adjudication of whether the issuance of a registration is in the public interest. 21 U.S.C. 823(f).

Although the standard of proof in a criminal case is more stringent than the standard required at an administrative proceeding, and the elements of both federal and state crimes relating to controlled substances are not always co-extensive with conduct that is relevant to a determination of whether registration is within the public interest, evidence that a registrant has been convicted of crimes related to controlled substances is a factor to be evaluated in reaching a determination as to whether he or she should be entrusted with a DEA certificate. While Respondent contends that the lack of convictions should weigh in his favor, Resp't Posth'g Brf. at 19, the probative value of an absence of any evidence of criminal prosecution, even if conceded as relevant *arguendo*, is perforce diminished by the myriad of considerations that are factored into a decision to initiate, pursue, and dispose of criminal proceedings by Federal, State, and local prosecution authorities. *See Robert L. Dougherty, M.D.*, 76 FR 16823, 16833 n.13 (2011); *Dewey C. Mackay, M.D.*, 75 FR 49956, 49973 (2010) ("[W]hile a history of criminal convictions for offenses involving the distribution or dispensing of controlled substances is a highly relevant consideration, there are any number of reasons why a registrant may not have been convicted of such an offense, and thus, the absence of such a conviction is of considerably less consequence in the public interest inquiry.") (citing *Jayam Krishna-Iyer, M.D.*, 74 FR 459, 461 (2009); *Edmund Chein, M.D.*, 72 FR 6580, 6593 n.22 (2007), *aff'd, Chein v. DEA*, 533 F.3d 828 (D.C. Cir. 2008), *cert. denied*, __ U.S. __, 129 S. Ct. 1033 (2009)); *Ladapo O. Shyngle, M.D.*, 74 FR 6056, 6057 n.2 (2009).

Accordingly, consideration of the evidence of record under the first and third factors neither supports the Government's argument for revocation nor militates against it.

[74] Tr. 392–409, 412, 422–23.

Factors 2 and 4: Experience in Dispensing Controlled Substances and Compliance With Applicable State, Federal, or Local Laws Relating to Controlled Substances

In this case, the gravamen of the Government's case relates to the allegations that the Respondent: (1) Failed to comply with the CSA's registration requirements; (2) failed to adhere to the CSA's recordkeeping and security requirements and was unable to account for both shortages and overages of controlled substances; and (3) dispensed controlled substances to himself for illegitimate purposes.[75]

Regarding Factor 2, in requiring an examination of a registrant's experience in dispensing controlled substances, Congress manifested an acknowledgement that the qualitative manner and the quantitative volume in which a registrant has engaged in the dispensing of controlled substances, and how long he or she has been in the business of doing so, are significant factors to be evaluated in reaching a determination as to whether he or she should be entrusted with a DEA COR. In some cases, viewing a registrant's actions against a backdrop of how he has performed activity within the scope of the certificate can provide a contextual lens to assist in a fair adjudication of whether continued registration is in the public interest.

Evidence that a practitioner may have conducted a significant level of sustained activity within the scope of the registration for a sustained period can be a relevant and correct consideration, which may be accorded due weight. The registrant's knowledge and experience regarding the rules and regulations applicable to practitioners also may be considered. *See Volusia Wholesale*, 69 FR69409, 69410 (2004) (List I case).[76] However, the Agency has taken the reasonable position that this factor can be outweighed by acts held to be inconsistent with the public interest. *Jayam Krishna-Iyer*, 74 FR at 463; *see also Jeri Hassman, M.D.*, 75 FR 8194, 8235 (2010) (acknowledging Agency precedential rejection of the concept that conduct which is inconsistent with the public interest is rendered less so by comparing it with a respondent's legitimate activities which occurred in substantially higher numbers); *Paul J. Cargine, Jr.*, 63 FR 51592, 51560 (1998) ("[E]ven though the patients at issue are only a small portion of Respondent's patient population, his prescribing of controlled substances to these individuals raises serious concerns regarding [his] ability to responsibly handle controlled substances in the future.").

Experience which occurred prior or subsequent to proven allegations of malfeasance may be relevant. Evidence that precedes proven misconduct may add support to the contention that, even acknowledging the gravity of a registrant's transgressions, they are sufficiently isolated and/or attenuated that adverse action against his registration is not compelled by public interest concerns. Likewise, evidence presented by the Government that the proven allegations are congruous with a consistent past pattern of poor behavior can enhance the Government's case.

In a similar vein, conduct which occurs after proven allegations can shed light on whether a registrant has taken steps to reform and/or conform his or her conduct to appropriate standards. Contrariwise, a registrant who has persisted in incorrect behavior, or made attempts to circumvent Agency directives, even after being put on notice, can diminish the strength of its case. *Novelty, Inc.*, 73 FR 52689, 52703 (2008), *aff'd*, 571 F.3d 1176 (D.C. Cir. 2009); *Southwood Pharm., Inc.*, 72 FR 36487, 36503 (2007); *John J. Fotinopoulous*, 72 FR 24602, 24606 (2007).

In *Jayam Krishna-Iyer*, 74 FR at 463, DEA acknowledged the reality that even a significant and sustained history of uneventful practice under a DEA certificate can be offset by proof that a registrant has committed acts inconsistent with the public interest. *Id.* Even, "evidence that a practitioner has treated thousands of patients does not negate a prima facie showing that the practitioner has committed acts inconsistent with the public interest." *Id.* The Agency, in its administrative precedent, has further curtailed the scope of Factor 2. The Agency's current view regarding Factor 2 is that, while evidence of a registrant's experience handling controlled substances may be entitled to some weight in assessing whether errant practices have been reformed, where the evidence of record raises intentional or reckless actions on the part of the registrant, such evidence is entitled to no weight where a practitioner fails to acknowledge wrongdoing in the matters before the Agency. *Cynthia M. Cadet, M.D.*, 76 FR 19450 n.3 (2011); *Roni Dreszer, M.D.*, 76 FR 19434 n.3 (2011); *Michael J. Aruta, M.D.*, 76 FR 19420 n.3 (2011); *Jacobo Dreszer, M.D.*, 76 FR 19386–87 n.3 (2011). This reasonable approach accepts the unavoidable logic that a transgression can only be rationally styled as an aberration when it is acknowledged by the actor as a transgression for which remorse is demonstrated.

The Respondent argues that his professional experience supports favorable consideration under Factor 2. Resp't Posth'g Brf. at 16–19. Indeed, on the present record, it is undisputed that the Respondent has uneventfully practiced dentistry for over two decades, is a periodontic specialist, has published numerous scholarly articles in his field, and was sufficiently accomplished in his profession that he has served as a professor and clinical director Case Western Reserve School of Dental Medicine. Resp't Ex. E; Tr. 655–56. While the Respondent's level of professional achievement is undeniably impressive, he has offered no affirmative evidence regarding his experience dispensing controlled substances from peers, co-workers, or even himself. Still, his professional experience and contributions to his field have been considered in this recommended decision.

Regarding Factor 4, Sections 822(e) and 1301.12 require that a registrant maintain "a separate registration * * * at each principal place of business or professional practice where the

[75] The present record is bereft of competent evidence to support this third factual allegation. The Respondent's erratic behavior was well-documented in the record, as were the IV marks on his hands and arms. The Respondent's explanation that the suspect marks were the product of some sort of hands-on IV experience by chronically untalented student dentists was more than just somewhat undermined by the blood and marks on the backs of his hands that were observed by his staff on a morning where he was inexplicably late for patients, and not teaching at Case Western Reserve. That the IV marks were the product of his large Newfoundland was about as unpersuasive as his "I'm a picker" theory. The evidence of record (enhanced by the Respondent's testimony) doubtless creates a suspicion that there was something more afoot than his offered explanations, but the Agency precedent on the subject has been commendably clear that "under the substantial evidence test, the evidence must 'do more than create a suspicion of the existence of the fact to be established.'" *Alvin Darby, M.D.*, 75 FR 26993, 26999, n.31 (2010) (citing *NLRB* v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939).

[76] In *Cynthia M. Cadet, M.D.*, 76 FR 19450, 19450 n.1 (2011), the Agency declined to adopt the List I experience analysis for practitioners charged with intentional diversion. Thus far, Agency precedent has left open the door to this form of evidence where intentional diversion has not been established. *Compare* 21 U.S.C. 823(h) (List I section mandating consideration of "any past *experience* of the applicant in the manufacture and distribution of chemicals,") (emphasis added) *with* 21 U.S.C. 823(f) (practitioner section mandating consideration of "[t]he applicant's *experience* in dispensing, or conducting research with respect to controlled substances.); *see U.S.* v. *Tinklenberg*, 131 S.Ct. 2007, 2019–20 (2011) ("Identical words used in different parts of a statute are presumed to have the same meaning absent indication to the contrary.").

applicant manufactures, distributes, or dispenses controlled substances or list I chemicals." This separate registration requirement has been called "an essential requirement of DEA's diversion control program." *Preventing the Accumulation of Surplus Controlled Substances at Long Term Care Facilities*, 70 FR 25462, 25463 (2005) *("Long Term Care")*. In its prehearing statement, the Government alleged that Respondent "administered controlled substances to patients from his Avon dental practice," but did not obtain a registration for the Avon location. Gov't PHS, at 7. Paragraph 5 of the OSC also alleged that Respondent "distributed controlled substances including fentanyl, diazepam and midazolam * * * to an unregistered location in violation of 21 CFR § 1307.11." [77] OSC, at ¶ 5.

The evidence of record establishes that Respondent maintained two dental offices: An office in Norwalk, where Respondent maintained his DEA registration; and an office in Avon, Ohio. Tr. 155–56, 221, 451–53. It appears that he practiced out of the Avon office once or twice per week. Tr. 156, 261. It is undisputed that controlled substances were, for a period of time, stored at Avon Office and that Respondent does not have a DEA registration for the Avon location. It is also undisputed that Respondent has regularly administered controlled substances for sedation at the Avon Office, and that he continues to do so. Tr. 764, Resp't Ex. M. Thus, it is clear that Respondent has administered controlled substances at a location that is unregistered, and has thus violated sections 822(e) and 1301.12.[78] Furthermore, insofar as the Respondent continues to administer controlled substances at the Avon Office, it appears that Respondent remains in flagrant violation of this regulation.[79] Even apart from the reality that the Respondent, as a DEA registrant is responsible for understanding his obligations under the clear language of the relevant regulations, he has been given direct notice that his Avon Office location must be registered, by the initiation of these proceedings and a full, contested hearing on the matter; yet the Respondent doggedly refuses to bring himself into compliance. He has not sought to obtain a registration for the Avon Office and has not stopped administering controlled substances there as a regular part of his professional practice. Hence, in the face of his refusal to obey the law, consideration of this factor, even standing alone, persuasively and conclusively balances in favor of revocation.

In addition to the registration violations, the Government also alleges that Respondent failed to secure controlled substances properly at the Avon Office, in violation of 21 CFR 1301.75(b). ALJ Ex. 1. With regard to security, 21 CFR 1301.71(a) provides, in relevant part, that "[a]ll applicants and registrants shall provide effective controls and procedures to guard against theft and diversion of controlled substances. In order to determine whether a registrant has provided effective controls against diversion, the Administrator shall use the security requirements set forth in §§ 1301.72–1301.76 as standards for the physical security controls and operating procedures necessary to prevent diversion." While the security provisions of sections 1301.72 through 1301.76 are used as standards to determine compliance with section 1301.71(a), the language of each of these sections is phrased in mandatory terms. *See e.g.*, 21 CFR 1301.75(a) ("Controlled substances listed in Schedule I *shall* be stored in a securely, locked, substantially constructed cabinet.") (emphasis added); 21 CFR 1301.76(a) ("The registrant *shall not* * * *") (emphasis added). Thus, while compliance with the security provisions is a consideration under 21 CFR 1301.71(a), violation of any of the relevant security requirements in sections 1301.72–76 will be an independent consideration under Factor Four.

Section 1301.75(b) provides, in relevant part, that "[c]ontrolled substances listed in Schedules II, III, IV, and V shall be stored in a securely locked, substantially constructed cabinet. However, pharmacies and institutional practitioners may disperse such substances throughout the stock of noncontrolled substances in such a manner as to obstruct the theft or diversion of the controlled substances." The security requirements of section 1301.75 are designed "to prevent the unlawful diversion of * * * drugs." *Jerry Neil Rand, M.D.*, 61 FR 28895, 28897 (1996). Thus, a reasonable reading of the regulations would compel a registrant entrusted with the care of controlled substances to ensure that when the controlled substances are left unattended, they must be placed in a container meeting the requirements of section 1301.75. *See D-Tek Enterprises*, 56 FR 28926, 28926 (1991) ("21 CFR 1301.75 requires that all Schedule I and II controlled substances be *kept* in a securely locked, substantially constructed cabinet.") (emphasis added); *see also* Merriam-Webster Dictionary (Defining "kept" as "to cause to remain in a given place, situation or condition.").

Here, the testimony establishes that, on numerous occasions, supplies of controlled substances were left in gray, shoebox-sized bins on the counters of the sterilization room in the Avon Office. Specifically, Ms. Tetzloff and Ms. Crockett testified that they would leave the gray bins in the open while preparing for patients in the morning. Tr. 157–58, 233–34. While true that the sterilization room was not readily accessible to patients standing by in the waiting room, a counter is not a locked cabinet. The regulations, which specify that controlled substances be stored in locked containers, are designed to provide both security and accountability

[77] The CSA provides that "[t]he term 'distribute' means to deliver * * * a controlled substance or a listed chemical." 21 U.S.C. 802(a)(10). The term "deliver," in turn, is defined as "the actual, constructive, or attempted *transfer* of a controlled substance or a listed chemical, whether or not there exists an agency relationship." 21 U.S.C. 802(a)(8) (emphasis added). No authority has been cited which would stand for the proposition that a practitioner "distributes" controlled substances when he moves controlled substances from one of his offices to another. Rather, it seems that, under the CSA and its implementing regulations, controlled substances are distributed between persons, and not locations. See 21 CFR 1307.11–12 (Regulating distribution of controlled substances between parties without mention of location). Accordingly, the Government's charge brought under § 1307.11—that the Respondent distributed controlled substances improperly—is without merit.

[78] Through counsel in his Posthearing Brief, the Respondent acknowledges that dispensing in Avon without a valid COR was in violation of the law. Resp't Posth'g Brf. at 17, 20.

[79] As discussed, *supra*, through counsel in his Posthearing Brief, the Respondent acknowledges that dispensing in Avon without a valid COR was in violation of the law. Resp't Posthearing Brf. at 17, 20. Interestingly though, the Respondent's Posthearing Brief also contends that "he discontinued storing drugs at his Avon location in order to be in compliance with the regulations." Resp't Posthearing Brf. at 3. This position, consistent as it may be with the posture the Respondent took on this matter during his testimony, is unsupported in the law. Tr. 765. DEA regulations clearly establish that *all* professional practices at which controlled substances are distributed must have their own DEA registration. 21 CFR 1301.12. A narrow exception to this requirement applies only insofar as: (1) The practitioner has a valid DEA registration in the same state as the second location; (2) the practitioner does not store controlled substances at the second location; and (3) the practitioner does not administer controlled substances as a regular part of the professional practice at the second location. 21 CFR 1301.12(b)(3). The Respondent testified that IV sedation is a "critical component" of his practice, and that he conducted procedures administering controlled substances up to the week prior to the hearing. Tr. 660, 764. Under these circumstances (even apart from the Respondent's through-counsel concession on this issue), the Respondent is clearly administering controlled substances is a regular part of his Avon practice, and therefore, must be separately registered under the regulations.

in the maintenance of a closed regulatory system for controlled substances. *Jerry Neil Rand, M.D.*, 61 FR at 28897. Where accountability is concerned, the system must be as concerned with the accountability of health professionals with access to office spaces as it is with potential access by the patients waiting for treatment. It is clear that the controlled substances were not left in securely locked, substantially constructed cabinets, as required by the regulations. 21 CFR 1301.75. Accordingly, substantial evidence supports the conclusion that Respondent violated the security requirement set forth in section 1301.75, and this factor militates in favor of revocation.

To effectuate the dual goals of conquering drug abuse and controlling both legitimate and illegitimate traffic in controlled substances, "Congress devised a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA." *Gonzales* v. *Raich*, 545 U.S. 1, 13 (2005). Consistent with the maintenance of that closed regulatory system, accurate and reliable records are an obvious bedrock safeguard that is essential to ensure the integrity of the closed regulatory system. A truly closed system requires not only that certain records and inventories be kept by all those registrants who either generate or take custody of controlled substances in any phase of the distribution chain until they reach the ultimate user, but that those documents be subject to periodic inspection and ready retrieval for that purpose. Registrants, such as the Respondent, who are authorized to dispense controlled substances are required to keep such records, and to maintain those records in a manner that is "readily retrievable," upon demand of those DEA officials charged with conducting inspections. *See* 21 CFR 1304.04(g) & (f)(2) (2011); *see* 21 CFR 1304.03 (requiring recordkeeping set forth in § 1304.04 for dispensing physicians). Readily retrievable is defined in the regulations as "records kept * * * in such a manner that they can be separated out from all other records in a reasonable time * * *" 21 CFR 1300.01(b)(38).

The Government alleged that DI Brinks conducted a regulatory inspection on the Respondent's practice on December 21, 2009 and found multiple regulatory violations. ALJ Ex. 5 at 6. It need hardly be restated that the audit computation results as offered by DI Brinks at the hearing were profoundly problematic to say the least, and cannot be used to support a finding of substantial evidence of anything. However, the record does credibly establish that the Respondent, for his part, produced no purchase records, and was able to furnish Brinks with only three Form 222s over the course of a two-year period, which, even based on a cursory examination of the sedation logs,[80] was a fraction of what should have been available. Tr. 444, 446–48, 639–40. Of that paltry number, one was incomplete. Tr. 451. Notwithstanding the Respondent's regular practice of "wasting" residual medication, he was unable to produce any Form 41s. Tr. 443, 449–50.

In the present record, every health professional who provided evidence on the topic, including the Respondent, himself, is of the opinion that the amounts of controlled-substance medication administered by the Respondent to the patients depicted in the sedation logs is high. It was the view of the Government's expert, Dr. Becker, that the amounts administered would have resulted in unconsciousness and other complications, and that to the extent that the higher amounts were based on addressing sedation-resistant patients, that this temporally-limited sample contained more such resistant patients than he has encountered in a lifetime of practice. Interestingly, in his testimony, the Respondent did not dispute that the amounts were high, but offered that he is a specialist who deals in difficult cases, and that it could have been that the patients (even though there were quite a few in a small window of time) could have been medication resistant for reasons that he hypothesized could have been present. The Respondent's argument that he is a specialist and gets complicated cases is unpersuasive because his specialty is in periodontics, not sedation-resistant patients. His argument that these patients could all have been medication resistant is undermined by any efforts on the Respondent's part to introduce evidence to establish medication resistance based on any patient in issue, even though he is in possession of the patient charts. As discussed, *supra*, a scholarly discussion among health professionals as to what choices, levels and combinations of medication(s) achieve optimum results is a discussion for a different forum and beyond the proper jurisdiction of DEA and this forum to evaluate. *Gonzales* v. *Oregon*, 546 U.S. 243, 274 (2006). The issue here is diversion, and this tribunal (and this Agency) can have no reasonable view as to whether reasonable minds can, should, or do differ on the issue of whether the administered doses were out of line with accepted medical practice. That said, the Government's expert, Dr. Becker, provided credible, persuasive, and unrefuted testimony that the amounts of medication employed by the Respondent as reflected in the sedation logs he supplied would likely have resulted in unconsciousness. The Respondent's testimony that none of his sedated patients were ever unconscious is likewise credible. With the poor state of the Respondent's controlled substance records, it is not possible to conclusively determine whether the high levels of controlled substance medications were administered as noted. The results of the audit conducted by DEA regarding the Respondent's recordkeeping demonstrated sufficient inattention to maintaining required documentation that his records were not reliable. The accountability concerns credibly conveyed by Crockett and Tetzloff in their testimony were borne of this same unreliability in the state of the records. Reliable records are a key aspect of maintaining a closed system, and this aspect of the Respondent's practice impacts negatively on consideration of Factor 4.

Finally, it is noteworthy that Respondent concedes that he regularly disposed of controlled substances without notifying the DEA, in violation of the governing regulations. *See* 21 CFR 1307.21(a) (Registrants must notify regional Special Agent in Charge before disposing of controlled substances). Respondent also testified that, notwithstanding the DEA administrative proceedings pending against his COR, he continues to follow this practice, essentially because he feels that other professionals in his field do it as well.[81] Tr. 709, 762–64, 776–78. A defense of "other people are doing it too" is generally no more persuasive in administrative enforcement proceedings than it is in the defense of a traffic violation, however, this case contains the arguably different wrinkle that every witness who presented evidence on the issue from each party is in agreement that squirting or "wasting" residual, unused amounts of controlled substances into the drain is common practice among registrants. Tr. 55–58,

[80] As discussed at length, *supra*, the sedation logs that were provided to DI Brinks differed with those provided at the hearing. Those records provided at the hearing were replete with multiple duplications and transpositions of the quantities counted.

[81] This posture is likewise assumed by the Respondent in his Posthearing Brief. Resp't Post H'ring Brf. at 10.

100–01, 105, 631; Resp't Ex. J. This forum is without jurisdiction (or inclination) to question the wisdom of the prior-notification requirements applicable to controlled substance disposal. While the issue of a common practice which may be knowingly and routinely ignored by the Agency [82] may present an interesting legal issue in another case where an adequate record on the subject has been developed, under the circumstances presented here, the Respondent's unwillingness to cease this disposal practice in the face of actual notice by the Agency militates against entrusting him with a DEA registration under Factor 4.

Accordingly, consideration of Factors 2 and 4 militate in favor of the revocation of the Respondent's COR.

Factor 5: Such Other Conduct Which May Threaten the Public Health and Safety

The fifth statutory public interest factor directs consideration of "[s]uch *other conduct* which may threaten the public health and safety." 21 U.S.C. 823(f)(5) (emphasis supplied). Existing Agency precedent has long held that this factor encompasses "conduct which creates a probable or possible threat (and not only an actual [threat]) to public health and safety." *Dreszer*, 76 FR at 19434 n.3; *Aruta*, 76 FR at 19420 n.3; *Boshers*, 76 FR 19403 n.4; *Dreszer*, 76 FR at 19386–87 n.3. Agency precedent has generally embraced the principle that any conduct that is properly the subject of Factor Five must have a nexus to controlled substances and the underlying purposes of the CSA. *Terese, Inc., d/b/a/Peach Orchard Drugs*, 76 FR 46843, 46848 (2011); *Tony T. Bui, M.D.*, 75 FR 49979, 49989 (2010) (prescribing practices related to a non-controlled substance such as human growth hormone may not provide an independent basis for concluding that a registrant has engaged in conduct which may threaten public health and safety); *but see Paul Weir Battershell, N.P.*, 76 FR 44359, 44368 n.27 (2011) (a registrant's non-compliance with the Food, Drug, and Cosmetic Act may be considered on the narrow issue of assessing a respondent's future compliance with the CSA).

Similar "catch all" language is employed by Congress in the CSA related to the Agency's authorization to regulate controlled substance manufacturing and List I chemical distribution, but the language is by no means identical. 21 U.S.C. 823(d)(6), (h)(5). Under the language utilized by Congress in those provisions, the Agency may consider "such *other factors* as are relevant to and consistent with the public health and safety." *Id.* (emphasis supplied). In *Holloway Distributors*, 72 FR 42118, 42126 (2007), the Agency held this catch all language to be broader than the language directed at practitioners under "other conduct which may threaten the public health and safety" utilized in 21 U.S.C. 823(f)(5). In *Holloway*, the Agency stated that regarding the List I catch all:

> [T]he Government is not required to prove that the [r]espondent's conduct poses a threat to public health and safety to obtain an adverse finding under factor five. See *T. Young*, 71 [FR] at 60572 n.13. Rather, the statutory text directs the consideration of "such other factors as are relevant to and consistent with the public health and safety." 21 U.S.C. § 823(h)(5). This standard thus grants the Attorney General broader discretion than that which applies in the case of other registrants such as practitioners. See id. § 823(f)(5) (directing consideration of "[s]uch other conduct which may threaten the public health and safety").

72 FR at 42126.[83] Thus, the Agency has recognized that, while the factor five applicable to List I chemical distributors—21 U.S.C. 823(h)(5)—encompasses all "factors," the factor five applied to practitioners—21 U.S.C. 823(f)(5)—considers only "conduct." Furthermore, because section 823(f)(5) only implicates "such *other* conduct," it necessarily follows that conduct considered in factors one through four may not be considered at factor five.

As discussed, *supra*, the Government has alleged and established that the Respondent disposed of controlled substances without procuring the prior DEA approval required in the regulations. The manner of disposal here, *to wit*, squirting the controlled substances into the drain, and thus, the sewage and water treatment system is *conduct* that could arguably have public safety implications. Because the public safety aspect of this conduct was not factually developed at the hearing, it is not necessary to reach this issue, or the issue as to whether the ultimate destination of the "wasted" controlled substances constitutes *other conduct* separate and apart from the act of disposing without prior DEA authorization. Accordingly, there being no other conduct alleged (or proven) which may threaten the public health and safety, Factor Five weighs neither for nor against revocation.

Recommendation

All relevant acts alleged by the Government and established in the record relate to the Respondent's registered location in Norwalk and his unregistered office in Avon. Although no misconduct related to the Respondent's registered location in Milwaukee have been alleged or proved, these proceedings relate to whether he "has committed such acts as would render his registration under [21 U.S.C. 823] inconsistent with the public interest," (a question answered in the affirmative here) and whether, as a matter of discretion, the Respondent should continue to be entrusted by the Agency with responsibilities as a DEA registrant in all locations that are the subject of the OSC.

As set forth above, Factors 1, 3 and 5 do not weigh for against revocation. Under Factor Four, substantial evidence supports a finding that Respondent: (1) maintained an unregistered professional practice, in violation of 21 U.S.C. 822(e) and 21 CFR 1301.12; (2) failed to secure controlled substances properly, in violation of 21 CFR 1301.75(b); and (3) failed to dispose of controlled substances properly, in violation of 21 CFR 1307.21(a). These acts bear some resemblance to those found in *Daniel Koller, D.V.M.*, 71 FR 66975, 66982–83 (2006).

In *Koller*, the Agency found that the respondent had: (1) Not stored controlled substances in a securely locked, substantially constructed cabinet, in violation of 21 CFR 1301.75(b); (2) failed to maintain proper DEA Form 222s, in violation of 21 CFR 1304.22(c); (3) distributed controlled substances to an unregistered practitioner, in violation of 21 CFR 1307.11(a); and (4) maintained an unregistered professional practice, in violation of 21 U.S.C. 822(e) and 21 CFR 1301.12(a). 71 FR at 66982–83. The Agency was unimpressed with Koller's testimony that in his view it was 'an absurdity' to claim that he violated the law by taking controlled substances [from a registered location to an unregistered location] because he had a DEA registration for his San Diego Residence [and] could 'take those drugs anywhere he wanted.'" *Id.* at 66982. In denying Respondent's application for registration, the Agency held that "Respondent's repeated violations of the CSA provide ample grounds to deny his application. Moreover, Respondent's attitude leaves [the Agency] with the firm impression that, if given the

[82] This issue was not sufficiently developed on the present record to support a finding that DEA has made a determination to eschew enforcement of this provision. Indeed the charges in the present OSC counter such a position in the strongest terms possible.

[83] In *Bui*, the Agency clarified that "an adverse finding under [Factor Five did not require a] showing that the relevant conduct actually constituted a threat to public safety." 75 FR 49888 n.12.

opportunity, he will violate the Act again." *Koller*, 71 FR at 66983.

Like the registrant in *Koller*, the Respondent's repeated and continuing violations in the face of—and even motivated by—his disagreement with his obligations as a registrant, undermine the confidence that can be placed in him to execute his responsibilities in compliance with the law. *See Koller, D.V.M.*, 71 FR at 66983 ("Respondent's repeated violations of the CSA provide ample grounds to deny his application.").

Following the guidance of *Koller*, it is clear that the Government has sustained its burden of showing that Respondent committed acts inconsistent with the public interest. Accordingly, the burden shifts to the Respondent to show that he can be entrusted with a DEA registration. As discussed above, "to rebut the Government's *prima facie* case, [the Respondent] is required not only to accept responsibility for [the established] misconduct, but also to demonstrate what corrective measures [have been] undertaken to prevent the reoccurrence of similar acts." *Jeri Hassman, M.D.*, 75 FR at 8236. The present record does not present transgressions on a level that could not have been overcome by a credible and persuasive acceptance of responsibility coupled with a cogent plan for coming into compliance and avoiding future violations; but inasmuch as neither demonstration was convincingly offered by the Respondent, under current Agency precedent, he cannot prevail.

Here, while Respondent has nominally[84] acknowledged that his conduct was wrongful, Tr. 763, 765, he has failed to outline any steps he has taken to prevent the reoccurrence of the infractions. Generally, actions speak louder than words, and the Respondent's actions speak volumes about his level of responsibility acceptance. By his own admission, the Respondent continues to dispose of controlled substances down his office drains without DEA authorization, and continues to administer drugs at his unregistered Avon location. Tr. 764. The Respondent has also failed to outline any steps which he has taken (or even intends to take) that would tend to prevent controlled substances from being left unsecured during mornings at the *unregistered* Avon Office. Clear on the evidence presented here, is that far from demonstrating acceptance and contrition, the Respondent has violated the law, disagrees with the law, and has continued to violate the law even after the Agency served him with an OSC. Thus, in this case, the Respondent has failed to sustain his burden of showing that he can be entrusted with the responsibilities incumbent upon a DEA registrant. *Koller*, 71 FR at 66983; *Jeri Hassman, M.D.*, 75 FR at 8236.[85]

Where, as here, the Government has made out a *prima facie* case that the Respondent has committed acts that render registration inconsistent with the public interest, Agency precedent has firmly placed acknowledgement of guilt and acceptance of responsibility as conditions precedent to merit the granting or continuation of status as a registrant. *Hoxie* v. *DEA*, 419 F.3d 477, 483 (6th Cir. 2005); *Ronald Lynch, M.D.*, 75 FR 78745, 78749 (Respondent's attempts to minimize misconduct held to undermine acceptance of responsibility); *George Mathew, M.D.*, 75 FR 66138, 66140, 66145, 66148 (2010); *George C. Aycock, M.D.*, 74 FR 17529, 17543 (2009); *Steven M. Abbadessa, D.O.*, 74 FR 10077, 10078 (2009); *Jayam Krishna-Iyer, M.D.*, 74 FR 459, 463 (2009); *Medicine Shoppe-Jonesborough*, 73 FR 364, 387 (2008). As explained above, Respondent has not rebutted the Government's prima facie case to the extent that he can avoid the sanction of a revocation of his registrations. Accordingly, the Respondent's Certificate of Registrations should be *revoked*, and any pending renewal applications should be *denied*.

Dated: December 21, 2011.

John J. Mulrooney II,
Chief Administrative Law Judge.

[FR Doc. 2012–29333 Filed 12–4–12; 8:45 am]
BILLING CODE 4410–09–P

[84] Though the Respondent acknowledged wrong doing, he also testified, in essence, that "everybody does it." These ministrations echo the righteous protests put forth in *Koller;* and are no more compelling here. Accordingly, the evidence here, as in *Koller*, leaves "the firm impression that, if given the opportunity, [Respondent] will violate the [CSA] again." *Koller*, 71 FR at 66983.

[85] In its Posthearing Brief the Government contends that "the agency has recently admitted and considered testimony with regard to community impact [of revocation]." Gov't Posth'g Brf. at 33. However, the Agency has recently once again re-affirmed its view that "community impact evidence is not relevant in determining whether to * * * revoke an existing registration under the various authorities provided in 21 U.S.C. 824(a)." *Cheek, M.D.*, 76 FR at 66972. Accordingly, community impact has not played a role in this recommended decision. *Id.*

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Amy S. Benjamin, N.P.; Decision and Order

On April 20, 2012, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause to Amy S. Benjamin, N.P. (Respondent), of Wheeler, Mississippi. The Show Cause Order proposed the revocation of Respondent's DEA Certificate of Registration MB1536171, and the denial of any pending applications to renew or modify the registration, on the ground that Respondent lacks authority to handle controlled substances in Mississippi, the State in which she is registered with the Agency. Show Cause Order, at 1 (citing 21 U.S.C. 824(a)(3)). Specifically, the Show Cause Order alleged that on June 10, 2011, the State of Mississippi Board of Nursing issued a final order, which suspended her nursing license, to include her authority to handle controlled substances in the State. *Id.*

The Show Cause Order notified Registrant of her right to request a hearing on the allegations, or in lieu of a hearing, to submit a written statement regarding the matters of fact and law asserted therein; the procedures for doing either; and the consequences for failing to do either. *Id.* at 2 (citing 21 CFR 1301.43(a), (c), (d), & (e)). The Show Cause Order was personally served on Registrant by members of the DEA New Orleans Field Division-Oxford Resident Office on April 23, 2012. GX 2, at 2; GX 6. Since the date of service of the Show Cause Order, thirty days have now passed and neither Registrant, nor anyone purporting to represent her, has requested a hearing or submitted a written statement in lieu of a hearing. I therefore find that Registrant has waived her right to a hearing or to submit a written statement in lieu of a hearing. 21 CFR 1301.43(d).

I further find that Registrant's DEA registration was due to expire on July 31, 2012, and that Registrant has failed to submit a renewal application. *See* Gov. Notification of Registration Expiration, at Ex. B. Therefore, I find that Registrant's registration expired on July 31, 2012.

It is well settled that "[i]f a registrant has not submitted a timely renewal application prior to the expiration date, then the registration expires and there is nothing to revoke." *Ronald J. Riegel*, 63 FR 67132, 67133 (1998); *see also William W. Nucklos*, 73 FR 34330 (2008). Moreover, in the absence of an application (whether timely filed or not), there is nothing to act upon. *See Donald Brooks Reece II, M.D.*, 77 FR 35054 (2012). Because Registrant's registration has expired and there is no pending application to act upon, I conclude that this case is now moot and will be dismissed.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f) and 824(a), as well as 28 CFR 0.100(b), I order that the Order to Show Cause issued to Amy S. Benjamin, N.P., be, and it hereby is, dismissed.

Dated: November 16, 2012.

Michele M. Leonhart,

Administrator.

[FR Doc. 2012–29302 Filed 12–4–12; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances, Notice of Application, Mylan Pharmaceuticals, Inc.

Pursuant to Title 21 Code of Federal Regulations 1301.34 (a), this is notice that on October 8, 2012, Mylan Pharmaceuticals, Inc., 781 Chestnut Ridge Road, Morgantown, West Virginia 26505, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as an importer of the following basic classes of controlled substances:

Drug	Schedule
Amphetamine (1100)	II
Methylphenidate (1724)	II
Oxycodone (9143)	II
Hydromorphone (9150)	II
Methadone (9250)	II
Morphine (9300)	II
Fentanyl (9801)	II

The company plans to import the listed controlled substances in finished dosage form (FDF) from foreign sources for analytical testing and clinical trials in which the foreign FDF will be compared to the company's own domestically-manufactured FDF. This analysis is required to allow the company to export domestically-manufactured FDF to foreign markets.

Any bulk manufacturer who is presently, or is applying to be, registered with DEA to manufacture such basic classes of controlled substances listed in schedule II, which falls under the authority of section 1002(a)(2)(B) of the Act (21 U.S.C. 952(a)(2)(B)) may, in the circumstances set forth in 21 U.S.C. 958(i), file comments or objections to the issuance of the proposed registration and may, at the same time, file a written request for a hearing on such application pursuant to 21 CFR 1301.43 and in such form as prescribed by 21 CFR 1316.47.

Any such written comments or objections should be addressed, in quintuplicate, to the Drug Enforcement Administration, Office of Diversion Control, Federal Register Representative (ODL), 8701 Morrissette Drive, Springfield, Virginia 22152; and must be filed no later than January 4, 2013.

This procedure is to be conducted simultaneously with, and independent of, the procedures described in 21 CFR 1301.34(b), (c), (d), (e), and (f). As noted in a previous notice published in the **Federal Register** on September 23, 1975, 40 FR 43745–46, all applicants for registration to import a basic classes of any controlled substances in schedules I or II are, and will continue to be, required to demonstrate to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, that the requirements for such registration pursuant to 21 U.S.C. 958(a); 21 U.S.C. 823(a); and 21 CFR 1301.34(b), (c), (d), (e), and (f) are satisfied.

Dated: November 27, 2012.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2012–29410 Filed 12–4–12; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances; Notice of Application; Fisher Clinical Services, Inc.

Pursuant to Title 21 Code of Federal Regulations 1301.34 (a), this is notice that on October 16, 2012, Fisher Clinical Services, Inc., 7554 Schantz Road, Allentown, Pennsylvania 18106, made application to the Drug Enforcement Administration (DEA) for registration as an importer of levorphanol (9220), a basic class of controlled substance in schedule II.

The company plans to import the listed controlled substance for analytical research and clinical trials.

The import of the above listed basic class of controlled substance would be granted only for analytical testing and clinical trials. This authorization does not extend to the import of a finished FDA approved or non-approved dosage form for commercial distribution in the United States.

Any bulk manufacturer who is presently, or is applying to be, registered with DEA to manufacture such basic class of controlled substance listed in schedules I or II, which fall under the authority of section 1002(a)(2)(B) of the Act 21 U.S.C. 952(a)(2)(B) may, in the circumstances set forth in 21 U.S.C. 958(i), file comments or objections to the issuance of the proposed registration and may, at the same time, file a written request for a hearing on such application pursuant to 21 CFR 1301.43 and in such form as prescribed by 21 CFR 1316.47.

Any such written comments or objections should be addressed, in quintuplicate, to the Drug Enforcement Administration, Office of Diversion Control, **Federal Register** Representative (ODL), 8701 Morrissette Drive, Springfield, Virginia 22152; and must be filed no later than January 4, 2013.

This procedure is to be conducted simultaneously with, and independent of, the procedures described in 21 CFR 1301.34(b), (c), (d), (e), and (f). As noted in a previous notice published in the **Federal Register** on September 23, 1975, 40 FR 43745–46, all applicants for registration to import a basic class of any controlled substance in schedules I or II are, and will continue to be, required to demonstrate to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, that the requirements for such registration pursuant to 21 U.S.C. 958(a); 21 U.S.C. 823(a); and 21 CFR 1301.34(b), (c), (d), (e), and (f) are satisfied.

Dated: November 27, 2012.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2012–29404 Filed 12–4–12; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application: Siemens Healthcare Diagnostics, Inc.

Pursuant to § 1301.33(a) Title 21 of the *Code of Federal Regulations* (CFR), this is notice that on November 7, 2012, Siemens Healthcare Diagnostics, Inc., Attn: RA, 100 GBC Drive, Mail Stop 514, Newark, Delaware 19702, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of the following basic classes of controlled substances:

Drug	Schedule
Tetrahydrocannabinols (7370)	I
Ecgonine (9180)	II
Morphine (9300)	II

The company plans to produce the listed controlled substances in bulk to be used in the manufacture of reagents and drug calibrator controls which are DEA exempt products.

Any other such applicant, and any person who is presently registered with DEA to manufacture such substances, may file comments or objections to the issuance of the proposed registration pursuant to 21 CFR 1301.33(a).

Any such written comments or objections should be addressed, in quintuplicate, to the Drug Enforcement Administration, Office of Diversion Control, Federal Register Representative (ODL), 8701 Morrissette Drive, Springfield, Virginia 22152; and must be filed no later than February 4, 2013.

Dated: November 27, 2012.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2012–29411 Filed 12–4–12; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances, Notice of Application, ISP Inc

Pursuant to § 1301.33(a), Title 21 of the Code of Federal Regulations (CFR), this is notice that on October 26, 2012, ISP Inc., 238 South Main Street, Assonet, Massachusetts 02702, made application by renewal to the Drug Enforcement Administration (DEA) as a bulk manufacturer of the basic classes of controlled substances:

Drug	Schedule
2,5-Dimethoxyamphetamine (7396).	I
Amphetamine (1100)	II
Phenylacetone (8501)	II

The company plans to manufacture bulk API, for distribution to its customers. The bulk 2,5-Dimethoxyamphetamine will be used for conversion into non-controlled substances.

Any other such applicant, and any person who is presently registered with DEA to manufacture such substances, may file comments or objections to the issuance of the proposed registration pursuant to 21 CFR 1301.33(a).

Any such written comments or objections should be addressed, in quintuplicate, to the Drug Enforcement Administration, Office of Diversion Control, Federal Register Representative (ODL), 8701 Morrissette Drive, Springfield, Virginia 22152; and must be filed no later than February 4, 2013.

Dated: November 27, 2012.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2012–29407 Filed 12–4–12; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Unemployment Insurance Title XII Advances and Voluntary Repayment Process

ACTION: Notice.

SUMMARY: On November 30, 2012, the Department of Labor (DOL) will submit the Employment and Training Administration (ETA) sponsored information collection request (ICR) titled, "Unemployment Insurance Title XII Advances and Voluntary Repayment Process," to the Office of Management and Budget (OMB) for review and approval for continued use in accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501 et seq.).

DATES: Submit comments on or before December 31, 2012.

ADDRESSES: A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained from the RegInfo.gov Web site, *http://www.reginfo.gov/public/do/PRAMain*, on December 1, 2012, or by contacting Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or sending an email to *DOL_PRA_PUBLIC@dol.gov*.

Submit comments about this request to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL–ETA, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503, Fax: 202–395–6881 (this is not a toll-free number). email: *OIRA_submission@omb.eop.gov*.

FOR FURTHER INFORMATION CONTACT: Contact Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or by email at *DOL_PRA_PUBLIC@dol.gov*.

Authority: 44 U.S.C. 3507(a)(1)(D).

SUPPLEMENTARY INFORMATION: This information collection allows a State to maintain a process for the Governor to request advances and repay advances through correspondence with the Secretary of Labor. This information collection is subject to the PRA.

A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information if the collection of information does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under Control Number 1205–0199. The current approval is scheduled to expire on November 30, 2012; however, it should be noted that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. For additional information, see the related notice published in the **Federal Register** on September 28, 2012 (77 FR 59669).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section by December 31, 2012. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1205–0199. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Agency: DOL–ETA.

Title of Collection: Unemployment Insurance Title XII Advances and Voluntary Repayment Process.

OMB Control Number: 1205–0199.

Affected Public: State, Local, or Tribal Governments.

Total Estimated Number of Respondents: 27.

Total Estimated Number of Responses: 243.

Total Estimated Annual Burden Hours: 243.

Total Estimated Annual Other Costs Burden: $0.

Dated: November 23, 2012.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2012–29382 Filed 12–4–12; 8:45 a.m.]

BILLING CODE 4510–FW–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2012–0038]

The Standard on Personal Protective Equipment (PPE) for Shipyard Employment; Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Request for public comment.

SUMMARY: OSHA solicits public comments concerning its proposal to extend OMB approval of the information collection requirements specified in the Standard on Personal Protective Equipment (PPE) for Shipyard Employment (29 CFR part 1915, subpart I).

DATES: Comments must be submitted (postmarked, sent, or received) by February 4, 2013.

ADDRESSES:

Electronically: You may submit comments and attachments electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

Facsimile: If your comments, including attachments, are not longer than 10 pages, you may fax them to the OSHA Docket Office at (202) 693–1648.

Mail, hand delivery, express mail, messenger, or courier service: When using this method, you must submit a copy of your comments and attachments to the OSHA Docket Office, Docket No. OSHA–2012–0038, U.S. Department of Labor, Occupational Safety and Health Administration, Room N–2625, 200 Constitution Avenue NW., Washington, DC 20210. Deliveries (hand, express mail, messenger, and courier service) are accepted during the Department of Labor's and Docket Office's normal business hours, 8:15 a.m. to 4:45 p.m., e.t.

Instructions: All submissions must include the Agency name and OSHA docket number for this Information Collection Request (ICR) (OSHA–2012–0038). All comments, including any personal information you provide, are placed in the public docket without change, and may be made available online at *http://www.regulations.gov.* For further information on submitting comments see the "Public Participation" heading in the section of this notice titled **SUPPLEMENTARY INFORMATION.**

Docket: To read or download comments or other material in the docket, go to *http://www.regulations.gov* or the OSHA Docket Office at the address above. All documents in the docket (including this **Federal Register** notice) are listed in the *http://www.regulations.gov* index; however, some information (e.g., copyrighted material) is not publicly available to read or download through the Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. You may also contact Theda Kenney at the address below to obtain a copy of the ICR.

FOR FURTHER INFORMATION CONTACT: Theda Kenney or Todd Owen, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor, Room N–3609, 200 Constitution Avenue NW., Washington, DC 20210; telephone (202) 693–2222.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor, as part of its continuing effort to reduce paperwork and respondent (i.e., employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, collection instruments are clearly understood, and OSHA's estimate of the information collection burden is accurate. The Occupational Safety and Health Act of 1970 (the OSH Act) (29 U.S.C. 651 *et seq.*) authorizes information collection by employers as necessary or appropriate for enforcement of the OSH Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657). The OSH Act also requires that OSHA obtain such information with minimum burden upon employers, especially those operating small businesses, and to reduce to the maximum extent feasible unnecessary duplication of efforts in obtaining information (29 U.S.C. 657).

Subpart I specifies several paperwork requirements which are described below.

Hazard Assessment and Verification (§ 1915.152(b)). Section 1915.152(b) requires the employer to assess work activities to determine whether there are hazards present, or likely to be present, which necessitate the worker's use of PPE. If such hazards are present, or likely to be present, the employer must: (1) Select the type of PPE that will protect the affected workers from the hazards identified in the occupational hazard assessment; (2) communicate selection decisions to affected workers; (3) select PPE that properly fits each affected worker; and (4) maintain documentation that verifies the required occupational hazard assessment has been performed. The verification must contain the following information: occupation or trade assessed, the date(s) of the hazard assessment, and the name of the person performing the hazard assessment.

The standards on PPE protection for the eyes and face (§ 1915.153), head (§ 1915.155), feet (§ 1915.156), hands and body (§ 1915.157), lifesaving equipment (§ 1915.158), personal fall arrest systems (§ 1915.159), and positioning device systems (§ 1915.160) do not contain any separate information collection requirements.

Disclosure of Inspection Records. The Agency believes that some employers will be subject to an OSHA inspection annually and be required to disclose hazard assessment certification records.

II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the Agency's functions, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and

• Ways to minimize the burden on employers who must comply; for example, by using automated or other technological information collection and transmission techniques.

III. Proposed Actions

OSHA is requesting that OMB extend its approval of the collection of information requirements contained in the Standard on Personal Protective Equipment (PPE) for Shipyard Employment (29 CFR part 1915, subpart I). The Agency is requesting that it retain its current burden hour estimate of 51.

OSHA will summarize the comments submitted in response to this notice, and will include this summary in its request to OMB to extend the approval of the information collection requirements contained in the Standard on Personal Protective Equipment (PPE) for Shipyard Employment (29 CFR part 1915, subpart I).

Type of Review: Extension of a currently approved collection.

Title: Personal Protective Equipment Standard for Shipyard Employment (29 CFR part 1915, subpart I).

OMB Control Number: 1218–0215.

Affected Public: Business or other for-profits.

Total Responses: 636.

Frequency: On occasion.

Estimated Time per Response: An estimated 5 minutes (.08 hour) for employers to record the hazard assessment and 5 minutes (.08 hour) to disclose the record to an OSHA compliance officer.

Total Burden Hours: 51.

Estimated Cost (Operation and Maintenance): $0.

IV. Public Participation—Submission of Comments on this Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document as follows: (1) Electronically at *http://www.regulations.gov,* which is the Federal e-Rulemaking Portal; (2) by facsimile (fax); or (3) by hard copy. All comments, attachments, and other material must identify the Agency name and OSHA docket number for the ICR (Docket No. OSHA–2012–0038). You may supplement electronic submissions by uploading document files electronically. If you wish to mail additional materials in reference to an electronic or facsimile submission, you must submit them to the OSHA Docket Office (see the section of this notice titled **ADDRESSES**). The additional materials must clearly identify your electronic comments by your name, date, and the docket number so the Agency can attach them to your comments.

Because of security procedures, the use of regular mail may cause a significant delay in the receipt of comments. For information about security procedures concerning the delivery of materials by hand, express delivery, messenger, or courier service, please contact the OSHA Docket Office at (202) 693–2350, (TTY (877) 889–5627).

Comments and submissions are posted without change at *http://www.regulations.gov.* Therefore, OSHA cautions commenters about submitting personal information such as social security numbers and dates of birth. Although all submissions are listed in the *http://www.regulations.gov* index, some information (e.g., copyrighted material) is not publically available to read or download through this Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using the *http://www.regulations.gov* Web site to submit comments and access the docket is available through the Web site's "User Tips" link. Contact the OSHA Docket Office for information about materials not available through the Web site, and for assistance in using the Internet to locate docket submissions.

V. Authority and Signature

David Michaels, Ph.D., MPH, Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and Secretary of Labor's Order No. 1–2012 (77 FR 3912).

Signed at Washington, DC, on November 28, 2012.

David Michaels,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2012–29310 Filed 12–4–12; 8:45 am]

BILLING CODE 4510–26–P

POSTAL REGULATORY COMMISSION

[Docket No. CP2013–22; Order No. 1557]

International Mail Contract

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing concerning an additional inbound competitive Multi-Service Agreements with Foreign Postal Operators 1 negotiated service agreement with Hongkong Post. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* December 10, 2012.

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 November 28, 2012, the Postal Service filed a Notice, pursuant to 39 CFR 3015.5, stating that it has entered into an additional negotiated service agreement with foreign postal operator Hongkong Post (Agreement).[1] The Postal Service seeks to have the inbound portion of the Agreement, which concerns delivery of inbound Air CP[2], included within Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1 (MC2012–34) on the competitive product list. Notice at 1.

II. Notice of Filing

The Postal Service's filing consists of the Notice, an Excel file containing redacted financial workpapers, and four attachments. Attachment 1 is a redacted copy of the Agreement. Attachment 2 is the certified statement required by 39 CFR 3015.5(c)(2). Attachment 3 is a redacted copy of the Governors' Decision No. 10–3. Attachment 4 is an application for non-public treatment of unredacted material. *Id.* at 3. The Agreement's intended effective date is January 1, 2013. *Id.* at 4. The term is for one year after the effective date, unless terminated sooner. *Id.*

The Postal Service reviews the regulatory history of the Inbound Competitive Multi-Service Agreements with Foreign Operators 1 product and identifies the TNT Agreement (approved

[1] Notice of United States Postal Service of Filing Functionally Equivalent Inbound Competitive Multi-Service Agreement with a Foreign Postal Operator, November 28, 2012 (Notice).

[2] "CP" is an abbreviation used to identify or reference international parcel post (from the French phrase *colis postaux,* "postal package").

in Docket No. CP2010–95) as the baseline agreement for purposes of determining the functional equivalence of the instant Agreement.[3] *Id.* at 3. It asserts that the instant Agreement fits within applicable Mail Classification Schedule language and addresses functional equivalency with the baseline agreement, including similarity of cost characteristics. *Id.* at 3–7. The Postal Service also identifies differences between the two contracts, such as the deletion of an article, the addition of an article, revisions to articles as a result of negotiations, and the term, but asserts that these differences do not detract from a finding of functional equivalency. *Id.* at 5–6.

III. Commission Action

Notice of establishment of docket. The Commission establishes Docket No. CP2013–22 for consideration of matters raised by the Notice. The Commission appoints Allison J. Levy to serve as Public Representative in this docket.

Interested persons may submit comments on whether the Postal Service's filing in the captioned docket is consistent with the policies of 39 U.S.C. 3632 and 3633 and the requirements of 39 CFR part 3015. Comments are due no later than December 10, 2012. The public portions of this filing can be accessed via the Commission's Web site (*http://www.prc.gov*). Information on obtaining access to sealed material appears in 39 CFR part 3007.

IV. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket No. CP2013–22 for consideration of matters raised by the Postal Service's November 28, 2012 Notice.

2. Pursuant to 39 U.S.C. 505, Allison J. Levy is appointed 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 this proceeding are due no later than December 10, 2012.

4. The Secretary shall arrange for publication of this Order in the **Federal Register**.

By the Commission.

Ruth Ann Abrams,

Acting Secretary.

[FR Doc. 2012–29287 Filed 12–4–12; 8:45 am]

BILLING CODE 7710–FW–P

[3] The Postal Service identifies Governors' Decision No. 10–3 as the enabling Governors' Decision. *Id.* at 5. The status of the TNT Agreement as the baseline agreement was confirmed in Order No. 840, issued September 7, 2011.

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 30285; 812–13871]

William Blair & Company, L.L.C. and William Blair Funds.; Notice of Application

November 29, 2012.

AGENCY: Securities and Exchange Commission ("Commission" or "SEC").

ACTION: Notice of application for an order under sections 6(c) and 17(b) of the Investment Company Act of 1940 ("Act") for exemptions from section 17(a) of the Act, and under section 17(d) of the Act and rule 17d–1 thereunder to permit certain joint transactions.

SUMMARY OF APPLICATION: Applicants requests an order to permit certain registered open-end management investment companies or series thereof that are advised by William Blair & Company, L.L.C. ("William Blair") to invest in a private investment vehicle established by William Blair to invest in China A shares.

APPLICANTS: William Blair and William Blair Funds (the "Trust").

FILING DATES: The application was filed on February 22, 2011, and amended on August 26, 2011, June 15, 2012, and November 19, 2012. Applicants have agreed to file an amendment during the notice period, the substance of which is reflected in this notice.

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 December 20, 2012, 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: Richard W. Smirl, William Blair & Company, L.L.C., 222 West Adams Street, Chicago, IL 60606.

FOR FURTHER INFORMATION CONTACT: Jaea F. Hahn, Senior Counsel, at (202) 942–0614, 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 summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Applicants' Representations

1. The Trust, a Delaware statutory trust, is registered under Act as an open-end management investment company. One existing series of the Trust, the Emerging Markets Growth Fund (the "Initial Fund")[1] currently desires to purchase and redeem interests ("Interests") of separately identified series of the William Blair China A-Share Fund, which will rely on the exemptions from registration under the Act provided by section 3(c)(1) and/or 3(c)(7) of the Act (the "A Share Fund," and each separate series of the A Share Fund an "A Share Fund Series").[2]

2. William Blair is registered as an investment adviser under the Investment Advisers Act of 1940 ("Advisers Act"). William Blair serves as investment adviser to the Initial Fund pursuant to an investment advisory agreement between William Blair and the Trust, on behalf of the Initial Fund (the "Advisory Agreement"). As the Initial Fund's investment adviser, William Blair is responsible for making investment decisions for the Initial Fund and administering the business and affairs of the Initial Fund, subject to the oversight of the Board of Trustees of the Trust ("Board"), at least a majority of whose members are not considered "interested persons" of the Initial Fund

[1] The Initial Fund currently anticipates investing in the A Share Fund Series, although final investment decisions will be made in light of the amount of quota available, account eligibility and then-current market conditions at the time of investment.

[2] Each entity that currently intends to rely on the requested relief has been named as an applicant. Any current or future series of the Trust and any other existing or future registered open-end management investment company or series thereof for which William Blair, or any person controlling, controlled by, or under common control with William Blair, or its or their successors (a "William Blair Affiliate") acts as an investment adviser that may rely on the requested relief in the future is a "Future Fund" (together with the Initial Fund, the "Funds"). For purposes of the requested order, "successor" is limited to an entity that results from reorganization into another jurisdiction or a change in the type of business organization. Each Fund or other entity that may rely on the requested relief in the future will do so only in accordance with the terms and conditions of the requested order.

as defined in Section 2(a)(19) ("Independent Trustees"). Under the terms of the Advisory Agreement, William Blair is entitled to receive monthly management fees from the Initial Fund at a specified annual rate. William Blair also manages or will manage separate accounts, collective investment trusts and funds registered in other jurisdictions, and may organize private pooled investment vehicles in the future (together, "Other Accounts"). These Other Accounts may have similar investment objectives and strategies as the Funds, and may invest in A Share Fund Series along with one or more Funds.

3. Applicants state that a significant majority of publicly traded Chinese companies list their shares on one or more of three stock exchanges—the Shanghai, Shenzhen and Hong Kong Stock Exchanges. The Shanghai and Shenzhen exchanges are located in mainland China and there are two categories of stock that are listed on these exchanges: China "A Shares" which trade in the currency of China, the renminbi, and "B Shares" which trade in foreign currencies. "H Shares" and "red chip" shares are listed and traded on the Hong Kong Stock Exchange.[3] Applicants state that far fewer Chinese companies have listed their shares as H Shares or red chips.

4. The Initial Fund currently invests in China through "H Shares" or "red chip" stocks. Applicants state that for a variety of reasons, China A Shares are a more attractive means to invest in Chinese companies, than H Shares red chip stocks or China B Shares. Applicants state that, while it is not practical or economical for Funds or Other Accounts to invest directly in China A Shares, a pooled investment vehicle would allow the Funds and Other Accounts to gain focused exposure to China A Shares.[4]

Applicants represent that the A Share Fund will be the entity that invests in and holds China A Shares; the A Share Fund was named as the investing vehicle in William Blair's application to obtain a license to invest in China. Interests in the A Share Fund will be sold only to the Funds and the Other Accounts.

5. The A Share Fund has filed a Certificate of Formation, to be effective as of December 17, 2012, and will be organized as a Delaware limited liability company, with William Blair, or a William Blair Affiliate, as its managing member. The A Share Fund will not have a board of directors or trustees. The A Share Fund may establish one or more separately identified A Share Fund Series, and a Fund or Other Account may invest in some or all of the different A Share Fund Series.[5] Each A Share Fund Series will have its own portfolio manager or portfolio management team at William Blair who will be responsible for selecting particular China A Shares for investment by that A Share Fund Series. Each Fund or Other Account investing in an A Share Fund Series will hold Interests which will represent a proportionate share of the A Share Fund Series' net assets and a proportionate claim on the A Share Fund Series' net income. Interests in an A Share Fund Series used by the Funds will be valued daily in accordance with the Funds' valuation procedures and in accordance with section 2(a)(41) of the Act. Each Interest would have the same rights as any other Interest, and the A Share Fund Series would not issue preferred interests.

6. William Blair will not charge advisory fees to A Share Fund Series used by the Funds. William Blair will, however be entitled to receive applicable advisory fees from the Funds or Other Accounts. Expenses of the A Share Fund Series will be charged to the A Share Fund Series as a whole and accrue on a daily basis.[6] The A Share Fund's books and those of the A Share Fund Series will be accounted for under standard accounting principles and in accordance with U.S. Generally Accepted Accounting Principles ("GAAP"), and they will be audited annually by a nationally recognized and PCAOB-registered audit firm in accordance with U.S. Generally Accepted Auditing Standards ("GAAS").[7] The A Share Fund Series used by the Funds will not lever themselves through borrowing, but A Share Fund Series used exclusively by Other Accounts may use leverage.

7. A Fund's decision to invest in an A Share Fund Series will be made by a Fund's portfolio manager(s). Because of the repatriation restrictions, investments in China A Shares would be deemed illiquid investments. Each Fund will, at all times, limit its holdings in the A Share Fund to no more than 15% of its net assets. Applicants state that access by the Funds and Other Accounts to the quota (*i.e.*, to China A Shares) through the A Share Fund Series is a limited opportunity and will be allocated in accordance with William Blair's Trade Allocation Policy. Under William Blair's Trade Allocation Policy, if fewer Interests are available than requested by the portfolio managers of the Funds and Other Accounts, Interests will generally be allocated across participating accounts on a *pro rata* basis according to requested order size. Similarly, if more than one Fund or Other Account seeks to repatriate proceeds at or about the same time, and Chinese regulations limit the aggregate amount of proceeds that may be repatriated at any given time to a level below the aggregate amount sought to be repatriated, the requests by the applicable portfolio manager(s) will be aggregated, if received at or about the same time, and proceeds available for repatriation will be allocated *pro rata* among requesting Funds and Other Accounts.[8] William Blair will not consider the potential impact on the A Shares quota when making investment decisions for the Funds or Other Accounts.[9]

[3] H Shares are shares of companies incorporated in mainland China, listed on the Hong Kong Stock Exchange and traded in Hong Kong dollars. "Red chip" shares are listed and traded on the Hong Kong Stock Exchange, issued by companies based in mainland China but incorporated outside of mainland China.

[4] Applicants state that until 2002, the Chinese government restricted investment in China A Shares to domestic (*i.e.*, Chinese) investors. Since 2002, the Chinese Government has permitted certain non-Chinese investors to invest in China A Shares, but to do so, a foreign investor must apply for, and receive a license as a Qualified Foreign Institutional Investor or "QFII" and be allotted a quota, representing the amount in renminbi of China A Shares that the investor may purchase. William Blair has received a QFII license and was granted a quota of US$100 million so that it can invest in China A Shares on behalf of the Funds and Other Accounts. As described more fully in the application, individual applications on behalf of each Fund or Other Account would generally not be practical or feasible.

[5] Applicants state that initially, one A Share Fund Series is contemplated but in the future, additional A Share Fund Series may be established for different types of investors or to invest in different companies based generally on the particular characteristics of those companies.

[6] Expenses of the A Share Fund Series will include basic fees and expenses of service providers, such as the administrator, accountant, local custodian and legal counsel.

[7] Applicants state that the GAAS standards applicable to the audit of the A Share Fund would be the same standards as those applicable to a registered investment company. Further, applicants state that GAAP would apply to both the A Share Fund audit and a registered investment company audit. Thus, applicants assert that critical accounting policies governing security valuation, accounting for investment transactions, recognition of investment income and of expenses, and accrual of expenses, which are often the critical policies applicable to investment companies, would apply in substantially the same manner for the audit of the A Share Fund.

[8] Applicants are not seeking comfort nor is the Commission providing any opinion on whether the Trade Allocation Policy meets the standards applicable under the Act or the Advisers Act.

[9] Applicants state that the Chinese authorities may reduce or revoke a QFII's quota if the QFII does not invest the full amount of its quota over a phase-in period, or, in certain cases, if it repatriates its investments below the quota amount.

8. Applicants request an order pursuant to sections 6(c) and 17(b) of the Act and pursuant to section 17(d) of the Act and rule 17d-1 under the Act solely to the extent necessary to permit: (a) The Funds to purchase Interests of the A Share Fund Series; (b) the A Share Fund to sell Interests in its Series to the Funds, and to redeem such shares held by the Funds upon the demand of the Funds; and (c) William Blair (or an William Blair Affiliate) to provide investment management services to the Funds and A Share Fund.

Applicants' Legal Analysis

1. Section 17(a) generally provides, in part, that it is unlawful for any affiliated person of a registered investment company ("first-tier affiliate"), or any affiliated person of such person ("second tier affiliate"), acting as principal, to sell or purchase any security or other property to or from such investment company. Section 2(a)(3) of the Act defines an "affiliated person" of another person to include (a) any person directly or indirectly owning, controlling, or holding with power to vote, 5% or more of the outstanding voting securities of the other person; (b) any person 5% or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with the power to vote by the other person; and (c) any person directly or indirectly controlling, controlled by, or under common control with the other person. Section 2(a)(9) defines "control" to mean "the power to exercise a controlling influence over the management or policies of a company, unless such power is solely the result of an official position with such company."

2. Applicants state that the Funds and the A Share Fund are expected to be affiliated persons under section 2(a)(3) of the Act, because it is expected that one or more Funds and Other Accounts will own at least 5%, and potentially, more than 25% of the Interests of the A Share Fund or an A Share Fund Series. While Interests of the A Share Fund (and A Share Fund Series) will be non-voting interests, a Fund or Other Account could have power to exercise a controlling influence over the management or policies of the A Share Fund or Series and be deemed an affiliated person of the A Share Fund or A Share Fund Series under section 2(a)(3)(C). In addition, William Blair is the investment adviser to the Initial Fund (and William Blair or a William Blair Affiliate will be the investment adviser to any Future Funds), and William Blair or a William Blair Affiliate will be the managing member of the A Share Fund. As a result, the A Share Fund or A Share Fund Series may be deemed to be under William Blair's control under section 2(a)(3)(C), such that the A Share Fund may be deemed an affiliated person of an affiliated person of the Funds. If a Fund and the A Share Fund are deemed affiliates of each other, or even second-tier affiliates, the sale of Interests of the A Share Fund to the Fund, and the redemption of such Interests by the Fund, would be prohibited under section 17(a) of the Act.

3. Section 17(b) of the Act authorizes the Commission to grant an order permitting a transaction otherwise prohibited by section 17(a) if the terms of the proposed transaction, including the consideration to be paid or received, are fair and reasonable and do not involve overreaching on the part of any person concerned, and the proposed transaction is consistent with the policies of each registered investment company involved and with the general purposes of the Act. Section 6(c) of the Act permits the Commission to exempt any person or transactions from any provisions of the Act if such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

4. Applicants submit that the proposed arrangement satisfies the standards for relief under sections 17(b) and 6(c) of the Act. For the reasons discussed below, Applicants submit that the terms of the arrangement, including the consideration to be paid, are fair and reasonable and do not involve overreaching on the part of any person concerned, and that the proposed transactions are consistent with the policy of each registered investment company concerned and with the general purposes of the Act. Applicants further submit that the Funds' participation in the A Share Fund Series will be necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policies and provisions of the Act.

5. Applicants state that each Fund and Other Account will be treated identically as a holder of Interest in the A Share Fund Series, and each Fund and Other Account will purchase and sell Interests of a China A Share Fund Series on the same terms and on the same basis as each other Fund and Other Account that invests in that A Share Fund Series. Applicants note that neither William Blair, nor a William Blair Affiliate, will receive a fee for advising any A Share Fund Series used by a Fund. The Funds, as holders of Interests of the A Share Fund, will not be subject to any sales load, redemption fee, distribution fee or service fee. Moreover, administrative fees will be paid by the A Share Fund Series used by the Funds to William Blair only upon the determination by each Fund's Board, including a majority of Independent Trustees, that the fees are (i) for services in addition to, rather than duplicative of, services rendered to the Funds directly and (ii) fair and reasonable in light of the usual and customary charges imposed by others for services of the same nature and quality. Applicants argue that the fees payable to the A Share Fund's service providers will be for distinct services, and the costs of such fees will be outweighed by opportunity to invest in China A Shares.

6. Applicants propose that the Funds be permitted to continue to engage in certain purchase and sale cross transactions in securities ("Cross Transactions") between a Fund or Other Account seeking to implement a portfolio strategy and another Fund or Account seeking to raise or invest cash. The Funds currently rely on rule 17a–7 to engage in such Cross Transactions; however, if one or more Funds or Other Accounts were deemed to be second-tier affiliates of each other by virtue of their ownership or control affiliations with the A Share Fund or an A Share Fund Series, the Funds may not be entitled to rely on rule 17a–7 because they would no longer be affiliated solely for the reasons permitted by the Rule.

7. Applicants assert that the potential affiliations created by the A Share Fund Series structure do not affect the other protections provided by the rule, including the integrity of the pricing mechanism employed, and oversight by each Fund's Board. Applicants represent that the Funds and Other Accounts will comply with the requirements set forth in rule 17a–(7)(a) through (g). Applicants thus believe that Cross Transactions will be reasonable and fair, and will not involve overreaching, and will be consistent with the purposes of the Act and the investment policy of each Fund.

8. Section 17(d) of the Act and rule 17d–1 under the Act generally prohibit joint transactions involving registered investment companies and their affiliates unless the Commission has approved the transaction. In considering whether to approve a joint transaction under rule 17d–1, the Commission considers whether the proposed transaction is consistent with the provisions, policies, and purposes of the Act, and the extent to which the

participation of the investment companies is on a basis different from or less advantageous than that of the other participants. Applicant states that the Funds and the Other Accounts (by purchasing Interests of the A Share Funds), William Blair (by managing the portfolio securities of the A Share Fund and the Funds at the same time that the Funds are invested in Interests of the A Share Fund), and the A Share Fund (by selling its Interests to, and redeeming its Interests from, the Funds), could be deemed to be participants in a joint enterprise or arrangement within the meaning of section 17(d) and rule 17d–1.

9. Applicants request an order pursuant to section 17(d) and rule 17d–1 to permit the proposed transactions with the A Share Fund. Applicants submit that the investment by the Funds in the A Share Fund on the basis proposed is consistent with the provisions, policies and purposes of the Act, and that each Fund will invest in Interests of the A Share Fund on the same basis as any other shareholder (*i.e.*, the other Funds and Other Accounts). Applicants further state that William Blair will take reasonable steps to make sure that allocations among the Funds and Other Accounts are fair and equitable. Allocations of China A Shares to different A Share Fund Series, and allocations of opportunities to invest in the A Share Fund Series, by Funds and Other Accounts, will be subject to William Blair's Trade Allocation Policy, under the supervision of William Blair's and the Funds' CCO, and compliance with William Blair's Trade Allocation Policy will be overseen by the Funds' Board.

Applicants' Conditions

Applicants agree that any order granting the requested relief shall be subject to the following conditions:

1. The Funds' investment in Interests of the A Share Fund will be undertaken only in accordance with the Funds' stated investment restrictions and will be consistent with their stated investment policies.

2. William Blair and its affiliated persons will receive no advisory fee from the A Share Fund in connection with the Funds' investment in the A Share Fund. William Blair and its affiliated persons will receive no commissions, fees, or other compensation from a Fund or the A Share Fund in connection with the purchase or redemption by the Funds of shares in the A Share Fund. Interests of the A Share Fund will not be subject to a sales load, redemption fee, distribution fee or service fee.

3. Administrative fees will be paid by the A Share Fund Series used by the Funds to William Blair or a William Blair Affiliate only upon a determination by each Fund's Board, including a majority of its Independent Trustees, that the fees are (i) for services in addition to, rather than duplicative of, services rendered to the Funds directly, and (ii) fair and reasonable in light of the usual and customary charges imposed by others for services of the same nature and quality. If such determination is not made by a Fund's Board, William Blair will reimburse to that Fund the amount of any administrative fee borne by that Fund as an investor in the A Share Fund.

4. Each Fund will, at all times, limit its holdings in the A Share Fund to no more than 15% of its assets.

5. Each Fund's Board, including a majority of the Independent Trustees, will determine initially and no less frequently than annually that the Fund's investments in the A Share Fund are, and continue to be, in the best interests of the Fund and the Fund's shareholders.

6. William Blair will make the accounts, books and other records of the A Share Fund available for inspection by the Commission staff and, if requested, to furnish copies of those records to the Commission staff.

7. The A Share Fund will comply with the requirements of the following sections of the Act, except as noted below: Sections 9, 12, 13, 17(a) (except insofar as relief is provided by the Order), 17(d) (except insofar as relief is provided by the Order), 17(e), 17(f), 17(h), 18, 21 and 36–53 of the Act and rule 22c–1 under the Act as if the A Share Fund were an open-end management investment company registered under the Act. In addition, the A Share Fund will comply with the requirements of the rules under section 17(f) and 17(g) of the Act. This condition 7 will apply only to A Share Fund Series in which a Fund has invested; this condition 7 will not apply to A Share Fund Series invested in exclusively by Other Accounts except insofar as necessary for the A Share Fund Series invested in by a Fund to comply with this condition. William Blair will adopt procedures designed to ensure that the A Share Fund complies with the aforementioned sections of the Act and rules under the Act. William Blair will periodically review and periodically update as appropriate such procedures and will maintain books and records describing such procedures, and maintain the records required by rules 31a–1(b)(1), 31a–1(b)(2)(ii) and 31a–1(b)(9) under the Act. In addition, in connection with the review required by condition 5 above, William Blair will provide annually to each Fund's Board a written report about William Blair's and the A Share Fund's compliance with this condition. All books and records required to be made pursuant to this condition will be maintained and preserved for a period of not less than six years from the end of the fiscal year in which any transaction occurred, the first two years in an easily accessible place, and will be subject to examination by the SEC and its staff.

8. To engage in Cross Transactions, the Funds will comply with rule 17a–7 under the Act in all respects other than the requirement that the parties to the transaction be affiliated persons (or affiliated persons of affiliated persons) of each other solely by reason of having a common investment adviser or investment advisers which are affiliated persons of each other, common officers, and/or common directors, solely because a Fund and Other Account might become affiliated persons within the meaning of section 2(a)(3)(A), (B) or (C) of the Act because of their investments in the A Share Fund.

For the Commission, by the Division of Investment Management, under delegated authority.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–29318 Filed 12–4–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 30284; 812–14023]

Foreside Advisor Services, LLC, et al.; Notice of Application

November 29, 2012.

AGENCY: Securities and Exchange Commission ("Commission").

ACTION: Notice of an application for an order under section 6(c) of the Investment Company Act of 1940 ("Act") for an exemption from sections 2(a)(32), 5(a)(1), 22(d) and 22(e) of the Act and rule 22c–1 under the Act, and under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and (2) of the Act, and under section 12(d)(1)(J) for an exemption from sections 12(d)(1)(A) and (B) of the Act.

APPLICANTS: Foreside Advisor Services, LLC ("FAS"), Foreside ETF Trust (the "Trust") and Foreside Fund Services, LLC ("Distributor").

SUMMARY OF APPLICATION: Applicants request an order that permits: (a) Certain

open-end management investment companies or series thereof to issue shares ("Shares") redeemable in large aggregations only ("Creation Units"); (b) secondary market transactions in Shares to occur at negotiated market prices; (c) certain series to pay redemption proceeds, under certain circumstances, more than seven days from the tender of Shares for redemption; (d) certain affiliated persons of the series to deposit securities into, and receive securities from, the series in connection with the purchase and redemption of Creation Units; and (e) certain registered management investment companies and unit investment trusts outside of the same group of investment companies as the series to acquire Shares.

FILING DATES: The application was filed on April 2, 2012, and amended on November 29, 2012.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. December 26, 2012, 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, Three Canal Plaza, Suite 100, Portland, ME 04101.

FOR FURTHER INFORMATION CONTACT: Deepak T. Pai, Senior Counsel, at (202) 551–6876 or Mary Kay Frech, Branch Chief, at (202) 551–6821 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Applicants' Representations

1. The Trust, a Delaware statutory trust, will be registered under the Act as an open-end management investment company. Applicants request that the order apply to the initial series of the Trust, The ETF 50, described in Exhibit A to the application ("Initial Fund"), and future series of the Trust and future open-end management investment companies and series thereof advised by FAS or an entity controlling, controlled by or under common control with FAS (the "Adviser") that comply with the terms and conditions of the application (each such company or series, a "Future Fund," and collectively with the Initial Fund, the "Funds").[1] The Initial Fund and the Future Funds will each track the performance of a specified equity or fixed income securities index ("Underlying Index"). Future Funds may be based on Underlying Indexes that include only foreign equity or fixed income securities ("International Funds"). Other Future Funds may be based on Underlying Indexes that include foreign and domestic equity or fixed income securities ("Global Funds").

2. FAS or another Adviser will serve as the investment adviser to the Funds. FAS and each other Adviser will be registered as an investment adviser under the Investment Advisers Act of 1940 ("Advisers Act"). The Adviser may enter into subadvisory agreements with investment advisers to act as subadvisers with respect to any Fund (each, a "Subadviser"). Any Subadviser to a Fund will be registered under the Advisers Act. The Distributor, a broker-dealer registered under the Securities Exchange Act of 1934 ("Broker") and an affiliate of the Adviser, will act as the distributor and principal underwriter of Creation Units of Shares. In the future, another Broker may act as distributor and principal underwriter. No Distributor will be affiliated with any Exchange (as defined below) or any Index Provider (as defined below).

3. Each Fund will consist of a portfolio of securities and other instruments ("Portfolio Instruments") selected to correspond generally to the price and yield performance of an Underlying Index. No entity that creates, compiles, sponsors or maintains an Underlying Index ("Index Provider") is or will be an affiliated person, as defined in section 2(a)(3) of the Act, or an affiliated person of an affiliated person of the Trust or a Fund, a promoter, the Adviser, a Subadviser, or a Distributor.

4. The investment objective of each Fund will be to provide investment returns that closely correspond, before fees and expenses, to the price and yield performance of its Underlying Index.[2] Each Fund will sell and redeem Creation Units on a "Business Day," which is defined to include any day that the Trust is open for business as required by section 22(e) of the Act. The Adviser and/or Subadviser may utilize a replication or a representative sampling strategy to track its Underlying Index. A Fund using a replication strategy will invest in substantially all of the Component Securities in its Underlying Index in the same approximate proportions as in the Underlying Index. A Fund using a representative sampling strategy generally will hold a significant number, but not necessarily all, of the Component Securities of its Underlying Index. Applicants state that if representative sampling is used, a Fund will not be expected to track its Underlying Index with the same degree of accuracy as a Fund employing the replication strategy. Applicants expect that each Fund will have a tracking error relative to the performance of its Underlying Index of no more than five percent.

5. Applicants anticipate that the price of a Share will range from $15 to $25, and that Creation Units will consist of at least 25,000 Shares. All orders to purchase and redeem Creation Units must be placed with the Distributor by or through an "Authorized Participant," which is either: (a) A "participating party," i.e., a Broker or other participant in the Continuous Net Settlement System of the National Securities Clearing Corporation ("NSCC"), a clearing agency registered with the Commission and affiliated with the Depository Trust Company ("DTC"), or (b) a participant in the DTC ("DTC Participant"), which in any case, has executed an agreement with the Distributor. The Distributor will transmit all purchase orders to the relevant Fund.

6. The Shares will be purchased and redeemed in Creation Units and

[1] All existing entities that intend to rely on the requested order have been named as applicants. Any other existing or future entity that subsequently relies on the order will comply with the terms and conditions of the application. An Acquiring Fund (as defined below) may rely on the order only to invest in a Fund and not in any other registered investment company.

[2] Applicants represent that at least 80% of each Fund's total assets will be invested in the constituent securities of its respective Underlying Index ("Component Securities"), TBA Transactions (as defined below) representing Component Securities, and Depositary Receipts (as defined below) representing Component Securities. Each Fund also may invest the remaining 20% of its total assets in a broad variety of other instruments, including securities not included in its Underlying Index, which the Adviser or Subadviser believes will assist the Fund in tracking the performance of its Underlying Index.

generally on an in-kind basis. Except where the purchase or redemption will include cash under the limited circumstances specified below, purchasers will be required to purchase Creation Units by making an in-kind deposit of specified instruments ("Deposit Instruments"), and shareholders redeeming their Shares will receive an in-kind transfer of specified instruments ("Redemption Instruments").[3] On any given Business Day the names and quantities of the instruments that constitute the Deposit Instruments and the names and quantities of the instruments that constitute the Redemption Instruments will be identical, unless the Fund is Rebalancing (as defined below). In addition, the Deposit Instruments and the Redemption Instruments will each correspond pro rata to the positions in a Fund's portfolio (including cash positions),[4] except: (a) In the case of bonds, for minor differences when it is impossible to break up bonds beyond certain minimum sizes needed for transfer and settlement; (b) for minor differences when rounding is necessary to eliminate fractional shares or lots that are not tradeable round lots; [5] (c) "to be announced" transactions ("TBA Transactions"),[6] derivatives and other positions that cannot be transferred in kind [7] will be excluded from the Deposit Instruments and the Redemption Instruments; [8] (d) to the extent the Fund determines, on a given Business Day, to use a representative sampling of the Fund's portfolio; [9] or (e) for temporary periods, to effect changes in the Fund's portfolio as a result of the rebalancing of its Underlying Index (any such change, a "Rebalancing"). If there is a difference between the net asset value ("NAV") attributable to a Creation Unit and the aggregate market value of the Deposit Instruments or Redemption Instruments exchanged for the Creation Unit, the party conveying instruments with the lower value will also pay to the other an amount in cash equal to that difference (the "Cash Amount").

7. Purchases and redemptions of Creation Units may be made in whole or in part on a cash basis, rather than in kind, solely under the following circumstances: (a) To the extent there is a Cash Amount, as described above; (b) if, on a given Business Day, a Fund announces before the open of trading that all purchases, all redemptions or all purchases and redemptions on that day will be made entirely in cash; (c) if, upon receiving a purchase or redemption order from an Authorized Participant, a Fund determines to require the purchase or redemption, as applicable, to be made entirely in cash; [10] (d) if, on a given Business Day, a Fund requires all Authorized Participants purchasing or redeeming Shares on that day to deposit or receive (as applicable) cash in lieu of some or all of the Deposit Instruments or Redemption Instruments, respectively, solely because: (i) Such instruments are not eligible for transfer through either the NSCC or DTC; or (ii) in the case of Global Funds and International Funds, such instruments are not eligible for trading due to local trading restrictions, local restrictions on securities transfers or other similar circumstances; or (e) if a Fund permits an Authorized Participant to deposit or receive (as applicable) cash in lieu of some or all of the Deposit Instruments or Redemption Instruments, respectively, solely because: (i) Such instruments are, in the case of the purchase of a Creation Unit, not available in sufficient quantity; (ii) such instruments are not eligible for trading by an Authorized Participant or the investor on whose behalf the Authorized Participant is acting; or (iii) a holder of Shares of a Global Fund or International Fund would be subject to unfavorable income tax treatment if the holder receives redemption proceeds in kind.[11]

8. Each Business Day, before the open of trading on a national securities exchange, as defined in section 2(a)(26) of the Act ("Exchange") on which Shares are listed ("Primary Listing Exchange"), each Fund will cause to be published through the NSCC the names and quantities of the instruments comprising the Deposit Instruments and the Redemption Instruments, as well as the estimated Cash Amount (if any), for that day. The list of Deposit Instruments and Redemption Instruments will apply until a new list is announced on the following Business Day, and there will be no intra-day changes to the list except to correct errors in the published list. The intra-day indicative value of Shares, which will represent on a per Share basis the sum of the current value of the Portfolio Instruments, will be published on the Consolidated Tape every 15 seconds throughout the regular trading hours of the Primary Listing Exchange.

9. Each Fund may recoup settlement costs charged by NSCC and DTC by imposing a transaction fee on investors purchasing or redeeming Creation Units ("Transaction Fee"). The Transaction Fee will be borne only by purchasers and redeemers of Creation Units and will be limited to amounts that have been determined appropriate by the Adviser to defray the transaction expenses that will be incurred by a Fund when an investor purchases or redeems Creation Units.[12] All orders to purchase Creation Units will be placed with the Distributor by or through an Authorized Participant, and the Distributor will transmit all purchase

[3] The Funds must comply with the federal securities laws in accepting Deposit Instruments and satisfying redemptions with Redemption Instruments, including that the Deposit Instruments and Redemption Instruments are sold in transactions that would be exempt from registration under the Securities Act of 1933 ("Securities Act"). In accepting Deposit Instruments and satisfying redemptions with Redemption Instruments that are restricted securities eligible for resale pursuant to Rule 144A under the Securities Act, the Funds will comply with the conditions of Rule 144A.

[4] The portfolio used for this purpose will be the same portfolio used to calculate the Fund's NAV for that Business Day.

[5] A tradeable round lot for a security will be the standard unit of trading in that particular type of security in its primary market.

[6] A TBA Transaction is a method of trading mortgage-backed securities. In a TBA Transaction, the buyer and seller agree on general trade parameters such as agency, settlement date, par amount and price. The actual pools delivered generally are determined two days prior to the settlement date.

[7] This includes instruments that can be transferred in kind only with the consent of the original counterparty to the extent the Fund does not intend to seek such consents.

[8] Because these instruments will be excluded from the Deposit Instruments and the Redemption Instruments, their value will be reflected in the determination of the Cash Amount (defined below).

[9] A Fund may only use sampling for this purpose if the sample: (i) Is designed to generate performance that is highly correlated to the performance of the Fund's portfolio; (ii) consists entirely of instruments that are already included in the Fund's portfolio; and (iii) is the same for all Authorized Participants on a given Business Day.

[10] In determining whether a particular Fund will sell or redeem Creation Units entirely on a cash or in kind basis (whether for a given day or a given order), the key consideration will be the benefit that would accrue to the Fund and its investors. For instance, in bond transactions, the Adviser may be able to obtain better execution than Share purchasers because of the Adviser's size, experience and potentially stronger relationships in the fixed income markets. Purchases of Creation Units either on an all cash basis or in kind are expected to be neutral to the Funds from a tax perspective. In contrast, cash redemptions typically require selling portfolio holdings, which may result in adverse tax consequences for the remaining Fund shareholders that would not occur with an in kind redemption. As a result, tax considerations may warrant in kind redemptions.

[11] A "custom order" is any purchase or redemption of Shares made in whole or in part on a cash basis in reliance on clause (e)(i) or (e)(ii).

[12] Where a Fund permits an in-kind purchaser to substitute cash-in-lieu of depositing one or more Deposit Instruments, the purchaser may be assessed a higher Transaction Fee to cover the cost of purchasing those particular Deposit Instruments. In all cases, the Transaction Fee will be limited in accordance with the requirements of the Commission applicable to open-end management investment companies offering redeemable securities.

orders to the relevant Fund. The Distributor will furnish a prospectus and a confirmation to Authorized Participants placing purchase orders and will maintain a record of the instructions given to a Fund to implement delivery of its Shares.

10. Shares of each Fund will be listed on an Exchange. The principal secondary market for the Shares will be the Primary Listing Exchange. It is expected that one or more member firms of the Primary Listing Exchange will be designated to act as a specialist or market maker and maintain a market for the Shares trading on the Primary Listing Exchange. The price of Shares will be based on a current bid/offer in the secondary market. Transactions involving the purchases or sales of Shares on an Exchange will be subject to customary brokerage fees and charges.

11. Applicants expect that purchasers of Creation Units will include institutional investors and arbitrageurs. Authorized Participants also may purchase or redeem Creation Units in connection with their market making activities. Applicants expect that secondary market purchasers of Shares will include both institutional and retail investors.[13] The price at which Shares trade will be disciplined by arbitrage opportunities created by the ability to purchase or redeem Creation Units at NAV, which applicants believe should ensure that Shares similarly do not trade at a material premium or discount in relation to NAV.

12. Shares will not be individually redeemable and owners of Shares may acquire those Shares from a Fund or tender such shares for redemption to the Fund, in Creation Units only. To redeem, an investor must accumulate enough Shares to constitute a Creation Unit. Redemption requests must be placed by or through an Authorized Participant.

13. Neither the Trust nor any Fund will be marketed or otherwise held out as a traditional open-end investment company or a "mutual fund". Instead, each Fund will be marketed as an "exchange-traded fund." All marketing materials that describe the features or method of obtaining, buying or selling Creation Units, or Shares being listed and traded on an Exchange, or refer to redeemability, will prominently disclose that Shares are not individually redeemable shares and will disclose that the owners of Shares may acquire those Shares from the Fund or tender such Shares for redemption to the Fund only in Creation Units. Copies of annual and semi-annual shareholder reports will also be provided to the DTC Participants for distribution to beneficial owners of Shares.

[13] Shares will be registered in book-entry form only. DTC or its nominee will be the record or registered owner of all outstanding Shares. Beneficial ownership of Shares will be shown on the records of DTC or DTC Participants.

Applicants' Legal Analysis

1. Applicants request an order under section 6(c) of the Act granting an exemption from sections 2(a)(32), 5(a)(1), 22(d) and 22(e) of the Act and rule 22c–1 under the Act, under sections 6(c) and 17(b) of the Act granting an exemption from sections 17(a)(1) and (2) of the Act, and under section 12(d)(1)(J) for an exemption from sections 12(d)(1)(A) and (B) of the Act.

2. Section 6(c) of the Act provides that the Commission may exempt any person, security or transaction, or any class of persons, securities or transactions, from any provision of the Act, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Section 17(b) of the Act authorizes the Commission to exempt a proposed transaction from section 17(a) of the Act if evidence establishes that the terms of the transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned, and the proposed transaction is consistent with the policies of the registered investment company and the general provisions of the Act. Section 12(d)(1)(J) of the Act provides that the Commission may exempt any person, security, or transaction, or any class or classes of persons, securities or transactions, from any provision of section 12(d)(1) if the exemption is consistent with the public interest and the protection of investors.

Sections 5(a)(1) and 2(a)(32) of the Act

3. Section 5(a)(1) of the Act defines an "open-end company" as a management investment company that is offering for sale or has outstanding any redeemable security of which it is the issuer. Section 2(a)(32) of the Act defines a redeemable security as any security, other than short-term paper, under the terms of which the holder, upon its presentation to the issuer, is entitled to receive approximately a proportionate share of the issuer's current net assets, or the cash equivalent. Because Shares will not be individually redeemable, applicants request an order that would permit the Trust to issue Shares in Creation Units only. Applicants state that Creation Units will always be redeemable in accordance with the provisions of the Act. Applicants further state that because the market price of Shares will be disciplined by arbitrage opportunities, investors should be able to sell Shares in the secondary market at prices that do not vary materially from their NAV per Share.

Section 22(d) of the Act and Rule 22c–1 Under the Act

4. Section 22(d) of the Act, among other things, prohibits a dealer from selling a redeemable security that is currently being offered to the public by or through an underwriter, except at a current public offering price described in the prospectus. Rule 22c–1 under the Act generally requires that a dealer selling, redeeming, or repurchasing a redeemable security do so only at a price based on its NAV. Applicants state that the purchase and sale of Shares of a Fund will not be accomplished at an offering price described in the Fund's prospectus, as required by section 22(d), nor will sales and repurchases be made at a price based on the current NAV next computed after receipt of an order, as required by rule 22c–1. Applicants request an exemption under section 6(c) from these provisions.

5. Applicants believe that the concerns sought to be addressed by section 22(d) of the Act and rule 22c–1 under the Act with respect to pricing are equally satisfied by the proposed method of pricing Shares. Applicants maintain that, while there is little legislative history regarding section 22(d), its provisions, as well as those of rule 22c–1, appear to have been intended to (a) prevent dilution caused by certain riskless-trading schemes by principal underwriters and contract dealers, (b) prevent unjust discrimination or preferential treatment among buyers, and (c) ensure an orderly distribution system of shares by contract dealers by eliminating price competition from non-contract dealers who could offer investors shares at less than the published sales price and who could pay investors a little more than the published redemption price.

6. Applicants believe that none of these purposes will be thwarted by permitting Shares to trade in the secondary market at negotiated prices. Applicants state that secondary market transactions in Shares would not cause dilution for owners of such Shares, because such transactions do not directly involve Fund assets. Similarly, secondary market trading in Shares should not create unjust discrimination or preferential treatment among buyers

to the extent different prices exist during a given trading day, or from day to day. Applicants state that such variances occur as a result of third-party market forces, such as supply and demand, but do not occur as a result of unjust or discriminatory manipulation. Finally, applicants contend that the proposed distribution system will be orderly because arbitrage activity will ensure that the Shares do not trade at a material discount or premium in relation to their NAV.

Section 22(e) of the Act

7. Section 22(e) of the Act generally prohibits a registered investment company from suspending the right of redemption or postponing the date of payment of redemption proceeds for more than seven days after the tender of a security for redemption. Applicants observe that the settlement of redemptions of Creation Units of the Global and International Funds is contingent not only on the settlement cycle of the U.S. securities markets but also on the delivery cycles present in foreign markets in which those Funds invest. Applicants have been advised that, under certain circumstances, the delivery cycles for transferring Portfolio Instruments to redeeming investors, coupled with local market holiday schedules, will require a delivery process of up to fourteen (14) calendar days. Applicants request relief under section 6(c) of the Act from section 22(e) to allow Global and International Funds to pay redemption proceeds up to 14 calendar days after the tender of the Creation Units. With respect to Future Funds based on a global or an international Underlying Index, applicants seek the same relief from section 22(e) only to the extent that similar circumstances exist. Except as disclosed in the relevant Global Fund's or International Fund's SAI, applicants expect that the Global Funds and International Funds will be able to deliver redemption proceeds within seven days.[14]

8. Applicants submit that Congress adopted section 22(e) to prevent unreasonable, undisclosed and unforeseen delays in the actual payment of redemption proceeds. Applicants state that allowing redemption payments for Creation Units of a Fund to be made within 14 calendar days would not be inconsistent with the spirit and intent of section 22(e). Applicants state that the SAI will disclose those local holidays (over the period of at least one year following the date thereof), if any, that are expected to prevent the delivery of redemption proceeds in seven calendar days and the maximum number of days (up to 14 calendar days) needed to deliver the proceeds for each affected Global Fund and International Fund.

9. Applicants are not seeking relief from section 22(e) for Global or International Funds that do not effect redemptions of Creation Units in-kind.

Section 12(d)(1) of the Act

10. Section 12(d)(1)(A) of the Act prohibits a registered investment company from acquiring shares of an investment company if the securities represent more than 3% of the total outstanding voting stock of the acquired company, more than 5% of the total assets of the acquiring company, or, together with the securities of any other investment companies, more than 10% of the total assets of the acquiring company. Section 12(d)(1)(B) of the Act prohibits a registered open-end investment company, its principal underwriter, or any other broker or dealer from selling the investment company's shares to another investment company if the sale would cause the acquiring company to own more than 3% of the acquired company's voting stock, or if the sale would cause more than 10% of the acquired company's voting stock to be owned by investment companies generally.

11. Applicants request an exemption to permit management investment companies ("Acquiring Management Companies") and unit investment trusts ("Acquiring Trusts") registered under the Act that are not advised or sponsored by the Adviser and are not part of the same "group of investment companies," as defined in section 12(d)(1)(G)(ii) of the Act, as the Funds (collectively, "Acquiring Funds") to acquire Shares beyond the limits of section 12(d)(1)(A). In addition, applicants seek relief to permit each Fund, the Distributor and/or a Broker to sell Shares to Acquiring Funds in excess of the limits of section 12(d)(1)(B).

12. Each investment adviser to an Acquiring Management Company within the meaning of section 2(a)(20)(A) of the Act ("Acquiring Fund Adviser") will be registered as an investment adviser under the Advisers Act. An "Acquiring Fund Subadviser" is any investment advisor within the meaning of section 2(a)(20)(B) of the Act to an Acquiring Management Company. Each Acquiring Trust's sponsor is the "Sponsor."

13. Applicants submit that the proposed conditions to the requested relief adequately address the concerns underlying the limits in section 12(d)(1)(A) and (B), which include concerns about undue influence by a fund of funds over underlying funds, excessive layering of fees and overly complex fund structures. Applicants believe that the requested exemption is consistent with the public interest and the protection of investors.

14. Applicants believe that neither an Acquiring Fund nor an Acquiring Fund Affiliate would be able to exert undue influence over a Fund.[15] Condition 5 limits the ability of an Acquiring Fund's Advisory Group[16] or an Acquiring Fund's Subadvisory Group[17] to control a Fund within the meaning of section 2(a)(9) of the Act. Applicants propose other conditions to limit the potential for undue influence over the Funds, including that no Acquiring Fund or Acquiring Fund Affiliate will cause a Fund to purchase a security in an offering of securities during the existence of an underwriting or selling syndicate of which a principal underwriter is an Underwriting Affiliate ("Affiliated Underwriting").[18]

[14] Applicants acknowledge that no relief obtained from the requirements of section 22(e) will affect any obligations that applicants may otherwise have under rule 15c6–1 under the Exchange Act. Rule 15c6–1 requires that most securities transactions be settled within three business days of the trade date.

[15] An "Acquiring Fund Affiliate" is defined as the Acquiring Fund Adviser, Acquiring Fund Subadviser(s), any Sponsor, promoter or principal underwriter of an Acquiring Fund and any person controlling, controlled by or under common control with any of these entities. A "Fund Affiliate" is defined as the Adviser, Subadviser(s), promoter or principal underwriter of a Fund and any person controlling, controlled by or under common control with any of these entities.

[16] An "Acquiring Fund's Advisory Group" is defined as the Acquiring Fund Adviser, Sponsor, any person controlling, controlled by or under common control with the Acquiring Fund Adviser or Sponsor, and any investment company or issuer that would be an investment company but for section 3(c)(1) or 3(c)(7) of the Act, that is advised or sponsored by the Acquiring Fund Adviser, Sponsor or any person controlling, controlled by or under common control with the Acquiring Fund Adviser or Sponsor.

[17] An "Acquiring Fund's Subadvisory Group" is defined as any Acquiring Fund Subadviser, any person controlling, controlled by, or under common control with the Acquiring Fund Subadviser, and any investment company or issuer that would be an investment company but for section 3(c)(1) or 3(c)(7) of the Act (or portion of such investment company or issuer) advised or sponsored by the Acquiring Fund Subadviser or any person controlling, controlled by or under common control with the Acquiring Fund Subadviser.

[18] An "Underwriting Affiliate" is defined as a principal underwriter in any underwriting or selling syndicate that is an officer, director, member of an advisory board, Acquiring Fund Adviser, Acquiring Fund Subadviser, Sponsor, or employee of the Acquiring Fund, or a person of which any such officer, director, member of an advisory board, Acquiring Fund Adviser, Acquiring Fund Subadviser, Sponsor, or employee is an affiliated person, except any person whose relationship to the Fund is covered by section 10(f) of the Act is not an Underwriting Affiliate.

15. Applicants do not believe that the proposed arrangement will involve excessive layering of fees. With respect to Acquiring Management Companies, applicants note that the board of directors or trustees, including a majority of the independent directors or trustees within the meaning of section 2(a)(19) of the Act, of any Acquiring Fund, will find that any fees charged under the Acquiring Management Company's advisory contract(s) are based on services provided that will be in addition to, rather than duplicative of, services provided under the advisory contract(s) of any Fund in which the Acquiring Management Company may invest. Under condition 13, the Acquiring Fund Adviser, or trustee of any Acquiring Trust ("Trustee"), or Sponsor, will waive fees otherwise payable to it by the Acquiring Fund in an amount at least equal to any compensation (including fees received pursuant to any plan adopted under rule 12b–1 under the Act) received from a Fund by the Acquiring Fund Adviser, Trustee or Sponsor, or an affiliated person of the Acquiring Fund Adviser, Trustee or Sponsor, in connection with the investment by the Acquiring Fund in the Fund. Applicants also state that any sales charges or service fees charged with respect to shares of an Acquiring Fund will not exceed the limits applicable to a fund of funds as set forth in NASD Conduct Rule 2830.[19]

16. Applicants submit that the proposed arrangement will not create an overly complex fund structure. Applicants note that no Fund will acquire securities of any investment company or company relying on section 3(c)(l) or 3(c)(7) of the Act in excess of the limits contained in section 12(d)(l)(A) of the Act, except to the extent permitted by exemptive relief from the Commission permitting the Fund to purchase shares of other investment companies for short-term cash management purposes. To ensure that the Acquiring Funds understand and will comply with the terms and conditions of the requested order, any Acquiring Fund will be required to enter into a written agreement with the Fund (the "Acquiring Fund Agreement"). The Acquiring Fund Agreement will include an acknowledgment from the Acquiring Fund that it may rely on the order only to invest in a Fund and not in any other investment company.

[19] Any references to NASD Conduct Rule 2830 include any successor or replacement rule that may be adopted by the Financial Industry Regulatory Authority.

17. Applicants note that a Fund may choose to reject any direct purchase of Creation Units by an Acquiring Fund. A Fund would also retain its right to reject any initial investment by an Acquiring Fund in excess of the limits in section 12(d)(l)(A) of the Act by declining to execute an Acquiring Fund Agreement with an Acquiring Fund.

Section 17 of the Act

18. Section 17(a) of the Act generally prohibits an affiliated person of a registered investment company, or an affiliated person of such a person ("second-tier affiliate"), from selling any security to or purchasing any security from the company. Section 2(a)(3) of the Act defines "affiliated person" of another person to include any person directly or indirectly owning, controlling, or holding with power to vote 5% or more of the outstanding voting securities of the other person and any person directly or indirectly controlling, controlled by, or under common control with, the other person. Section 2(a)(9) of the Act defines "control" as the power to exercise a controlling influence over the management or policies of a company, and provides that a control relationship will be presumed where one person owns more than 25% of a company's voting securities. The Funds may be deemed to be controlled by the Adviser and hence affiliated persons of each other. In addition, the Funds may be deemed to be under common control with any other registered investment company (or series thereof) advised by the Adviser (an "Affiliated Fund"). Applicants believe there exists a possibility that, with respect to one or more Funds and the Trust, a large institutional investor could own more than 5% of a Fund or the Trust, or in excess of 25% of the outstanding Shares of a Fund or the Trust, making that investor a first-tier affiliate of each Fund under section 2(a)(3)(A) or section 2(a)(3)(C) of the Act. In addition, a large institutional investor could own 5% or more of, or in excess of 25% of the outstanding shares of one or more Affiliated Funds, making that investor a second-tier affiliate of a Fund.

19. Applicants request an exemption under sections 6(c) and 17(b) of the Act from sections 17(a)(1) and 17(a)(2) of the Act in order to permit persons that are affiliated persons or second-tier affiliates of the Funds solely by virtue of (a) holding 5% or more, or in excess of 25% of the outstanding Shares of one or more Funds; (b) having an affiliation with a person with an ownership interest described in (a); or (c) holding 5% or more, or more than 25% of the Shares of one or more Affiliated Funds, to effectuate purchases and redemptions in-kind. Applicants also request an exemption in order to permit a Fund to sell Shares to, and purchase Shares from, and to engage in any accompanying in-kind transactions with, an Acquiring Fund of which the Fund is an affiliated person or a second-tier affiliate.[20]

20. Applicants assert that no useful purpose would be served by prohibiting such affiliated persons from making in-kind purchases or in-kind redemptions of Shares of a Fund in Creation Units. Deposit Instruments and Redemption Instruments will be valued in the same manner as those Portfolio Instruments currently held by the relevant Funds, and the valuation of the Deposit Instruments and Redemption Instruments will be made in the same manner and on the same terms for all, regardless of the identity of the purchaser or redeemer. Deposit Instruments, Redemption Instruments, and the balancing Cash Amounts, except for any permitted cash-in-lieu amounts consistent with the terms of the application, will be the same regardless of the identity of the purchaser or redeemer. Therefore, applicants state that in-kind purchases and redemptions create no opportunity for affiliated persons or applicants to effect a transaction detrimental to the other holders of Shares of that Fund. Applicants also believe that in-kind purchases and redemptions will not result in abusive self-dealing or overreaching of the Fund. Applicants believe that an exemption is appropriate under sections 17(b) and 6(c) because the proposed arrangement meets the standards for relief in those sections. Applicants note that any consideration paid for the purchase or redemption of Shares directly from a Fund will be based on the NAV of the Fund in accordance with policies and procedures set forth in the Fund's registration statement.[21] Applicants also

[20] To the extent that purchases and sales of Shares of a Fund occur in the secondary market and not through principal transactions directly between an Acquiring Fund and a Fund, relief from section 17(a) would not be necessary. However, the requested relief would apply to direct sales of Shares in Creation Units by a Fund to an Acquiring Fund and redemptions of those Shares. Applicants are not seeking relief from section 17(a) for, and the requested relief will not apply to, transactions where a Fund could be deemed an affiliated person or a second-tier affiliate of an Acquiring Fund because the Adviser provides investment advisory services to that Acquiring Fund.

[21] Applicants acknowledge that the receipt of compensation by (a) an affiliated person of an Acquiring Fund, or a second-tier affiliate, for the purchase by the Acquiring Fund of Shares or (b) an

Continued

state that the proposed transactions are consistent with the general purposes of the Act and appropriate in the public interest.

Applicants' Conditions

Applicants agree that any order of the Commission granting the requested relief will be subject to the following conditions:

ETF Relief

1. As long as a Fund operates in reliance on the requested relief to permit ETF operations, its Shares will be listed on an Exchange.

2. Neither the Trust nor any Fund will be advertised or marketed as an open-end investment company or a mutual fund. Any advertising material that describes the purchase or sale of Creation Units or refers to redeemability will prominently disclose that Shares are not individually redeemable and that owners of Shares may acquire those Shares from a Fund and tender those Shares for redemption to a Fund in Creation Units only.

3. The Web site for the Funds, which is and will be publicly accessible at no charge, will contain, on a per Share basis for each Fund, the prior Business Day's NAV and the market closing price or the midpoint of the bid/ask spread at the time of the calculation of such NAV ("Bid/Ask Price"), and a calculation of the premium or discount of the market closing price or Bid/Ask Price against such NAV.

4. The requested relief to permit ETF operations will expire on the effective date, of any Commission rule under the Act that provides relief permitting the operation of index-based exchange-traded funds.

12(d)(1) Relief

5. The members of the Acquiring Fund's Advisory Group will not control (individually or in the aggregate) a Fund within the meaning of section 2(a)(9) of the Act. The members of an Acquiring Fund's Subadvisory Group will not control (individually or in the aggregate) a Fund within the meaning of section 2(a)(9) of the Act. If, as a result of a decrease in the outstanding voting securities of a Fund, the Acquiring Fund's Advisory Group or the Acquiring Fund's Subadvisory Group, each in the aggregate, becomes a holder of more than 25 percent of the outstanding voting securities of a Fund, it will vote its Shares in the same proportion as the vote of all other holders of the Shares. This condition does not apply to an Acquiring Fund Subadvisory Group with respect to a Fund for which the Acquiring Fund Subadviser or a person controlling, controlled by, or under common control with the Acquiring Fund Subadviser acts as the investment adviser within the meaning of section 2(a)(20)(A) of the Act.

6. No Acquiring Fund or Acquiring Fund Affiliate will cause any existing or potential investment by the Acquiring Fund in a Fund to influence the terms of any services or transactions between the Acquiring Fund or an Acquiring Fund Affiliate and the Fund or a Fund Affiliate.

7. The board of directors or trustees of an Acquiring Management Company, including a majority of the disinterested directors or trustees, will adopt procedures reasonably designed to ensure that the Acquiring Fund Adviser and any Acquiring Fund Subadviser are conducting the investment program of the Acquiring Management Company without taking into account any consideration received by the Acquiring Management Company or an Acquiring Fund Affiliate from a Fund or a Fund Affiliate in connection with any services or transactions.

8. Once an investment by an Acquiring Fund in Shares exceeds the limits in section 12(d)(1)(A)(i) of the Act, the board of trustees of the Trust ("Board"), including a majority of the disinterested directors/trustees, will determine that any consideration paid by the Fund to an Acquiring Fund or an Acquiring Fund Affiliate in connection with any services or transactions: (i) Is fair and reasonable in relation to the nature and quality of the services and benefits received by the Fund; (ii) is within the range of consideration that the Fund would be required to pay to another unaffiliated entity in connection with the same services or transactions; and (iii) does not involve overreaching on the part of any person concerned. This condition does not apply with respect to any services or transactions between a Fund and its investment adviser(s), or any person controlling, controlled by or under common control with such investment adviser(s).

9. No Acquiring Fund or Acquiring Fund Affiliate (except to the extent it is acting in its capacity as an investment adviser to a Fund) will cause the Fund to purchase a security in any Affiliated Underwriting.

10. The Board, including a majority of the independent trustees, will adopt procedures reasonably designed to monitor any purchases of securities by the Fund in an Affiliated Underwriting, once an investment by an Acquiring Fund in the securities of the Fund exceeds the limit of section 12(d)(1)(A)(i) of the Act, including any purchases made directly from an Underwriting Affiliate. The Board will review these purchases periodically, but no less frequently than annually, to determine whether the purchases were influenced by the investment by the Acquiring Fund in the Fund. The Board will consider, among other things: (i) Whether the purchases were consistent with the investment objectives and policies of the Fund; (ii) how the performance of securities purchased in an Affiliated Underwriting compares to the performance of comparable securities purchased during a comparable period of time in underwritings other than Affiliated Underwritings or to a benchmark such as a comparable market index; and (iii) whether the amount of securities purchased by the Fund in Affiliated Underwritings and the amount purchased directly from an Underwriting Affiliate have changed significantly from prior years. The Board will take any appropriate actions based on its review, including, if appropriate, the institution of procedures designed to assure that purchases of securities in Affiliated Underwritings are in the best interest of shareholders of the Fund.

11. Each Fund will maintain and preserve permanently in an easily accessible place a written copy of the procedures described in the preceding condition, and any modifications to such procedures, and will maintain and preserve for a period of not less than six years from the end of the fiscal year in which any purchase in an Affiliated Underwriting occurred, the first two years in an easily accessible place, a written record of each purchase of securities in Affiliated Underwritings, once an investment by an Acquiring Fund in the securities of the Fund exceeds the limit of section 12(d)(1)(A)(i) of the Act, setting forth from whom the securities were acquired, the identity of the underwriting syndicate's members, the terms of the purchase, and the information or materials upon which the determinations of the Board were made.

12. Before investing in Shares in excess of the limits in section 12(d)(1)(A), each Acquiring Fund and the Fund will execute an Acquiring Fund Agreement stating, without limitation, that their boards of directors or trustees and their investment adviser(s), or their Sponsors or Trustee, as applicable, understand the terms and

---

affiliated person of a Fund, or a second-tier affiliate, for the sale by the Fund of its Shares to an Acquiring Fund, may be prohibited by section 17(e) of the Act. The Acquiring Fund Agreement also will include this acknowledgment.

conditions of the order, and agree to fulfill their responsibilities under the order. At the time of its investment in Shares in excess of the limit in section 12(d)(1)(A)(i), an Acquiring Fund will notify the Fund of the investment. At such time, the Acquiring Fund will also transmit to the Fund a list of the names of each Acquiring Fund Affiliate and Underwriting Affiliate. The Acquiring Fund will notify the Fund of any changes to the list of the names as soon as reasonably practicable after a change occurs. The Fund and the Acquiring Fund will maintain and preserve a copy of the order, the Acquiring Fund Agreement, and the list with any updated information for the duration of the investment and for a period of not less than six years thereafter, the first two years in an easily accessible place.

13. The Acquiring Fund Adviser, Trustee or Sponsor, as applicable, will waive fees otherwise payable to it by the Acquiring Fund in an amount at least equal to any compensation (including fees received pursuant to any plan adopted under rule 12b-1 under the Act) received from the Fund by the Acquiring Fund Adviser, Trustee or Sponsor, or an affiliated person of the Acquiring Fund Adviser, Trustee or Sponsor, other than any advisory fees paid to the Acquiring Fund Adviser, Trustee, or Sponsor, or its affiliated person by the Fund, in connection with the investment by the Acquiring Fund in the Fund. Any Acquiring Fund Subadviser will waive fees otherwise payable to the Acquiring Fund Subadviser, directly or indirectly, by the Acquiring Management Company in an amount at least equal to any compensation received from a Fund by the Acquiring Fund Subadviser, or an affiliated person of the Acquiring Fund Subadviser, other than any advisory fees paid to the Acquiring Fund Subadviser or its affiliated person by the Fund, in connection with any investment by the Acquiring Management Company in the Fund made at the direction of the Acquiring Fund Subadviser. In the event that the Acquiring Fund Subadviser waives fees, the benefit of the waiver will be passed through to the Acquiring Management Company.

14. Any sales charges and/or service fees charged with respect to shares of an Acquiring Fund will not exceed the limits applicable to a fund of funds as set forth in NASD Conduct Rule 2830.

15. No Fund will acquire securities of any other investment company or company relying on section 3(c)(1) or 3(c)(7) of the Act in excess of the limits contained in section 12(d)(1)(A) of the Act, except to the extent permitted by exemptive relief from the Commission permitting the Fund to purchase shares of other investment companies for short-term cash management purposes.

16. Before approving any advisory contract under section 15 of the Act, the board of directors or trustees of each Acquiring Management Company, including a majority of the disinterested directors or trustees, will find that the advisory fees charged under such advisory contract are based on services provided that will be in addition to, rather than duplicative of, the services provided under the advisory contract(s) of any Fund in which the Acquiring Management Company may invest. These findings and their basis will be recorded fully in the minute books of the appropriate Acquiring Management Company.

For the Commission, by the Division of Investment Management, under delegated authority.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012-29317 Filed 12-4-12; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-68317; File No. SR-NSX-2012-22]

Self-Regulatory Organizations; National Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Adopt a New Order Type Called the Double Play Order

November 29, 2012.

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 November 14, 2012, National Stock Exchange, Inc. ("NSX" or the "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is proposing to amend NSX Rule 11.11(c), entitled "Order and Modifiers" to provide a new order type, a Double Play Order. The text of the proposed rule change is available on the Exchange's Web site at *http://www.nsx.com*, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange is proposing to amend NSX Rule 11.11(c) entitled "Order and Modifiers" to provide a new order type, a Double Play Order. The proposed Double Play Order is a market or limit order that instructs the System [3] to route the order to a specified away Trading Center(s) [4] as approved by the Exchange from time to time.[5] Such Trading Centers may include execution venues known as "dark pools." The order will not be exposed to the NSX Book [6] before being routed to a specified destination or destinations. An order that is not executed in full after routing away would return to the Exchange, receive a new timestamp, and be processed in the manner described in NSX Rule 11.14.(a).

The Exchange will route the Double Play Order through NSX Securities, Inc., an affiliate and facility of the Exchange ("Outbound Router").[7] The Outbound

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b-4.

[3] Under Exchange Rule 1.5, the term "System" is defined as "the electronic communications and trading facility * * * through which orders of [ETP Holders] are consolidated for ranking and execution."

[4] NSX Rule 2.11. A Trading Center is defined as "other securities exchanges, facilities of securities exchanges, automated trading systems, electronic communication networks or other brokers or dealers."

[5] The Exchange will not directly route orders to the Chicago Stock Exchange, Inc. until approved as an inbound routing facility of the Chicago Board Options Exchange, Inc.

[6] Under Exchange Rule 1.5, the term "NSX Book" is defined as "the System's electronic file of orders."

[7] The Outbound Router is regulated as a facility of the Exchange (as defined in Section 3(a)(2) of the Securities Exchange Act of 1934, as amended ("Exchange Act" or "Act")), 15 U.S.C. 78c(a)(2),

Continued

Router will be subject to the requirements set forth in NSX Rule 2.11. Accordingly, the Exchange believes that routing of Double Play Orders is consistent with the previously approved functions of the Outbound Router, and the Exchange does not believe these functions are expanded through the addition of this order type.

The Exchange notes that both the BATS Exchange, Inc.[8] ("BATS") and The Nasdaq Stock Market LLC ("Nasdaq")[9] have similar order types. Both BATS and Nasdaq members are given the option of entering an order that instructs the exchange to route the order to a specified away trading center or centers. There is no material difference between the BATS Modified Destination Specific Order and the NSX's Double Play Order. Both orders are similar in that: (1) Orders that are not executed in full are returned to the exchange; and (2) each receives new timestamps upon return to the exchange and a new time price priority as appropriate.[10]

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with Section 6 of the Exchange Act,[11] and the rules and regulations thereunder and. in particular, the requirements of Section 6(b) of the Exchange Act.[12] Specifically, the Exchange believes the Double Play Order furthers the objective of Section 6(b)(5) of the Exchange Act because it will enable ETP Holders to access pools of liquidity that may offer a faster response time and a lower fee which promotes just and equitable principles of trade and perfects the mechanism of a free and open market and a national market system. Further, the Double Play Order is designed to allow ETP Holders to obtain response times that are generally consistent with those of other market centers that offer order handling and routing options that are designed to facilitate access to two or more markets with comparable access fees. In so doing, the proposed rule filing promotes the protection of investors and the protection of the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments on the proposed rule change were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[13] and Rule 19b–4(f)(6) thereunder.[14] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6)(iii) thereunder.[15]

A proposed rule change filed under Rule 19b–4(f)(6) normally does not become operative for 30 days after the date of filing.[16] However, Rule 19b–4(f)(6)(iii) permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange requested that the Commission waive the 30-day operative delay, as specified in Rule 19b–4(f)(6)(iii),[17] which would make the rule change effective and operative upon filing.

The Exchange represented that the proposed rule is similar to and based on rules of other exchanges and that the waiver of the 30-day operative delay would allow the Exchange to immediately compete with other exchanges that offer a similar order type. The Exchange believes that the proposed rule change is consistent with the protection of investors and the public interest because it would give ETP Holders enhanced order execution opportunities for market participants by allowing such participants to access, at a potentially reduced fee, pools of liquidity in addition to orders resting on the Exchange. The Commission believes waiving the 30-day operative delay is consistent with the protection of investors and the public interest because such waiver would allow the Exchange to offer an order type immediately to market participants that is similar to an order type that has been offered by other exchanges. In addition, as the proposed rule change is similar to order types offered by other national securities exchanges, the Commission does not believe that the proposed rule change raises any novel regulatory issues. Therefore, the Commission designates the proposed rule change as operative upon filing with the Commission.[18]

At any time within sixty (60) days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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–NSX–2012–22 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–NSX–2012–22. This file number should be included on the

subject to Section 6 of the Exchange Act. 15 U.S.C. 78f.

[8] *See* BATS Rule 11.9(c)(13). *See also* Exchange Act Release No. 58546 (September 15, 2008) 73 FR 54440 (September 19, 2008) (SR–BATS–2008–003).

[9] *See* Nasdaq Rule 4751(f)(9). *See also* Exchange Act Release No. 55405 (March 6, 2007) 72 FR 11069 (March 12, 2007) (SR–Nasdaq–2007–020).

[10] Unlike the BATS Modified Destination Specific Order and NSX's proposed Double Play Order, the Nasdaq Directed Orders that are not executed in full are returned to the customer and not Nasdaq.

[11] 15 U.S.C. 78f.

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78s(b)(3)(A)(iii).

[14] 17 CFR 240.19b–4(f)(6).

[15] 17 CFR 240.19b–4(f)(6).

[16] 17 CFR 240.19b–4(f)(6)(iii). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[17] 17 CFR 240.19b–4(f)(6)(iii).

[18] 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).

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–NSX–2012–22 and should be submitted on or before December 26, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–29281 Filed 12–4–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68322; File No. SR–NYSEARCA–2012–129]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Permit ETP Holders to Designate Orders as Retail Orders By Using a Tag in the Order Entry Message

November 29, 2012.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the "Act")[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on November 16, 2012, NYSE Arca, Inc. (the "Exchange" or "NYSE Arca") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange proposes to permit ETP Holders to designate orders as Retail Orders for the purpose of qualifying for the Retail Order Tier by means of a tag in the order entry message. The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.com*, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange is proposing to permit ETP Holders to designate orders as Retail Orders for the purpose of qualifying for the Retail Order Tier by means of a tag in the order entry message. The Exchange proposes to implement the change effective December 1, 2012.

On August 1, 2012, the Exchange introduced the "Retail Order Tier," a new tier and corresponding credit in the Fee Schedule for ETP Holders, including Market Makers, that execute an average daily volume ("ADV") of Retail Orders during the particular month that is 0.40% or more of the U.S. Consolidated ADV.[4] For purposes of the Retail Order Tier and credit, a "Retail Order" is an agency order that originates from a natural person and is submitted to the Exchange by an ETP Holder, provided that no change is made to the terms of the order with respect to price or side of market and the order does not originate from a trading algorithm or any other computerized methodology.

As part of qualifying for the Retail Order Tier, an ETP Holder is required to designate certain of its order entry ports at the Exchange as "Retail Order Ports" and attest, in a form and/or manner prescribed by the Exchange, that all orders submitted to the Exchange via such Retail Order Ports are Retail Orders.

The Exchange proposes to provide an additional method for ETP Holders to designate orders as Retail Orders. Specifically, the Exchange proposes to allow ETP Holders to designate orders as Retail Orders by using a tag in the order entry message. ETP Holders would still be able to use Retail Order Ports to designate orders as Retail Orders.

As currently required with the use of Retail Order Ports to designate orders as Retail Orders, an ETP Holder designating orders as Retail Orders by using a tag in the order entry message will be required to have written policies and procedures reasonably designed to assure that it will only designate orders as Retail Orders if all requirements of a Retail Order are met. The written policies and procedures must require the ETP Holder to (i) exercise due diligence before entering a Retail Order to assure that entry as a Retail Order is in compliance with the requirements specified by the Exchange, and (ii) monitor whether orders entered as Retail Orders meet the applicable requirements. If the ETP Holder represents Retail Orders from another broker-dealer customer, the ETP Holder'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 ETP Holder must (i) 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 specified by the Exchange, and (ii) monitor whether its broker-dealer customer's Retail Order flow continues to meet the applicable requirements.[5]

[19] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] Exchange Act Release No. 34–67540 (July 30, 2012), 77 FR 46539 (August 3, 2012) (SR–NYSEArca–2012–77).

[5] The Financial Industry Regulatory Authority, Inc. ("FINRA"), on behalf of the Exchange, will

Continued

The proposed change is not otherwise intended to address any other matter, and the Exchange is not aware of any significant problem that ETP Holders would have in complying with the proposed change.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the "Act"),[6] in general, and furthers the objectives of Section 6(b)(4) of the Act,[7] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers, or dealers.

The Exchange believes that the proposed rule change is reasonable since permitting ETP Holders to use alternative methods to designate orders as Retail Orders will encourage the development of the Exchange's liquidity pool, and thus support the quality of price discovery, promote market transparency, and improve investor protection. The Exchange believes the proposed change is reasonable because it will provide ETP Holders alternative ways to designate orders as Retail Orders while ensuring that ETP Holders are required to have written policies and procedures designed to assure that they will only designate orders as Retail Orders if all requirements of a Retail Order are met.

The Exchange believes that the proposed rule change is equitable and not unfairly discriminatory because it provides a second method for Retail Order designation and allows each ETP Holder to choose the designation method most convenient to it, recognizing that individual firms have different internal system configurations. By providing alternative avenues for ETP Holders to designate orders as Retail Orders, the Exchange believes that ETP Holders will choose the designation method that is most operationally efficient, potentially reducing transaction costs.

Finally, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues. In such an environment, the Exchange must continually review, and consider adjusting, its fees and credits to remain competitive with other exchanges. For the reasons described above, the Exchange believes that the proposed rule change reflects this competitive environment.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)[8] of the Act and subparagraph (f)(2) of Rule 19b–4[9] thereunder, because it establishes a due, fee, or other charge imposed by the NYSE Arca.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NYSEARCA–2012–129 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.

All submissions should refer to File Number SR–NYSEARCA–2012–129. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEARCA–2012–129 and should be submitted on or before December 26, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–29316 Filed 12–4–12; 8:45 am]

BILLING CODE 8011–01–P

review an ETP Holder's compliance with these requirements through an exam-based review of the ETP Holder's internal controls.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(2).

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68318; File No. SR–ISE–2012–90]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Regarding the Short Term Option Series Program

November 29, 2012.

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 November 21, 2012, the International

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Securities Exchange, LLC (the "Exchange" or "ISE") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its rules to expand the number of expirations available under the Short Term Option Series Program ("STOS Program"), to allow for the Exchange to delist certain series in the STOS that do not have open interest and to expand the number of series in STOS under limited circumstances. The text of the proposed rule change is available on the Exchange's Web site *www.ise.com*, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization 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 proposal is to amend ISE rules to provide for the ability to open up to five consecutive expirations under the Short Term Option Series Program ("STOS Program") for trading on the Exchange, to allow for the Exchange to delist certain series in the STOS that do not have open interest and to expand the number of series in STOS under limited circumstances when there are no series at least 10% but not more than 30% away from the current price of the underlying security.[3]

This filing is based on filings previously submitted by NYSE Arca, Inc. ("Arca") and NYSE MKT LLC ("MKT"), which the Commission recently approved.[4]

Currently, the Exchange may select up to 30 currently listed option classes on which STOS options may be opened in the STOS Program and the Exchange may also match any option classes that are selected by other securities exchanges that employ a similar program under their respective rules.[5] For each option class eligible for participation in the STOS Program, the Exchange may open up to 30 Short Term Option Series for each expiration date in that class.[6] Under the current rule, STOS options expire the following week.

This proposal seeks to allow the Exchange to open STOS option series for up to five consecutive week expirations. The Exchange intends to add a maximum of five consecutive week expirations under the STOS Program, however it will not add a STOS expiration in the same week that a monthly options series expires or, in the case of Quarterly Option Series, on an expiration that coincides with an expiration of Quarterly Option Series on the same class. In other words, the total number of consecutive expirations will be five, including any existing monthly or quarterly expirations.[7] The Exchange notes that the STOS Program has been well-received by market participants, in particular by retail investors.[8] The Exchange believes that the current proposed revision to the STOS Program will permit the Exchange to meet increased customer demand and provide market participants with the ability to hedge in a greater number of option classes and series.

With regard to the impact of this proposal on system capacity, the Exchange has analyzed its capacity and represents that it and the Options Price Reporting Authority have the necessary systems capacity to handle the potential additional traffic associated with trading of an expanded number of expirations that participate in the STOS Program.

In addition, the Exchange is proposing to add new language to Supplementary Material .02 to ISE Rule 504 and Supplementary Material .01 to ISE Rule 2009 to allow the Exchange, in the event that the underlying security has moved such that there are no series that are at least 10% above or below the current price of the underlying security, to delist series with no open interest in both the call and the put series having a: (i) strike higher than the highest strike price with open interest in the put and/or call series for a given expiration month; and (ii) strike lower than the lowest strike price with open interest in the put and/or the call series for a given expiration month, so as to list series that are at least 10% but not more than 30% above or below the current price of the underlying security. Further, in the event that all existing series have open interest and there are no series at least 10% above or below the current price of the underlying security, the Exchange may list additional series, in excess of the 30 allowed currently under current ISE Rules 504 and 2009, that are at least 10% and not more than 30% above or below the current price of the underlying security. This change is being proposed notwithstanding the current cap of 30 series per class under the STOS Program.

The Exchange believes that it is important to allow investors to roll existing option positions and ensuring that there are always series at least 10% but not more than 30% above or below the current price of the underlying security will allow investors the flexibility they need to roll existing positions.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with Section 6(b) of the Act[9] in general, and furthers the objectives of Section 6(b)(5),[10] in particular, in that it is designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanisms of a free and open market and a national market

[3] On July 12, 2005, the Commission approved the STOS Program on a pilot basis. *See* Securities Exchange Act Release No. 52012 (July 12, 2005), 70 FR 41246 (July 19, 2005) (SR–ISE–2005–17). The STOS Program was made permanent on July 1, 2010. *See* Securities Exchange Act Release No. 62444 (July 2, 2010), 75 FR 39595 (July 9, 2010) (SR–ISE–2010–72).

[4] *See* Securities Exchange Act Release Nos. 68190 (November 8, 2012) (SR–NYSEArca–2012–95); 68191 (November 8, 2012) (SR–NYSEMKT–2012–42).

[5] *See* ISE Rule 504, Supplementary Material .02(a).

[6] *See* ISE Rule 504, Supplementary Material .02(c) and (d).

[7] For example, if quarterly options expire week 1 and monthly options expire week 3 from now, the proposal would allow the following expirations: week 1 quarterly, week 2 STOS, week 3 monthly, week 4 STOS, and week 5 STOS. If quarterly options expire week 3 and monthly options expire week 5, the following expirations would be allowed: week 1 STOS, week 2 STOS, week 3 quarterly, week 4 STOS, and week 5 monthly.

[8] Since the STOS Program has been adopted, it has seen rapid acceptance among industry participants as evidenced by the expansion of the number of classes eligible for the STOS Program. *See* Securities Exchange Act Release No. 66432 (February 21, 2012), 77 FR 11614 (February 27, 2012 (SR–ISE–2012–08).

[9] 15 U.S.C. 78f (b).

[10] 15 U.S.C. 78f(b)(5).

system and, in general, to protect investors and the public interest.

The Exchange believes that expanding the STOS Program will result in a continuing benefit to investors by giving them more flexibility to closely tailor their investment decisions and hedging decisions in a greater number of securities. The Exchange also believes that expanding the STOS Program will provide the investing public and other market participants with additional opportunities to hedge their investment thus allowing these investors to better manage their risk exposure. While the expansion of the STOS Program will generate additional quote traffic, the Exchange does not believe that this increased traffic will become unmanageable since the proposal remains limited to a fixed number of expirations.

The Exchange believes that the ability to delist certain series with no open interest in both the call and the put series will benefit investors by devoting the current cap in the number of series to those series that are more closely tailored to the investment decisions and hedging decisions of investors.

B. Self-Regulatory Organization's Statement on Burden on Competition

ISE does not believe that this proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act. In this regard and as indicated above, the Exchange notes that the rule change is being proposed as a competitive response to filings recently submitted by Arca and MKT and approved by the Commission. ISE believes this proposed rule change is necessary to permit fair competition among the options exchanges and to establish uniform rules regarding the STOS Program.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not significantly affect the protection of investors or the public interest, does not impose any significant burden on competition, and, by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[11] and Rule 19b–4(f)(6) thereunder.[12]

The Exchange has requested that the Commission waive the 30-day operative delay. The Commission believes that waiver of the operative delay is consistent with the protection of investors and the public interest because the proposal is substantially similar to those of other exchanges that have been approved by the Commission and permit such exchanges to open up to five consecutive expirations under their respective STOS Programs as well as allow for the exchanges to delist any series in the STOS Programs that do not have open interest and expand the number of series per class permitted in the STOS Programs under limited circumstances.[13] Therefore, 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.

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–ISE–2012–90 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–ISE–2012–90. 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–ISE–2012–90 and should be submitted on or before December 26, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–29313 Filed 12–4–12; 8:45 am]

BILLING CODE 8011–01–P

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[13] *See supra* note 4.

[14] 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).

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68320; File No. SR–NYSEArca–2012–108]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Designation of Longer Period for Commission Action on Proposed Rule Change, as Modified by Amendment No. 1 Thereto, Relating to the Listing and Trading of Shares of the NYSE Arca U.S. Equity Synthetic Reverse Convertible Index Fund Under NYSE Arca Equities Rule 5.2(j)(3)

November 29, 2012.

On September 27, 2012, NYSE Arca, Inc. ("Exchange" or "NYSE Arca") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] a proposed rule change to list and trade shares ("Shares") of the NYSE Arca U.S. Equity Synthetic Reverse Convertible Index Fund ("Fund") under NYSE Arca Equities Rule 5.2(j)(3). On October 2, 2012, the Exchange submitted Amendment No. 1 to the proposed rule change. The proposed rule change, as modified by Amendment No. 1, was published in the **Federal Register** on October 18, 2012.[3] The Commission received no comment letters on the proposal.

Section 19(b)(2) of the Act[4] provides that, within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day for this filing is December 2, 2012. The Commission is extending this 45-day time period.

The Commission finds that it is appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the proposed rule change. The proposed rule change would allow the Exchange to list and trade Shares of the Fund under NYSE Arca Equities Rule 5.2(j)(3), which governs the listing and trading of Investment Company Units.

Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[5] designates January 16, 2013, as the date by which the Commission should either approve or disapprove or institute proceedings to determine whether to disapprove the proposed rule change (File Number SR–NYSEArca–2012–108).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–29315 Filed 12–4–12; 8:45 am]

BILLING CODE 8011–01–P

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 68043 (October 12, 2012), 77 FR 64153 ("Notice").

[4] 15 U.S.C. 78s(b)(2).

[5] 15 U.S.C. 78s(b)(2).

[6] 17 CFR 200.30–3(a)(31).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68319; File No. SR–NYSEArca–2012–109]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Designation of Longer Period for Commission Action on Proposed Rule Change Relating to the Listing and Trading of Shares of the U.S. Equity High Volatility Put Write Index Fund Under NYSE Arca Equities Rule 5.2(j)(3)

November 29, 2012.

On September 27, 2012, NYSE Arca, Inc. ("Exchange" or "NYSE Arca") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] a proposed rule change to list and trade shares ("Shares") of the U.S. Equity High Volatility Put Write Index Fund ("Fund") under NYSE Arca Equities Rule 5.2(j)(3). The proposed rule change was published in the **Federal Register** on October 18, 2012.[3] The Commission received no comment letters on the proposal.

Section 19(b)(2) of the Act[4] provides that, within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day for this filing is December 2, 2012. The Commission is extending this 45-day time period.

The Commission finds that it is appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the proposed rule change. The proposed rule change would allow the Exchange to list and trade Shares of the Fund under NYSE Arca Equities Rule 5.2(j)(3), which governs the listing and trading of Investment Company Units.

Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[5] designates January 16, 2013, as the date by which the Commission should either approve or disapprove or institute proceedings to determine whether to disapprove the proposed rule change (File Number SR–NYSEArca–2012–109).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–29314 Filed 12–4–12; 8:45 am]

BILLING CODE 8011–01–P

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 68044 (October 12, 2012), 77 FR 64160 ("Notice").

[4] 15 U.S.C. 78s(b)(2).

[5] 15 U.S.C. 78s(b)(2).

[6] 17 CFR 200.30–3(a)(31).

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration # 13380 and # 13381]

New Jersey Disaster Number NJ–00034

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 1.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the State of New Jersey (FEMA—4086—DR), dated 11/05/2012.

Incident: Hurricane Sandy.

Incident Period: 10/26/2012 through 11/08/2012.

Effective Date: 11/23/2012.

Physical Loan Application Deadline Date: 01/04/2013.

Economic Injury (EIDL) Loan Application Deadline Date: 08/05/2013.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance,

U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for Private Non-Profit organizations in the State of New Jersey, dated 11/05/2012, is hereby amended to establish the incident period for this disaster as beginning 10/26/2012 and continuing through 11/08/2012.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Joseph P. Loddo,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 2012–29141 Filed 12–4–12; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[License No. 04/04–0315]

Salem Investment Partners III, L.P.; Notice Seeking Exemption Under Section 312 of the Small Business Investment Act, Conflicts of Interest

Notice is hereby given that Salem Investment Partners III, L.P., 1348 Westgate Center Drive, Suite 100, Winston-Salem, NC 27114, a Federal Licensee under the Small Business Investment Act of 1958, as amended ("the Act"), in connection with the financing of a small concern, has sought an exemption under Section 312 of the Act and Section 107.730, Financings which Constitute Conflicts of Interest of the Small Business Administration ("SBA") Rules and Regulations (13 CFR 107.730). Salem Investment Partners III. L.P. proposes to provide debt security financing to Industrial Services Group, Inc., 318 Neeley Street, Sumter, SC 29150 ("Universal Blastco").

The financing is brought within the purview of § 107.730(a)(4) of the Regulations because Universal Blastco owes a debt obligation to Salem Capital Partners, L.P. and Salem Halifax Capital Partners, L.P., all Associates of Salem Investment Partners III, L.P., and a part of the financing will be used to discharge the obligation. Therefore this transaction is considered a financing constituting a conflict of interest requiring prior SBA approval.

Notice is hereby given that any interested person may submit written comments on the transaction, within fifteen days of the date of this publication, to the Associate Administrator for Investment, U.S. Small Business Administration, 409 Third Street SW., Washington, DC 20416.

Dated: November 28, 2012

Sean J. Greene,

Associate Administrator for Investment.

[FR Doc. 2012–29359 Filed 12–4–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF STATE

[Public Notice 8102]

Application for a Presidential Permit To Operate and Maintain Pipeline Facilities on the Border of the United States and Canada

AGENCY: Department of State.

ACTION: Notice of Receipt of Application for a Presidential Permit to Operate and Maintain Pipeline Facilities on the Border of the United States and Canada.

SUMMARY: Notice is hereby given that the Department of State (DOS) received an application from Plains LPG Services, L.P. (Plains LPG) to operate and maintain facilities it has acquired pertaining to six pipelines at the U.S.-Canada border (St. Clair Pipeline border facilities). The pipeline facilities were previously owned by Dome Petroleum, which operated and maintained them pursuant to earlier Presidential Permits. Plains LPG requests issuance of a new permit reflecting sole ownership of the St. Clair Pipeline border facilities and allowing Plains LPG to operate and maintain those facilities for use in transporting liquefied hydrocarbons, consistent with the terms of the currently applicable permits. The Plains application will supersede an application made by Dome on May 14, 2010 as it relates to the St. Clair Pipeline border facilities.

The St. Clair pipelines cross the Canada- United States border from Sarnia, Canada into the United States, underneath the St. Clair River, terminating in Marysville, Michigan. The first two of the St Clair Pipelines were constructed and a permit issued in 1918. The remaining four of the St Clair Pipelines were constructed and a permit issued in 1973.

Plains LPG is a Texas limited partnership with its principle place of business at 333 Clay Street, Suite 1600, Houston Texas, 77002. Plains LPG is a subsidiary of Plains All American Pipeline, L.P. ("Plains"), a publicly traded master limited partnership organized under the laws of the State of Delaware and headquartered in Houston, Texas.

Plains LPG acquired the St. Clair Pipelines following the indirect acquisition of Dome Petroleum LLC (formerly known as Dome Petroleum Corp.) by Plains LPG's affiliate, Plains Midstream Canada ULC (Plains Midstream). Specifically, Plains Midstream acquired BP Canada Energy Corporation, which owned Dome Petroleum LLC. Immediately following the acquisition by Plains Midstream, Dome Petroleum LLC became Plains Midstream Superior LLC, which subsequently merged with Plains LPG. That acquisition and merger resulted in the allocation and transfer of the St. Clair Pipeline border facilities to Plains LPG.

Under E.O. 13337 the Secretary of State is designated and empowered to receive all applications for Presidential Permits for the construction, connection, operation, or maintenance at the borders of the United States, of facilities for the exportation or importation of liquid petroleum, petroleum products, or other non-gaseous fuels to or from a foreign country. The Department of State is circulating this application to concerned federal agencies for comment. The Department of State has the responsibility to determine whether issuance of a new Presidential Permit reflecting the change in ownership or control of the St. Clair Pipeline border facilities would be in the U.S. national interest.

DATES: Interested parties are invited to submit comments not later than 30 days after the publication date of this notice by email to *Plainslpgservicespermit@state.gov* with regard to whether issuing a new Presidential Permit reflecting the corporate succession and authorizing Plains LPG to operate and maintain the St. Clair Pipeline border facilities would be in the national interest. The application is available at *http://www.state.gov/e/enr/c52945.htm.*

FOR FURTHER INFORMATION CONTACT: Office of Energy Diplomacy, Energy Resources Bureau (ENR/EDP/EWA) Department of State 2201 C St. NW Ste 4843 Washington DC 20520 Attn: Michael Brennan Tel: 202–647–7553. Email: *brennanmf @state.gov.*

Dated: November 20, 2012.

Douglas R. Kramer,

Acting Director, Office of Europe, Western Hemisphere & Africa, Bureau of Energy Resources, U.S. Department of State.

[FR Doc. 2012–29377 Filed 12–4–12; 8:45 am]

BILLING CODE 4710–09–P

DEPARTMENT OF STATE

[Public Notice 8101]

Application for a Presidential Permit To Operate and Maintain Pipeline Facilities on the Border of the United States and Canada

AGENCY: Department of State.

ACTION: Notice of Receipt of Application for a Presidential Permit to Operate and Maintain Pipeline Facilities on the Border of the United States and Canada.

SUMMARY: Notice is hereby given that the Department of State (DOS) has received an application from Plains LPG Services, L.P. ("Plains LPG") to operate and maintain pipeline facilities it has acquired at the U.S.-Canada border (the EDS Pipeline border facilities). The EDS pipeline, a single 10 inch diameter pipe, crosses the United States- Canada border underneath the Detroit River, between Detroit Michigan in the United States and the city of Windsor, in Ontario, Canada. The EDS pipeline was one of two parallel pipelines and an electric cable that were constructed by American Brine, Inc., and operated, and maintained most recently by Dome Petroleum pursuant to earlier Presidential Permits. Plains LPG requests issuance of a new permit reflecting its acquisition and sole ownership of the EDS Pipeline border facilities and allowing Plains LPG to operate and maintain those facilities for use in transporting liquefied hydrocarbons. The Plains application will supersede a joint application made by Dome Petroleum Corporation and Kinder Morgan Cochin, LLC on June 7, 2010 as it relates to the EDS Pipeline border facilities.

Plains LPG is a Texas limited partnership with its principle place of business at 333 Clay Street, Suite 1600, Houston Texas, 77002. Plains LPG is a subsidiary of Plains All American Pipeline, L.P. ("Plains"), a publicly traded master limited partnership organized under the laws of the State of Delaware and headquartered in Houston, Texas.

Plains LPG acquired the EDS Pipeline following the indirect acquisition of Dome Petroleum LLC (formerly known as Dome Petroleum Corp.) by Plains LPG's affiliate, Plains Midstream Canada ULC (Plains Midstream). Specifically, Plains Midstream acquired BP Canada Energy Corporation, which owned Dome Petroleum LLC. Immediately following the acquisition by Plains Midstream, Dome Petroleum LLC became Plains Midstream Superior LLC, which subsequently merged with Plains LPG. That acquisition and merger resulted in the allocation and transfer of the EDS Pipeline border facilities to Plains LPG.

Under E.O. 13337 the Secretary of State is designated and empowered to receive all applications for Presidential Permits for the construction, connection, operation, or maintenance at the borders of the United States, of facilities for the exportation or importation of liquid petroleum, petroleum products, or other non-gaseous fuels to or from a foreign country. The Department of State is circulating this application to concerned federal agencies for comment. The Department of State has the responsibility to determine whether issuance of a new Presidential Permit reflecting the change in ownership or control of the EDS Pipeline border facilities would be in the U.S. national interest.

DATES: Interested parties are invited to submit comments not later than 30 days after the publication date of this notice by email to *Plainslpgservicespermit@state.gov* with regard to whether issuing a new Presidential Permit reflecting the corporate succession and authorizing Plains LPG to operate and maintain the EDS Pipeline border facilities would be in the national interest. The application is available at *http://www.state.gov/e/enr/c52945.htm.*

FOR FURTHER INFORMATION CONTACT: Office of Energy Diplomacy, Energy Resources Bureau (ENR/EDP/EWA) Department of State 2201 C St. NW Ste 4843 Washington DC 20520 Attn: Michael Brennan Tel: 202–647–7553. Email: *brennanmf @state.gov.*

Dated: November 20, 2012.

Douglas R. Kramer,

Acting Director, Office of Europe, Western Hemisphere & Africa, Bureau of Energy Resources, U.S. Department of State.

[FR Doc. 2012–29376 Filed 12–4–12; 8:45 am]

BILLING CODE 4710–09–P

DEPARTMENT OF STATE

[Public Notice 8103]

Shipping Coordinating Committee; Notice of Committee Meeting

The Shipping Coordinating Committee (SHC) will conduct an open meeting at 9:30 a.m. on Thursday December 20, 2012, and Thursday January 10, 2013, at the Radio Technical Commission for Maritime Services (RTCM) in suite 605, 1611 N. Kent St., Arlington VA 22209. These meetings were previously noticed in Public Notice Number 7973 [FR Vol, 77, Number 153 (Wednesday August 8, 2012) pages 47490–47491]. This notice updates the physical address at which the meetings will be conducted. The primary purpose of the meetings is to prepare for the seventeenth Session of the International Maritime Organization's (IMO) Sub-Committee on Radiocommunications Search and Rescue to be held at the IMO Headquarters, United Kingdom, January 21–25, 2013.

The agenda items to be considered include:

—Adoption of the agenda
—Decisions of other IMO bodies
—Global Maritime Distress and Safety System (GMDSS):
  —Review and modernization of the GMDSS
  —Further development of the GMDSS master plan on shore-based facilities
  —Consideration of operational and technical coordination provisions of maritime safety information (MSI) services, including the development and review of the related documents
—ITU maritime radiocommunication matters:
  —Consideration of radiocommunication ITU–R Study Group matters
  —Consideration of ITU World Radiocommunication Conference matters
—Consideration of developments in Inmarsat and Cospas-Sarsat
—Search and Rescue (SAR):
  —Development of guidelines on harmonized aeronautical and maritime search and rescue procedures, including SAR training matters
  —Further development of the Global SAR Plan for the provision of maritime
—SAR services, including procedures for routeing distress information in the GMDSS
—Developments in maritime radiocommunication systems and technology
—Development of amendments to the IAMSAR Manual
—Development of measures to avoid false distress alerts
—Development of measures to protect the safety of persons rescued at sea
—Development of an e-navigation strategy implementation plan
—Consideration of LRIT-related matters
—Development of a mandatory Code for ships operating in polar waters
—Biennial agenda and provisional agenda for COMSAR 18

—Election of Chairman and Vice-Chairman for 2014
—Any other business
—Report to the Maritime Safety Committee

Members of the public may attend this meeting up to the seating capacity of the room. To facilitate the building security process, and to request reasonable accommodation, those who plan to attend should contact the meeting coordinator, Russell Levin, by email at *russell.s.levin@uscg.mil,* by phone at (202) 475–3555, by fax at (202) 475–3927, or in writing at Commandant (CG–6PS), U.S. Coast Guard, 2100 2nd Street SW., Stop 7101, Washington, DC 20593–7101 not later than 7 days prior to the meeting. Requests made after that date might not be able to be accommodated. The RTCM building is accessible by taxi and privately owned conveyance (public transportation is not generally available). However, parking in the vicinity of the building is extremely limited. Additional information regarding this and other IMO SHC public meetings may be found at: *www.uscg.mil/imo.*

Dated: November 30, 2012.

Brian Robinson,

Executive Secretary, Shipping Coordinating Committee, Department of State.

[FR Doc. 2012–29378 Filed 12–4–12; 8:45 am]

BILLING CODE 4710–09–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

[Docket DOT–OST–2012–0108]

Application of Boutique Air, Inc. for Commuter Air Carrier Authority

AGENCY: Department of Transportation.

ACTION: Notice of Order to Show Cause (Order 2012–11–32).

SUMMARY: The Department of Transportation is directing all interested persons to show cause why it should not issue an order finding Boutique Air, Inc., fit, willing, and able, and awarding it commuter air carrier authority to conduct scheduled commuter service.

DATES: Persons wishing to file objections should do so no later than December 19, 2012.

ADDRESSES: Objections and answers to objections should be filed in Docket DOT–OST–2012–0108 and addressed to Docket Operations, (M–30, Room W12–140), U.S. Department of Transportation, 1200 New Jersey Avenue SE., Washington, DC 20590, and should be served upon the parties listed in Attachment A to the order.

FOR FURTHER INFORMATION CONTACT: Barbara Snoden, Air Carrier Fitness Division (X–56, Room W86–471), U.S. Department of Transportation, 1200 New Jersey Avenue SE., Washington, DC 20590, (202) 366–4834.

Dated: November 29, 2012.

Robert Letteney,

Deputy Assistant Secretary, For Aviation and International Affairs.

[FR Doc. 2012–29372 Filed 12–4–12; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2012–37]

Petition for Exemption; Summary of Petition Received

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petition for exemption received.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of 14 CFR. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATE: Comments on this petition must identify the petition docket number and must be received on or before December 26, 2012.

ADDRESSES: You may send comments identified by Docket Number FAA–2012–0964 using any of the following methods:

- *Government-wide rulemaking web site:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *Mail:* Send comments to the Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590.
- *Fax:* Fax comments to the Docket Management Facility at 202–493–2251.
- *Hand Delivery:* Bring comments to the Docket Management Facility 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.

Privacy: We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. Using the search function of our docket Web site, anyone can find and read the comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

Docket: To read background documents or comments received, go to *http://www.regulations.gov* at any time or to the Docket Management Facility 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: Keira Jones (202) 267–4024, and Tyneka Thomas (202) 267—7626, Office of Rulemaking, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on November 30, 2012.

Lirio Liu,

Acting Director, Office of Rulemaking.

Petition for Exemption

Docket No.: FAA–2012–0964.
Petitioner: Ameriflight, LLC.
Section of 14 CFR Affected: 14 CFR 135.243(c)(2)
Description of Relief Sought: Ameriflight requests relief to allow its pilots to serve as pilot in command (PIC) of an aircraft in part 135 cargo operations under instrument flight rules (IFR) without meeting the minimum flight time requirements.

[FR Doc. 2012–29415 Filed 12–4–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Buy America Waiver Notification

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice.

SUMMARY: This notice provides information regarding the FHWA's finding that a Buy America waiver is appropriate for the use of non-domestic Amacan K800—400/358XG–S submersible pumps (4 each), and Amacan K800—401/506XG–S submersible pumps (2 each) for rehabilitation of two pump stations in the State of Michigan.

DATES: The effective date of the waiver is December 6, 2012.

FOR FURTHER INFORMATION CONTACT: For questions about this notice, please contact Mr. Gerald Yakowenko, FHWA Office of Program Administration, (202) 366–1562, or via email at *gerald.yakowenko@dot.gov*. For legal questions, please contact Mr. Michael Harkins, FHWA Office of the Chief Counsel, (202) 366–4928, or via email at *michael.harkins@dot.gov*. Office hours for the FHWA are from 8:00 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this document may be downloaded from the **Federal Register**'s home page at: *http://www.archives.gov* and the Government Printing Office's database at: *http://www.access.gpo.gov/nara*.

Background

The FHWA's Buy America policy in 23 CFR 635.410 requires a domestic manufacturing process for any steel or iron products (including protective coatings) that are permanently incorporated in a Federal-aid construction project. The regulation also provides for a waiver of the Buy America requirements when the application would be inconsistent with the public interest or when satisfactory quality domestic steel and iron products are not sufficiently available. This notice provides information regarding the FHWA's finding that a Buy America waiver is appropriate to use non-domestic Amacan K800—400/358XG–S submersible pumps (4 each), and Amacan K800—401/506XG–S submersible pumps (2 each) for rehabilitation of two pump stations in the State of Michigan.

In accordance with Title I, Division C, section 122 of the "Consolidated and Further Continuing Appropriations Act, 2012" (Pub. L. 112–55), the FHWA published a notice of intent to issue a waiver on its Web site for Amacan K800—400/358XG–S submersible pumps (4 each), and Amacan K800—401/506XG–S submersible pumps (2 each) (*http://www.fhwa.dot.gov/construction/contracts/waivers.cfm?id=75*) on May 16th. The FHWA received five comments in response to the publication. One commenter supports the waiver if there is no American made pump. Miami Pump and Supply Company requested that the Michigan DOT (MDOT) should contact them for specifications of the pump. The MDOT contacted Miami Pump and Supply and provided specifications for the pumps. Miami Pump and Supply determined that they were unable to meet the pump specifications. Three other commenters indicated that the specifications for the pumps should be changed to accommodate American made pumps. However, MDOT is unable to utilize other types of pumps due to the unique circumstances involved with this project.

During the 15-day comment period, the FHWA conducted additional nationwide review to locate potential domestic manufacturers of Amacan K800—400/358XG–S submersible pumps (4 each), and Amacan K800—401/506XG–S submersible pumps (2 each) for rehabilitation of two pump stations in the State of Michigan. The National Institute of Standards and Technology—Manufacturing Extension Partnership also conducted supplier scouting on submersible pumps and reported that there were no domestic matching items for the pumps. Based on all the information available to the agency, the FHWA concludes that there are no domestic manufacturers of Amacan K800—400/358XG–S submersible pumps (4 each), and Amacan K800—401/506XG–S submersible pumps (2 each).

In accordance with the provisions of section 117 of the SAFETEA–LU Technical Corrections Act of 2008 (Pub. L. 110–244, 122 Stat. 1572), the FHWA is providing this notice as its finding that a waiver of Buy America requirements is appropriate. The FHWA invites public comment on this finding for an additional 15 days following the effective date of the finding. Comments may be submitted to the FHWA's Web site via the link provided to Michigan waiver page noted above.

Authority: 23 U.S.C. 313; Pub. L. 110–161, 23 CFR 635.410).

Issued on: November 28, 2012.

Victor M. Mendez,

Administrator.

[FR Doc. 2012–29328 Filed 12–4–12; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Buy America Waiver Notification

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice.

SUMMARY: This notice provides information regarding the FHWA's finding that a Buy America waiver is appropriate for the use of non-domestic Main Submersible pumps (3 @ 3,000 gallons/minute), (1 Low Flow Submersible pump @ 1,000 gallons/minute), (1 Low Flow Sump Pump @ 20 gallons/minute) for rehabilitation of a pump station in the State of Illinois.

DATES: The effective date of the waiver is December 6, 2012.

FOR FURTHER INFORMATION CONTACT: For questions about this notice, please contact Mr. Gerald Yakowenko, FHWA Office of Program Administration, (202) 366–1562, or via email at *gerald.yakowenko@dot.gov*. For legal questions, please contact Mr. Michael Harkins, FHWA Office of the Chief Counsel, (202) 366–4928, or via email at *michael.harkins@dot.gov*. Office hours for the FHWA are from 8:00 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this document may be downloaded from the **Federal Register**'s home page at: *http://www.archives.gov* and the Government Printing Office's database at: *http://www.access.gpo.gov/nara*.

Background

The FHWA's Buy America policy in 23 CFR 635.410 requires a domestic manufacturing process for any steel or iron products (including protective coatings) that are permanently incorporated in a Federal-aid construction project. The regulation also provides for a waiver of the Buy America requirements when the application would be inconsistent with the public interest or when satisfactory quality domestic steel and iron products are not sufficiently available. This notice provides information regarding the FHWA's finding that a Buy America waiver is appropriate to use non-domestic Main Submersible pumps (3 @ 3,000 gallons/minute), (1 Low Flow Submersible pump @ 1,000 gallons/minute), (1 Low Flow Sump Pump @ 20 gallons/minute) for rehabilitation of a pump station in the State of Illinois.

In accordance with Title I, Division C, section 122 of the "Consolidated and Further Continuing Appropriations Act, 2012" (Pub. L. 112–55), the FHWA published a notice of intent to issue a waiver on its Web site for Main Submersible pumps (3 @ 3,000 gallons/minute), (1 Low Flow Submersible pump @ 1,000 gallons/minute), (1 Low Flow Sump Pump @ 20 gallons/minute) (*http://www.fhwa.dot.gov/construction/contracts/waivers.cfm?id=74*) on May 3rd. The FHWA received six comments

in response to the publication. Three commenters indicated that the waiver will only help other countries and, therefore, opposed the waiver. Three others are in support only when the product is not available domestically. None of the commenters provided information on possible domestic manufacturers. During the 15-day comment period, the FHWA conducted additional nationwide review to locate potential domestic manufacturers of Main Submersible pumps (3 @ 3,000 gallons/minute), (1 Low Flow Submersible pump @ 1,000 gallons/minute), (1 Low Flow Sump Pump @ 20 gallons/minute). The National Institute of Standards and Technology—Manufacturing Extension Partnership also conducted supplier scouting on submersible pumps and reported that there were no domestic matching items for the pumps. Based on all the information available to the agency, the FHWA concludes that there are no domestic manufacturers of Main Submersible pumps (3 @ 3,000 gallons/minute), (1 Low Flow Submersible pump @ 1,000 gallons/minute), (1 Low Flow Sump Pump @ 20 gallons/minute).

In accordance with the provisions of section 117 of the SAFETEA–LU Technical Corrections Act of 2008 (Pub. L. 110–244, 122 Stat. 1572), the FHWA is providing this notice as its finding that a waiver of Buy America requirements is appropriate. The FHWA invites public comment on this finding for an additional 15 days following the effective date of the finding. Comments may be submitted to the FHWA's Web site via the link provided to Illinois waiver page noted above.

Authority: 23 U.S.C. 313; Pub. L. 110–161, 23 CFR 635.410.

Issued on: November 26, 2012.

Victor M. Mendez,

Federal Highway Administrator.

[FR Doc. 2012–29326 Filed 12–4–12; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Buy America Waiver Notification

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice.

SUMMARY: This notice provides information regarding the FHWA's finding that a Buy America waiver is appropriate for the use of non-domestic Motor and Machinery brakes; 16″ Drum brake, Thruster disk, and 2-Right angle gear reducers for Pasquotnak River Bridge project, Federal-aid project #STP–0158(51), in the State of North Carolina.

DATES: The effective date of the waiver is December 6, 2012.

FOR FURTHER INFORMATION CONTACT: For questions about this notice, please contact Mr. Gerald Yakowenko, FHWA Office of Program Administration, (202) 366–1562, or via email at *gerald.yakowenko@dot.gov*. For legal questions, please contact Mr. Michael Harkins, FHWA Office of the Chief Counsel, (202) 366–4928, or via email at *michael.harkins@dot.gov*. Office hours for the FHWA are from 8:00 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this document may be downloaded from the **Federal Register**'s home page at: *http://www.archives.gov* and the Government Printing Office's database at: *http://www.access.gpo.gov/nara*.

Background

The FHWA's Buy America policy in 23 CFR 635.410 requires a domestic manufacturing process for any steel or iron products (including protective coatings) that are permanently incorporated in a Federal-aid construction project. The regulation also provides for a waiver of the Buy America requirements when the application would be inconsistent with the public interest or when satisfactory quality domestic steel and iron products are not sufficiently available. This notice provides information regarding the FHWA's finding that a Buy America waiver is appropriate to use non-domestic Motor and Machinery brakes; 16″ Drum brake, Thruster disk, and 2-Right angle gear reducers.

In accordance with Title I, Division C, section 122 of the "Consolidated and Further Continuing Appropriations Act, 2012" (Pub. L. 112–55), the FHWA published a notice of intent to issue a waiver on its Web site for Motor and Machinery brakes; 16″ Drum brake, Thruster disk, and 2-Right angle gear reducers (*http://www.fhwa.dot.gov/construction/contracts/waivers.cfm?id=63*) on November 14, 2011. The FHWA received no comment in response to the publication. During the 15-day comment period, the FHWA conducted additional nationwide review to locate potential domestic manufacturers of Motor and Machinery brakes; 16″ Drum brake, Thruster disk, and 2-Right angle gear reducers. The National Institute of Standards and Technology—Manufacturing Extension Partnership also conducted supplier scouting on motor and machinery system and reported that there are some domestic manufacturers of subcomponents to the motor and machinery brake system. However, the subcomponents are not compatible with the specified motor and machinery brakes. Based on all the information available to the agency, the FHWA concludes that there are no domestic manufacturers of Motor and Machinery brakes; 16″ Drum brake, Thruster disk, and 2-Right angle gear reducers for the Pasquotnak River Bridge project in the State of North Carolina.

In accordance with the provisions of section 117 of the SAFETEA–LU Technical Corrections Act of 2008 (Pub. L. 110–244, 122 Stat. 1572), the FHWA is providing this notice as its finding that a waiver of Buy America requirements is appropriate. The FHWA invites public comment on this finding for an additional 15 days following the effective date of the finding. Comments may be submitted to the FHWA's Web site via the link provided to the North Carolina waiver page noted above.

Authority: 23 U.S.C. 313; Pub. L. 110–161, 23 CFR 635.410).

Issued on: November 29, 2012.

Victor M. Mendez,

Administrator.

[FR Doc. 2012–29330 Filed 12–4–12; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Buy America Waiver Notification

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice.

SUMMARY: This notice provides information regarding the FHWA's finding that a Buy America waiver is appropriate for the use of non-domestic Motor and Machinery Brakes; 16″-Diameter Motor Brakes, weight 340 lb, and 13″-Diameter Machinery Brakes, weight 250 lb, for rehabilitation of Murray Morgan Bridge, project #STP–STPUL–3268(003), and South Park Bridge Replacement, project #TIGERII–BRM–STPL–1491(002), in the State of Washington.

DATES: The effective date of the waiver is December 6, 2012.

FOR FURTHER INFORMATION CONTACT: For questions about this notice, please contact Mr. Gerald Yakowenko, FHWA Office of Program Administration, (202)

366–1562, or via email at *gerald.yakowenko@dot.gov*. For legal questions, please contact Mr. Michael Harkins, FHWA Office of the Chief Counsel, (202) 366–4928, or via email at *michael.harkins@dot.gov*. Office hours for the FHWA are from 8:00 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this document may be downloaded from the **Federal Register**'s home page at: *http://www.archives.gov* and the Government Printing Office's database at: *http://www.access.gpo.gov/nara.*

Background

The FHWA's Buy America policy in 23 CFR 635.410 requires a domestic manufacturing process for any steel or iron products (including protective coatings) that are permanently incorporated in a Federal-aid construction project. The regulation also provides for a waiver of the Buy America requirements when the application would be inconsistent with the public interest or when satisfactory quality domestic steel and iron products are not sufficiently available. This notice provides information regarding the FHWA's finding that a Buy America waiver is appropriate to use non-domestic Motor and Machinery Brakes; 16″-Diameter Motor Brakes, weight 340 lb, and 13″ -Diameter Machinery Brakes, weight 250 lb, for rehabilitation of Murray Morgan Bridge, project #STP–STPUL–3268(003), and South Park Bridge Replacement, project #TIGERII–BRM–STPL–1491(002), in the State of Washington.

In accordance with Title I. Division C, section 122 of the "Consolidated and Further Continuing Appropriations Act, 2012" (Pub. L. 112–55), the FHWA published a notice of intent to issue a waiver on its Web site for Motor and Machinery Brakes; 16″-Diameter Motor Brakes, weight 340 lb and 13″-Diameter Machinery Brakes, weight 250 lb (*http://www.fhwa.dot.gov/construction/contracts/waivers.cfm?id=64*) on November 14, 2011. The FHWA received no comment in response to the publication. During the 15-day comment period, the FHWA conducted additional nationwide review to locate potential domestic manufacturers of Motor and Machinery Brakes; 16″-Diameter Motor Brakes, weight 340 lb and 13″-Diameter Machinery Brakes, weight 250 lb. The National Institute of Standards and Technology—Manufacturing Extension Partnership also conducted supplier scouting on motor and machinery system and reported that there are some domestic manufacturers of subcomponents to the motor and machinery brake system. However, the subcomponents are not compatible with the specified motor and machinery brakes. Based on all the information available to the agency, the FHWA concludes that there are no domestic manufacturers of Motor and Machinery Brakes; 16″-Diameter Motor Brakes, weight 340 lb and 13″-Diameter Machinery Brakes, weight 250 lb for rehabilitation of Murray Morgan Bridge project #STP–STPUL–3268(003) and South Park Bridge Replacement project #TIGERII–BRM–STPL–1491(002) in Washington State.

In accordance with the provisions of section 117 of the SAFETEA–LU Technical Corrections Act of 2008 (Pub. L. 110–244, 122 Stat. 1572), the FHWA is providing this notice as its finding that a waiver of Buy America requirements is appropriate. The FHWA invites public comment on this finding for an additional 15 days following the effective date of the finding. Comments may be submitted to the FHWA's Web site via the link provided to the Washington State waiver page noted above.

Authority: 23 U.S.C. 313; Pub. L. 110–161, 23 CFR 635.410).

Issued on: November 26, 2012.

Victor M. Mendez,

Administrator.

[FR Doc. 2012–29329 Filed 12–4–12; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA–2012–0279]

Pipeline Safety: Using Meaningful Metrics in Conducting Integrity Management Program Evaluations

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Notice; Issuance of Advisory Bulletin.

SUMMARY: PHMSA is issuing an Advisory Bulletin to remind operators of gas transmission and hazardous liquid pipeline facilities of their responsibilities, under Federal integrity management regulations, to perform evaluations of their integrity management programs using meaningful performance metrics.

FOR FURTHER INFORMATION CONTACT: Alan Mayberry by phone at 202–366–5124 or by email at *alan.mayberry@dot.gov*. All materials in this docket may be accessed electronically at *http://www.regulations.gov*. General information about the PHMSA Office of Pipeline Safety (OPS) can be obtained by accessing OPS's Internet home page at *http://www.phmsa.dot.gov/pipeline.*

SUPPLEMENTARY INFORMATION:

I. Background

PHMSA's integrity management regulations require operators to establish processes to evaluate the effectiveness of their integrity management programs. Program evaluation is one of the key required program elements as established in the integrity management rules. For hazardous liquid pipelines, §§ 195.452(f)(7) and 195.452(k) require methods to measure program effectiveness:

§ 195.452(f) What are the elements of an integrity management program? An integrity management program begins with the initial framework. An operator must continually change the program to reflect operating experience, conclusions drawn from results of the integrity assessments, other maintenance and surveillance data, and evaluation of consequences of a failure on the high consequence area. An operator must include, at minimum, each of the following elements in its written integrity management program:

* * * * *

(7) Methods to measure the program's effectiveness (see paragraph (k) of this section);

§ 195.452(k) What methods to measure program effectiveness must be used? An operator's program must include methods to measure whether the program is effective in assessing and evaluating the integrity of each pipeline segment and in protecting the high consequence areas. (See Appendix C of this part for guidance on methods that can be used to evaluate a program's effectiveness.)

Appendix C provides more specific guidance on establishing performance measures, including the need to select measures based on the understanding and analysis of integrity threats to each pipeline segment. Appendix C also describes three general types of metrics that an integrity management program should have:

- *Activity Measures* that monitor the surveillance and preventive activities that are in place to control risk. These measures indicate how well an operator is implementing the elements of its integrity management program.

• *Deterioration Measures* that monitor operational and maintenance trends to indicate if the program is successful or weakening, or if the desired outcome is being achieved or not, despite the risk control activities in place.

• *Failure Measures* that reflect whether the program is effective in achieving the objective of improving integrity. These are typically lagging indicators that measure the number of releases, the volume spilled, percent recovered, etc.

Section 13 "Program Evaluation" of API Standard 1160, *Managing Integrity for Hazardous Liquid Pipelines* also provides additional guidance on the program evaluation process in which these measures are used to improve performance.

For gas transmission pipelines, §§ 192.911(i) and 192.945 define the requirements for establishing performance metrics and evaluating integrity management program performance.

§ 192.911 What are the elements of an integrity management program?

An operator's initial integrity management program begins with a framework (see § 192.907) and evolves into a more detailed and comprehensive integrity management program as information is gained and incorporated into the program. An operator must make continual improvements to its program. The initial program framework and subsequent program must, at minimum, contain the following elements. (When indicated, refer to ASME/ANSI B31.8S incorporated by reference, see § 192.7) for more detailed information on the listed element.)

* * * * *

(i) A performance plan as outlined in ASME/ANSI B31.8S, section 9 that includes performance measures meeting the requirements of § 192.945.

§ 192.945 What methods must an operator use to measure program effectiveness?

(a) General. An operator must include in its integrity management program methods to measure whether the program is effective in assessing and evaluating the integrity of each covered pipeline segment and in protecting the high consequence areas. These measures must include the four overall performance measures specified in ASME/ANSI B31.8S (incorporated by reference, see § 192.7 of this part), section 9.4, and the specific measures for each identified threat specified in ASME/ANSI B31.8S, Appendix A. An operator must submit the four overall performance measures as part of the annual report required by § 191.17 of this subchapter.

(b) External Corrosion Direct Assessment (ECDA). In addition to the general requirements for performance measures in paragraph (a) of this section, an operator using direct assessment to assess an external corrosion threat must define and monitor measures to determine the effectiveness of the ECDA process. These measures must meet the requirements of § 192.925.

The gas transmission requirements invoke ASME B31.8S–2004, *Managing System Integrity of Gas Pipelines.* Section 9 of this standard provides guidance on the selection of performance measures. It describes three categories of measures that are directly analogous to those noted above in Appendix C of Part 195. These are:

• *Process or Activity Measures* used to evaluate preventive and mitigation activities. These determine how well an operator is implementing the various elements of its integrity management program.

• *Operational Measures,* which include operational and maintenance trends that measure how well the system is responding to the integrity management program.

• *Direct Integrity Measures,* which include leaks, ruptures, injuries, and fatalities.

Furthermore, the hazardous liquid and gas transmission integrity management rules also require that operators retain adequate records to support integrity management program decisions and activities. These include the information that supports the selection of performance metrics, the performance metric data and trends, and the decisions that are based in whole or in part on these metrics. Specifically, the hazardous liquid integrity management program requirements are:

§ 195.452(l) What records must be kept? (1) An operator must maintain for review during an inspection:

* * * * *

(ii) Documents to support the decisions and analyses, including any modifications, justifications, variances, deviations and determinations made, and actions taken, to implement and evaluate each element of the integrity management program listed in paragraph (f) of this section.

(2) See Appendix C of this part for examples of records an operator would be required to keep.

Appendix C further states:

§ 195.452 Appendix C. VI. Examples of types of records an operator must maintain.

* * * * *

(22) methods used to measure the program's effectiveness.

The comparable gas transmission integrity management program requirements are:

§ 192.947 What records must be kept?

An operator must maintain, for the useful life of the pipeline, records that demonstrate compliance with the requirements of this subpart. At minimum, an operator must maintain the following records for review during an inspection.

* * * * *

(d) Documents to support any decision, analysis, and process developed and used to implement and evaluate each element of the baseline assessment plan and integrity management program. Documents include those developed and used in support of any identification, calculation, amendment, modification, justification, deviation and determination made, and any action taken, to implement and evaluate any of the program elements;

PHMSA's inspection protocols currently address the need to examine operator compliance with these requirements.

In its report on the September 9, 2010, gas pipeline accident in San Bruno, California, the National Transportation Safety Board (NTSB) identified concerns with Pacific Gas and Electric Company's (PG&E) self-assessments of its integrity management program. NTSB concluded that the company's self-assessments were "superficial and resulted in no improvements to the integrity management program." As a result, NTSB recommended that PG&E:

Assess every aspect of your integrity management program, paying particular attention to the areas identified in this investigation, and implement a revised program that includes, at a minimum,

* * * * *

(4) an improved self-assessment that adequately measures whether the program is effectively assessing and evaluating the integrity of each covered pipeline segment. (Recommendation P–11–29)

In this same investigation, NTSB raised some concerns with PHMSA's oversight of performance-based safety programs such as integrity management. NTSB concluded that greater focus is needed on how performance-based safety systems are implemented, executed and evaluated, and whether problem areas are being detected and corrected. Critical to this overall process is the selection of meaningful metrics by operators that allow them to quantify,

understand, and improve their own performance.

Following its investigation, NTSB issued two related recommendations for enhancing PHMSA's oversight of operator programs to assess the effectiveness of PHMSA's programs using performance metrics. These recommendations are:

Revise your integrity management inspection protocol to:

(1) incorporate a review of meaningful metrics;

(2) require auditors to verify that the operator has a procedure in place for ensuring the completeness and accuracy of underlying information;

(3) require auditors to review all integrity management performance measures reported to the Pipeline and Hazardous Materials Safety Administration and compare the leak, failure, and incident measures to the operator's risk model; and

(4) require setting performance goals for pipeline operators at each audit and follow up on those goals at subsequent audits. (Recommendation P–11–18)

(1) Develop and implement standards for integrity management and other performance-based safety programs that require operators of all types of pipeline systems to regularly assess the effectiveness of their programs using clear and meaningful metrics and to identify and then correct deficiencies; and (2) make those metrics available in a centralized database. (Recommendation P–11–19)

These recommendations reinforce the importance of a rigorous evaluation of a company's integrity management program in improving performance. Through this Advisory Bulletin, PHMSA is reminding operators of the importance of these regulation-required program elements. Operators should review their current programs for evaluating integrity management program effectiveness and the performance metrics used in these programs to be sure they provide a current and accurate representation of integrity management program performance. Further, operators should ensure that program improvements and corrective actions identified by these evaluations are implemented in a timely manner.

As a result of NTSB's recommendations, PHMSA is initiating efforts to strengthen its protocols and oversight of these key integrity management program elements. Beginning immediately, PHMSA's inspections will emphasize reviewing operator methods for integrity management program evaluation as required by § 192.945 and § 195.452(k) for gas transmission and hazardous liquid pipelines, respectively. PHMSA will evaluate specific metrics operators use to assess program effectiveness and how those metrics are used in a process of continuous improvement. PHMSA will also confirm that operators are maintaining adequate records of their program effectiveness evaluations and their performance metrics data, as well as the activities and decisions associated with all required integrity management program elements. Our inspectors will check to confirm that information and data gaps are aggressively being addressed and that assumptions are appropriately based on location-specific data.

II. Advisory Bulletin (ADB–2012–10)

To: Owners and Operators of Hazardous Liquid and Gas Transmission Pipeline Systems

Subject: Using Meaningful Metrics in Conducting Integrity Management Program Evaluations

Advisory: To further enhance PHMSA's safety efforts and as an initial step in addressing NTSB Recommendations P–11–18 and P–11–19, PHMSA is issuing this Advisory Bulletin concerning operator integrity management program evaluation using meaningful metrics.

A critical program element of an operator's integrity management program is the systematic, rigorous evaluation of the program's effectiveness using clear and meaningful metrics. When executed diligently, this self-evaluation process will lead to more robust and effective integrity management programs and improve overall safety performance. This process is critical to achieving a mature integrity management program and a culture of continuous improvement. Program evaluation is a required integrity management program element as established in §§ 192.911(i) and 195.452(k) for gas transmission and hazardous liquid pipelines, respectively. In light of NTSB's findings following the San Bruno gas transmission incident, PHMSA is reminding operators about the importance of these requirements.

Operators are advised to critically review their processes and methods for evaluating integrity management program performance and take action to strengthen these processes where warranted. An effective operator performance evaluation process is expected to have the following characteristics:

- A well-defined description of the scope, objectives, and frequency of program evaluations.
- The use of periodic self-assessments, internal or external audits, management reviews, performance metrics analysis, benchmarking against other operators, or other self-critical evaluations to assess program effectiveness.
- Clear performance goals and objectives to measure the effectiveness of key integrity activities.
- Clear assignment of responsibility for implementing required actions.
- Review and follow-up of program evaluation results, findings, and recommendations, etc., by appropriate company managers.

Operators are also advised that a clear and meaningful set of performance metrics is essential to program effectiveness. An effective program for measuring integrity management program effectiveness should have the following characteristics:

- A description of the type of performance measures to be used, along with the data sources, data validation and quality assurance activities, the frequency of data collection, and any normalization factors.
- A means to update the performance measures (if needed) to assure they are providing useful information about the effectiveness of integrity management program activities.
- The use of performance metrics data to check and calibrate the operator's risk analysis tools to assure these best represent the performance of the operator's specific assets.

The performance metrics that are required to be reported to PHMSA annually, such as the number of miles of pipeline assessed, number of anomalies found requiring repair or mitigation, etc., are a small subset of the overall suite of metrics used by an operator to evaluate its program. A much larger set of operator-specific metrics to be used internally is needed to effectively evaluate an integrity management program performance. Metrics should be developed for each of the following:

- Overall program effectiveness indicated by the number of releases, number of injuries or fatalities, volume released, etc.
- Specific threats that include both leading and lagging indicators for the important integrity threats on an operator's systems. These include:

Activity Measures that monitor the surveillance and preventive activities that are in place to control risk.

Deterioration Measures that monitor operational and maintenance trends to indicate if the program is successful or weakening despite the risk control activities in place. (Also

identified as Operational Measures in ASME B31.8S.)

○ *Failure Measures* that reflect whether the program is effective in achieving the objective of improving integrity. (Also identified as Direct Integrity Measures in ASME B31.8S)

• Metrics that measure and provide insights into how well an operator's processes associated with the various integrity management program elements are performing. Examples of such processes would include integrity assessment, risk analysis, the identification of preventive and mitigative measures, etc.

While operator-level rollups of metrics are useful for small operators, a robust program for large operators should also include metrics at a more granular level. The metrics should enable operators to drill down to understand the performance of specific systems or segments within systems. This is particularly important for the threat-specific metrics mentioned previously.

Finally, as required by §§ 195.452(l) and 192.947, operators must keep records supporting the decisions, analyses, and processes developed and used in their evaluation of integrity management program effectiveness. These records should include those justifying the selection of performance metrics, the performance metric data and trends, and how these metrics are used to improve the integrity management program. Operators should also be diligently working to eliminate information and data gaps throughout their entire integrity management program.

Issued in Washington, DC, on November 29, 2012.

Jeffrey D. Wiese,

Associate Administrator for Pipeline Safety.

[FR Doc. 2012–29362 Filed 12–4–12; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF VETERANS AFFAIRS

Clinical Science Research and Development Service Cooperative Studies Scientific Evaluation Committee; Notice of Meeting

The Department of Veterans Affairs gives notice under the Federal Advisory Committee Act, 5 U.S.C. App. 2, that the Clinical Science Research and Development Service Cooperative Studies Scientific Evaluation Committee will hold a meeting on December 13, 2012, at the Hamilton Crowne Plaza, 1001 14th Street NW., Washington, DC. The meeting is scheduled to begin at 8:30 a.m. and end at 4 p.m.

The Committee advises the Chief Research and Development Officer through the Director of the Clinical Science Research and Development Service on the relevance and feasibility of proposed projects and the scientific validity and propriety of technical details, including protection of human subjects.

The session will be open to the public for approximately 30 minutes at the start of the meeting for the discussion of administrative matters and the general status of the program. The remaining portion of the meeting will be closed to the public for the Committee's review, discussion, and evaluation of research and development applications.

During the closed portion of the meeting, discussions and recommendations will deal with qualifications of personnel conducting the studies, staff and consultant critiques of research proposals and similar documents, and the medical records of patients who are study subjects, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. As provided by section 10(d) of Public Law 92–463, as amended, closing portions of this meeting is in accordance with 5 U.S.C. 552b(c)(6) and (c)(9)(B).

Those who plan to attend should contact Dr. Grant Huang, Deputy Director, Cooperative Studies Program (10P9CS), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, at (202) 443–5700 or by email at *grant.huang@va.gov*.

By Direction of the Secretary.

Dated: November 29, 2012.

Vivian Drake,

Committee Management Officer.

[FR Doc. 2012–29285 Filed 12–4–12; 8:45 am]

BILLING CODE 8320–01–P

FEDERAL REGISTER

Vol. 77 Wednesday,
No. 234 December 5, 2012

Part II

Department of the Interior

Bureau of Indian Affairs

25 CFR Part 162
Residential, Business, and Wind and Solar Resource Leases on Indian Land; Final Rule

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

25 CFR Part 162

[Docket ID BIA–2011–0001]

RIN 1076–AE73

Residential, Business, and Wind and Solar Resource Leases on Indian Land

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Final rule.

SUMMARY: The Bureau of Indian Affairs (BIA) is revising its regulations addressing non-agricultural surface leasing of Indian land. This rule adds new regulations to address residential leases, business leases, wind energy evaluation leases, and wind and solar development leases on Indian land, and removes the existing regulations for non-agricultural leases.

DATES: This rule is effective on January 4, 2013.

FOR FURTHER INFORMATION CONTACT: Elizabeth Appel, Acting Director, Office of Regulatory Affairs & Collaborative Action, (202) 273–4680; *elizabeth.appel@bia.gov*.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

Federal statutes require the Secretary to approve leases of Indian land. The rule establishing the procedures for obtaining Secretarial approval of leases and administration and enforcement of surface leases is at 25 CFR part 162, Leases and Permits. Currently, part 162 contains a subpart addressing all non-agricultural leases. This rule replaces that general subpart with subparts specifically addressing the following categories of leasing on Indian land: residential, business, and wind resource evaluation and wind and solar resource development. Specifically, this rule:

- Revises Subpart A, General Provisions;
- Creates a new Subpart C, Residential Leases;
- Creates a new Subpart D, Business Leases;
- Creates a new Subpart E, Wind Energy Evaluation Leases (WEELs) and Wind and Solar Resource (WSR) Leases;
- Deletes Subpart F, Non-agricultural Leases (because that subpart was intended to address residential and business leasing, which this rule addresses specifically in subparts C and D, respectively);
- Moves the current Subpart E, Special Requirements for Certain Indian Reservations, to Subpart F; and
- Creates a new Subpart G, Records.

The rule does not affect Subpart B, Agricultural Leases. Subpart B may be revised at a later time. In addition, to ensure that changes to the General Provisions do not affect agricultural lease regulations, the current General Provisions section is being moved to Subpart B, where they apply only to agricultural leases. Minor edits were made to the General Provision section to delete redundancies and clarify that they now apply only to agricultural leases.

This rule contains new provisions on residential, business, and wind and solar resource leasing that:

- Clarify the procedures for obtaining BIA approval of residential, business, and wind and solar resource lease documents;
- Establish deadlines for BIA to issue decision on complete residential, business, and wind and solar resource lease applications;
- Define what information and documents are necessary for a complete application; and
- Provide greater deference to tribes for tribal land leasing decisions.

II. Summary of Substantive Revisions

This rule makes the procedures for obtaining BIA approval of residential, business, and wind and solar resource lease documents (leases, amendments, assignments, subleases, and leasehold mortgages) as explicit and transparent as

possible. The current regulations provide for the approval of these instruments, but do not specify the approval procedures, leading to possible inconsistencies nationwide, to the detriment of Indian landowners, lessees and lenders.

This rule continues to require Indian landowner consent for leases, consistent with the Indian Long Term Leasing Act and the Indian Land Consolidation Act of 2000 (ILCA), as amended by the American Indian Probate Reform Act (AIPRA). Because ILCA does not apply to tribes in Alaska, the consent requirements for Alaska remain the same as in the previous regulations governing leasing. The regulations also establish the standard for rental rates, providing that leases on tribal land may be approved for the compensation negotiated by the tribe and leases for less than fair market rental may be approved on individually owned Indian land under certain circumstances.

Subpart C, Residential Leases, addresses leasing for single-family homes and housing for public purposes on Indian land. The regulations provide for a 30-day time frame within which BIA must issue a decision on a complete residential lease application. The final rule eliminates the requirement for bonds and insurance for residential leases. Subpart C also includes provisions for enforcement of lease violations.

Subpart D, Business Leases, addresses leasing for business purposes, including: (1) Leases for residential purposes that are not covered in Subpart C; (2) leases for business purposes not covered by Subpart E (wind energy evaluation and wind and solar resource development); (3) leases for religious, educational, recreational, cultural, and other public purposes; and (4) commercial or industrial leases for retail, office, manufacturing, storage, biomass, waste-to-energy, and/or other business purposes. The regulations provide for a 60-day time frame within which BIA must issue a decision on a complete business lease application.

Subpart E, WEELs and WSR Leases, establishes procedures for obtaining BIA review and approval of WEELs and WSR leases. For wind energy, this rule establishes a two-part process whereby developers may obtain BIA approval of a short-term lease for possession of Indian land for the purposes of installation and maintenance of wind evaluation equipment, such as meteorological towers. The WEEL may provide the developer with an option to lease the Indian land for wind energy development purposes. The environmental reviews conducted for the short-term lease, which would evaluate only the impacts of the evaluation equipment, not the full development of the wind project, may be incorporated by reference, as appropriate, into environmental reviews conducted for a lease for full development of the wind project. This two-part process is not necessary for solar resource development because solar resource evaluation does not require possession of the land. The regulations provide for a 20-day time frame within which BIA must issue a decision on a complete WEEL and a 60-day time frame within which BIA must issue a decision on a complete WSR lease application.

Some of the more notable cross-cutting substantive changes include the following.

General Provisions

- Clarifying when BIA approval of a lease is required
- Clarifying what taxes apply in the context of leasing Indian land
- Clarifying the applicability of the regulations
- Clarifying that leases may include a provision giving a preference to qualified tribal members, based on their political affiliation with the tribe

BIA Approval Process

- Eliminating the requirement for BIA approval of permits of Indian land
- Eliminating the requirement for BIA approval of subleases and assignments where certain conditions are met
- Imposing time limits on BIA to act on requests to approve leases, lease assignments, and leasehold mortgages
- Establishing that BIA has 30 days to act on a request to approve a lease amendment or sublease, or the document will be deemed approved
- Establishing that BIA must approve leases, amendments, assignments, leasehold mortgages, and subleases unless it finds a compelling reason not to do so, based on certain specified findings

Compensation and Valuations

- Providing that BIA will defer to the tribe's negotiated value for a lease of tribal land and will not require valuations of tribal land
- Automatically waiving valuation for leases of individually owned land if the individual landowners provide 100 percent consent
- Allowing for BIA waiver of compensation and valuation for residential leases of individually owned land under certain circumstances if the lessee is a co-owner that has been living on the tract for the past 7 years without objection
- Allowing for BIA waiver of valuation for leases where the lessee or tribe will provide infrastructure improvements to the leased premises and BIA determines it is in the best interest of the landowners
- Allowing short-term leases for wind resource evaluation purposes at the value negotiated by the Indian landowners (whether tribal or individual Indians)
- Providing that BIA will defer to the tribe's determination that allowing alternative forms of rental (other than monetary) compensation for tribal land is in its best interest
- Allowing alternative forms of rental (other than monetary) compensation for individually owned Indian land if the if BIA determines it is in the best interest of the Indian landowners
- Allowing market analysis, competitive bidding, and other appropriate types of valuation, in addition to appraisals
- For tribal land, requiring BIA to defer to the tribe's determination that rental reviews and adjustments are not necessary
- For individually owned land, allowing for automatic rental adjustments and restricting the need for reviews of the lease compensation (to determine if an adjustment is needed) to certain circumstances

Improvements

- Requiring plans of development and schedules for construction of improvements to assist the BIA and Indian landowners in enforcement of diligent development of the leased premises

Direct Pay

- Allowing for direct pay (i.e., to the Indian landowners, rather than to BIA) for residential, business, and wind and solar resource leasing only where there are 10 or fewer landowners, and all landowners consent to direct pay
- Continuing direct pay unless and until 100 percent of the owners agree to discontinue direct pay, but suspending direct pay under certain circumstances

These changes are intended to increase the efficiency and transparency of the BIA approval process for the residential, business, wind energy evaluation, and wind and solar resource leasing of Indian land, support landowner decisions regarding the use of their land, support tribal self-determination, increase flexibility in compensation and valuations, and facilitate management of direct pay. These changes do not affect agricultural leasing.

III. Responses to Comments on the Proposed Rule

Tribal consultation on the proposed leasing rule, published November 29, 2011 (76 FR 73784), occurred during January 2012. We held three consultation sessions on the proposed rule: January 10, 2012, in Seattle, Washington; January 12, 2012, in Palm Springs, California; and January 18, 2012, in Rapid City, South Dakota. The comment deadline was January 30, 2012. We received over 80 written submissions, and received written and oral comments from approximately 50 Indian tribes during this round of tribal consultation, as well as comments from tribal organizations, tribal housing authorities, and tribal corporations. We also received comments from community development financial institutions (CDFIs), tribal members, and members of the public.

The following is a summary of comments received during consultation and the public comment period on the proposed rule, and an explanation of how we addressed those comments in the final rule. We accepted a number of wording changes that are incorporated into the final rule, but may not be specifically mentioned here.

Note: The section numbers in this preamble refer to section numbers in the final rule. We have included a "PR" for "proposed rule" to indicate the corresponding proposed rule section where it differs from the final rule section number and may be helpful to the reader.

A. Overview

Many tribes and tribal organizations stated that they generally supported the proposed rule, and that the proposed rule was a significant improvement over the previous draft (which was released for consultation) because it more accurately reflected the intent of BIA to streamline and expedite the leasing process, advance economic development, and spur renewable energy development. Tribes stated that they supported the steps BIA took in the proposed rule to recognize tribal sovereignty and tribes' achievements in terms of their ability to manage their own affairs on critical leasing issues. Tribes were particularly supportive of provisions for tribal waiver of appraisals, deadlines for BIA action, and BIA's deference to the Indian landowners' determination that the lease is in their best interest.

While tribes supported the proposed rule overall, they had suggestions for improvement, which are summarized below. A tribal organization stated, broadly, that the regulations should better reflect an updated concept of trust responsibility that defers to tribes in financial matters. We have reviewed the regulation to ensure that the final rule requires BIA to defer to tribes in all possible cases, consistent with our trust responsibility.

One tribe suggested we review the regulation to reconsider each and every regulatory burden it imposes. Likewise, another tribe asked that we review the regulation to ensure tribes' sovereign rights are recognized. We followed these recommendations and have deleted regulatory burdens that are not necessary for BIA to meet its statutory and trust responsibilities and have included provisions supporting tribes' sovereign rights.

Several tribes stated that revision of the business leasing regulations was long overdue. Tribes had suggestions for limiting BIA's role in the leasing process to an administrative role by, for example, limiting BIA's independent review of tribal leasing decisions for financial prudence. Another tribe said that tribes should be able to rely on BIA to process lease documents but not make decisions affecting substantive lease contents or negotiations. We have limited BIA's involvement in substantive lease contents, and left lease provisions and issue resolutions to negotiation, to the extent possible and consistent with our trust responsibility.

A few tribes requested deferring finalization of the residential leasing subpart, to allow for further consultation and more time for all comments to be considered. We will discuss these tribes' comments in more detail, below.

Tribes had suggestions for communicating the final rule's changes, including the following:

- Create a Web page dedicated solely to the new leasing regulations including a repository of guidance and informational materials. We are developing a Web site accessible from *www.bia.gov* and will populate the Web site with guidance and informational materials as they are developed.
- Provide checklists and sample lease provisions to assist in the lease negotiation process. We will develop checklists and make them available on the Web site.

B. Format of Regulations

A few tribes commented on the format of the regulations. The majority stated that they believe the common provisions of separate subparts should be kept separate because it is more user-friendly. A minority stated that this format results in regulations that are too lengthy and redundant. We retained the separate subparts for user-friendliness.

Several tribes stated that the proposed rule made little distinction between individual Indian landowners and tribes or tribal agencies, and noted that BIA should defer to the tribe and tribal agency and exercise a lesser degree of oversight than for individual Indian landowners. To the extent consistent with the trust responsibility, we treated tribal and individual Indian landowners differently, providing more deference to tribal landowners in the lease approval process and in the lease enforcement process. We highlighted this difference in the final rule by breaking out questions regarding rental compensation and valuation according to whether the lease is of tribal land or individually owned Indian land.

C. Subpart A—General Provisions

We received the following comments on sections within subpart A.

162.002—How the Part Is Subdivided

- Clarify the provision in 162.002 stating that Subpart F (Special Requirements for Certain Reservations) is subject to subparts A and G. In response, we added a sentence to 162.002 to clarify which provisions apply if there is a conflict between Subpart F (or any act of Congress under which a Subpart F lease is made) and Subparts A through G. Note that Subpart F is merely a redesignation of what was Subpart E.
- Explain the effect of deleting the former subpart addressing non-agricultural leases on tribal regulations modeled after that subpart. There will be no effect; the tribal regulations stand independent of Federal regulations.

162.003—Definitions

- "Amendment"—Define this term to include any changes to the terms of a lease approved by BIA under part 162 that are not contemplated by or provided for in the lease during its initial or renewal period. We did not add this definition because it is self-evident.
- "Business day"—Include tribally recognized holidays out of respect for tribal sovereignty and to provide consistency for individuals and businesses dealing with tribes. We determined not to include tribally recognized holidays because the wide variation in tribally recognized holidays would make administration of the Federal regulations unworkable.
- "Court of competent jurisdiction"—Add that nothing in the definition alters preexisting allocations of jurisdiction over any matter as among State, Federal,

and tribal courts. While we agree this is true, we determined that explicitly including this in the definition could imply that, where this statement is not made explicitly, preexisting allocations of jurisdiction are altered.

• "Fee interest"—Clarify this definition to state when restrictions on alienation attach, if at all, to tribally acquired fee land. We determined that this request is outside the scope of this rulemaking.

• "Government lands"—Clarify that this definition does not include tribal lands. We incorporated this change.

• "Housing for public purposes"—Clarify that this term includes programs administered or substantially financed by any entity (not just not-for-profit entities) organized for the purpose of developing or improving low income housing using tax credits. We incorporated this change.

• "Immediate family"—Leave this definition to tribes' discretion. We incorporated this change by providing that the definition will apply only in the absence of a tribal law definition.

• "Indian landowner"—Include tribal corporations organized under 25 U.S.C. 477 ("section 17 corporations") in this definition, to the extent they have the authorization to lease Indian land to third parties. We did not incorporate this change because section 17 corporations are exempt from the requirement to obtain BIA approval of leases under part 162. A few commenters also suggested defining "individual Indian landowner" and "tribal landowner" to emphasize their differences. We determined that these definitions were unnecessary.

• "Inherent Federal function"—See discussion of 162.018, below.

• "Lease"—Add that a lessee's right to possession will limit the landowner's right only to the extent provided in the lease to avoid any possible argument that common law definitions requiring exclusive right of possession be applied to part 162. We incorporated the suggested change.

• "Lease"—Expand the definitions of "lease" and "lessee" to include subleases and assignments from sublessees and assignees. We did not incorporate this change because it would expand the application of the regulations beyond what is intended.

• "Lease document"—Add a definition for this term (the proposed rule used this term without a definition) to expressly include a lease, amendment, assignment, sublease, and leasehold mortgage. We added this definition.

• "LTRO"—Revise to clarify that a tribe contracting or compacting LTRO functions may be included in this definition. We did not make this change because these tribes are already included in the definition, as part of "BIA."

• "Notice of violation"—Revise to account for situations in which a notice of violation is issued against the Indian landowner/lessor. We did not incorporate this change because BIA's obligation is to the Indian landowner, not to enforce the lease on behalf of the lessee.

• "Orphaned minor"—Revise because the proposed rule's definition inaccurately suggests that every minor without a court-appointed guardian is orphaned. We revised the definition to match the common understanding of this term.

• "Permit"—Revise to clarify that this term does not include tribal grazing permits. Because grazing permits are governed by another CFR part, 25 CFR part 166, this definition does not apply to them; therefore, we determined that no change to this definition is necessary.

• "Single family residence"—Restrict this term to one dwelling unit. We did not revise the definition, but the definition allows tribes to define the term differently. This definition is consistent with the scope of financing available under section 184 of the Housing and Community Development Act of 1992 (12 U.S.C. 1715z–13a). We also added this term to the definition of "housing for public purposes" to clarify that this housing may include a single family residence, rather than just developments. We incorporated a tribal housing authority's suggestion that we add "or other tribal law" to allow tribal law beyond just zoning law to define this term.

• "Sublease"—Revise to indicate that the interest held by the sublessee should be "no greater than" that of the lessee, since the sublessee may hold the same rights as the lessee. We incorporated this change.

• "Tribal law"—Revise to add that the body of non-Federal law is "defined by each tribe." We did not incorporate this change because it would be redundant, given that the definition clearly establishes that the tribe defines its own body of law.

• "TDHE" (tribally designated housing entity)—Expand to include tribally sponsored or tribally sanctioned not-for-profit entities. We incorporated this requested change. Expand to include a tribal council or other tribal departments fulfilling TDHE services. We did not incorporate this change because a tribal council or tribal department that fulfills the function of a TDHE, but is not separate from the tribe, does not have to obtain a lease of tribal land (the tribe cannot lease to itself) while entities separate from the tribe must obtain a lease of tribal land.

162.004 (PR 162.006)—Applicability to Indian Land and Life Estates

• Clarify how BIA addresses leases of life estates where the land is fractionated. We revised this section to clarify the difference between a life estate that includes all of the interests in a tract, and a life estate of a fractional interest in a tract—including clarifying whose consent is required for the life tenant to lease in each case, and whether BIA approval of the lease is required in each case. Where the life estate covers only a fractional interest in a tract, the life tenant must obtain the consent of the co-owners and BIA approval.

• Restrict BIA services in collecting rents on behalf of a life tenant so that they do not exceed services provided to trust beneficiaries. In response, BIA is not responsible for collecting the rents on behalf of the life tenant, but may where the life tenant's whereabouts are unknown. In these situations, the Trust Fund Accounting System (TFAS) will distribute rent to an account for the life tenant.

• Do not assume that all life estates are held by non-Indians, because tribes use life estates as a form of estate planning for tribal members. The revised regulations clarify that BIA treats life estates the same whether they are held by Indians or non-Indians; BIA's trust responsibility is to the remaindermen.

• Delete provisions requiring lessees to pay life tenants directly, because that requirement exposes the life tenant's rental income to State court judgments; whereas if BIA collected rent on behalf of the life tenant, the rental income would be protected from these judgments by an individual Indian money (IIM) account. While we note this point, the rule allows life tenants to enter into leases without BIA approval, and BIA does not administer such leases on behalf of life tenants. The requirement that lessees pay life tenants directly is consistent with the rights and responsibilities afforded to life tenants in the rule. As stated above, this rule treats life estates the same whether they are held by Indians or non-Indians.

• Reflect Congress's intent to extend BIA's trust responsibility to protect Indian descendants who are life tenants, without removing property from trust. BIA will protect the trust asset, but does not agree that Congress expressed its

intent to extend the fiduciary duty to life tenants.

• Protect remaindermen from a situation where a life tenant enters into a long-term lease for the duration of his or her life and receives up-front payments such that the life tenant enjoys the income to the detriment of the remaindermen. If a life tenant enters into a lease only for the duration of his or her life, he or she is entitled to enjoy the income, whether paid in a lump sum or over time, to the exclusion of the remaindermen. The rule protects remaindermen by making it clear that, upon the death of the life tenant, any lease of a life estate terminates. The remaindermen could evict the life tenant's lessee or negotiate a new lease with new payment terms. If either the lessee or the remainderman believed they had grounds to do so, they could attempt to recoup losses from the life tenant's estate.

162.005 (PR 162.008)—When Lease Is Needed

• Add that an entity using a tribal land assignments or similar instruments and permit holders do not need a lease to possess Indian land. We incorporated this change.

• Exempt owners of a fractional interest from the requirement to obtain a lease from the owners of the other fractional interests in the same tract. We did not incorporate this change. Section 162.005(a)(2) allows the co-owner to use the tract if the other fractional co-owners agree; otherwise, the co-owner must obtain a lease from the other fractional owners to ensure that they consent (if leased, rent may not be necessary, as this situation is one in which fair market rental may be waived). We disagree with the commenters' claim that each owner has full rights to use the property in any manner, because one co-owner does not have the right to exclude the others without their consent. For this reason, we reject the commenters' claim that requiring a lease is diminishing the property rights of each co-owner by requiring him or her to pay rent for use of his or her own property.

• Clarify how 162.005(a)(2), which states that co-owners may agree to allow one co-owner to use the tract without a lease, will work and when a lease, rather than an informal agreement, is required. While a lease documenting the agreement is preferable, the rule provides for maximum flexibility by allowing for informal agreements. A lease is required if all the co-owners cannot agree to an informal agreement. Section 162.005(a)(2) is consistent with existing regulations, allowing for owners' use when 100 percent of the landowners agree. If not all 100 percent agree, then a lease is required. The informal agreement may continue throughout the lives of the landowners, or for whatever period they agreed to, until they no longer agree.

• Incorporate the current language of 162.102(d) (regarding section 17 corporations) into the new subpart A. This provision is incorporated at 162.005(b)(3).

162.006 (PR 162.007)—Land Use Agreements Subject to This Part

• Clarify whether the regulations apply to those tribes with tribe-specific statutory authority for leasing. We added provisions to 162.006 to clarify that tribes leasing Indian land under a special act of Congress that authorizes leasing without BIA approval are not subject to part 162.

• Clarify that tribes with special Federal statutory authority to lease under tribal regulations approved by the Secretary may adopt any of the part 162 regulations subject to Secretarial approval of the amendment to tribal regulations. We agree this is the case.

• Make Federal approval requirements, but not recording and enforcement provisions, inapplicable to leases issued by section 17 corporations. We clarified in 162.006 that leases of tribal land issued by section 17 corporations under their charters are not subject to the regulations (including enforcement provisions) for leases of 25 years or less, but the leases must be recorded.

• State that a land use agreement that encumbers tribal land and is authorized by 25 U.S.C. 81 is governed by 25 CFR part 84, rather than, as the proposed rule stated, that a land use agreement that encumbers tribal land is governed by 25 U.S.C 81. We incorporated this change.

• Correct the erroneous suggestion in the table in 162.006 that all land use agreements that can be called by a certain name are governed by the corresponding CFR parts, because the statutory authority determines what the land use agreement is, and what the corresponding CFR part is. We considered adding the statutory authorities to this table but determined that it would be too voluminous and ultimately unhelpful. Instead, we clarified the statutory authorities for part 162 leases and provide that other statutory authority governs the agreements in the table.

• Add that tribal laws and customs must be deferred to in determining whether a use is "temporary" under a "tribal land assignment." We addressed this comment by deleting the word "temporary," because a tribal land assignment may be for any appropriate period of time under tribal law.

• Clarify whether declarations of tribal land set-asides must be submitted to BIA for a determination that they are not leases, as permits must. Tribal land assignments and similar instruments allowing use of tribal land cannot be subject to part 162, and therefore do not need to be submitted to BIA for BIA's file or a determination that they are not leases.

• Clarify that tribal "dedications to a public use" and other means of setting aside tribal land for particular purposes do not require an approved lease under this part. Instruments such as these would fall under "tribal land assignments and similar instruments authorizing uses of tribal land," which are not subject to part 162.

• Clarify the applicability of the regulations to section 17 corporations. We have added provisions to 162.006 to clarify that part 162 does not apply to leases of tribal land by a section 17 corporation under its charter to a third party for a period not to exceed 25 years, and to 162.005 to clarify that a section 17 corporation managing or having the power to manage tribal land directly under its Federal charter or under a tribal authorization (not under a lease from the Indian tribe) does not need a lease under part 162 to do so. Several tribes stated that they disagree with the exemption for section 17 corporations leasing to third parties, because tribes would have to obtain BIA approval to lease to a third party. This exemption is established in 25 U.S.C. 477 and applies to BIA approval of any lease document that would otherwise fall under part 162.

162.007 (PR 162.004)—Permits

Tribes nearly unanimously supported the proposed rule's removal of the requirement to obtain BIA approval of permits. The tribes stated that eliminating BIA permit approval increases tribal self-determination and streamlines the process. Some tribes also stated that requirements for the landowners to follow relevant environmental and cultural resource laws, and for BIA to confirm the document is a permit, protect Indian land without burdening landowners with an onerous approval process. In addition, we received the following comments:

• Reconcile 162.007's explanation as to what qualifies as a "permit" with the grazing regulations. Because grazing permits are issued under a separate statutory authority and are governed by

separate regulations at 25 CFR part 166, the description in part 162 does not affect grazing permits.

• Clarify that the requirement that permits comply with applicable environmental laws does not mean the National Environmental Policy Act (NEPA) applies. Because there is no Federal approval of permits, neither NEPA nor Section 106 of the National Historic Preservation Act applies to permits.

• Add a timeline or process by which BIA "confirms" whether a document is a permit or a lease. We incorporated this change by adding a 10-day timeline by which BIA may notify the Indian landowners that a lease is required because the permit grants an interest in Indian land.

• Clarify in the introductory paragraph to the table that the characteristics are merely "examples of common characteristics," to ensure that permits that lack one or more characteristics are not necessarily excluded from being considered a permit. We incorporated this change.

• Delete the permit characteristic "does not grant an interest in Indian land" because permits typically grant non-possessory use rights, which are, in effect, an "interest." BIA disagrees that a non-possessory use privilege is a "legal interest" in the Indian land. For this reason, we did not make the requested change.

• Narrow the permit characteristic, "unlimited access by others," because it is too broad. Tribal members retain rights of access on permitted lands, including hunting privileges, cultural and spiritual use access, and easements. We revised this to clarify that a permittee has a "non-possessory right of access."

• Clarify that BIA will no longer police compliance with permits or collect and distribute permit payments, and allow landowners to opt-in or opt-out of BIA approval for permits. BIA understands this is a significant change for some areas that heavily rely on permits. Once this final rule is effective, the landowner will be responsible for collecting permit payments, rather than BIA. BIA will not collect permit income from permittees, and BIA will not distribute permit income to Indian landowners. If there is a dispute regarding the permit or whether the permittees have made timely payments, the Indian landowners' remedy is with a court of competent jurisdiction. We added a provision to clarify that BIA will not administer or enforce permits.

• Limit tribes' ability to establish compensation and conditions to prevent permitting from being a separate revenue opportunity for tribes beyond leases and rights-of-way. BIA did not incorporate this change because tribal landowners have the right to receive compensation for granting access through a permit, and tribal landowners may establish whatever compensation they like.

• Clarify whether 162.007 allows BIA to grant permits on tribal land, without tribal approval. The final 162.007 does not allow BIA to grant permits on tribal land, only on U.S. Government land covered by part 162.

162.008 (PR 162.005)—Applicability to Documents Submitted Before Effective Date

• Clarify that those leases that were submitted to BIA before the effective date of the rule, but not approved by BIA before the effective date of the rule, are governed by the rules in effect at the time of the submission. We reworded 162.008 to clarify that this is the case.

• Clarify what version of the regulations will apply to leases approved before the effective date of the rule. We reworded 162.008 to clarify that new regulations will apply to leases approved before the effective date of the rule, except that where the provisions of the lease conflict with the provisions of the regulation, the provisions of the lease will govern. Likewise, options to renew in leases approved by BIA before the effective date of the final rule will continue to be governed by the lease terms. Renewals after the effective date of the final rule of leases that were approved by BIA before the effective date of the final rule will not have to contain the final rule's mandatory lease provisions.

• Add a qualifying clause in the beginning of 162.008 stating that it applies "except as provided in 162.006" ("To what land use agreements does this part apply?") for clarity. We incorporated this change.

• Delete the provision in 162.008 stating that BIA has the right to amend the regulations at any time, because it may create uncertainty. BIA accepted the request to delete this provision since BIA retains the right to amend through the Administrative Procedure Act public notice and comment process, regardless of whether this right is stated in the regulations.

• Address the rule's applicability to leases issued by section 17 corporations that are exempt from Federal approval. As stated below, we clarified in 162.006 that part 162 does not apply to these leases where the term is 25 years or less.

• Address the rule's applicability to leases that a tribe or tribal corporation is obligated to issue upon exercise of a legally binding option to lease on the effective date of the new rules. The fact that a party is obligated to issue a lease will not change the applicability of the regulations.

162.009 (PR N/A)—Approval of Subleasehold Mortgages (New Section)

• We added a new section to clarify whether subleasehold mortgages require BIA approval, in response to comments on subleases and leasehold mortgages.

162.010 (PR 162,009)—How To Obtain a Lease

• Narrow 162.010 so that only a tribe may submit a lease to BIA for approval. We did not add this restriction because a lease of Indian land must be signed by the Indian landowners (or the BIA on behalf of landowners in limited circumstances) and the lessee. BIA will accept the lease document from either the prospective lessee or the Indian landowner.

162.011 (PR 162.010)—Identifying and Contacting Indian Landowners

• Require prospective lessees to contact tribes directly, rather than going through BIA first in 162.011. We addressed this comment by narrowing application of this section to individual Indian landowners.

• Add language to this section requiring the prospective lessee to provide a written explanation of the need for obtaining Indian landowner information. We added this requirement.

162.013 (PR 162.012)—Consent

One tribe submitted extensive comments regarding its situation, wherein tribal members constructed homes without a lease so long as the member had a fractional interest in the tract. Any person who owns a fractional interest in a tract must obtain consent from all of the other owners (co-owners) of fractional interests in that tract in order to possess that tract without a lease, or must obtain consent from the co-owners representing the appropriate percentage of ownership in the tract to lease the tract. See 162.005(a) (PR 162.008(a)). Where a lease is required, and consent to lease cannot be obtained within 90 days, BIA may issue a lease under paragraph 162.013(c)(6) (PR 162.012(c)(6)). One Alaska tribe with a unique situation stated that BIA should add a provision to part 162 addressing consent requirements specifically for that tribe. Because the Indian Land Consolidation Act (ILCA) and its consent provisions do not apply to Alaska, we were unable to incorporate this requested change.

In addition, we received the following comments:

• Clarify that a section 17 corporation may consent to a lease. Because part 162 does not apply to section 17 corporations granting others the right to possess Indian land, we did not incorporate this change.

• A few tribes noted that where the consent of the landowners of 100 percent of the interests is required, it is difficult to obtain a lease. Under ILCA, if there are one to five landowners in a tract, then the owners of 90 percent of the interests in that tract must consent. In some cases, depending on the percentage of interests owned by each, this may mean that all of the landowners must consent. BIA recognizes the practical problems that are caused in those cases where all landowners must consent, but is constrained by statutory parameters.

• Clarify what tribal consent is needed for tribal lands and for fractionated lands where individual landowners owning the required percentage of interests under the ILCA have consented. If the tract is one in which 100 percent of the interests are owned by the tribe, the tribe must be a party to the lease of tribal land, and will need to authorize (i.e., consent to) the lease. If the tract is fractionated, and less than 100 percent of the interests are owned by the tribe and the lease is authorized by the Native American Housing and Self-Determination Act (NAHASDA), tribal consent is still required. If the lease for a fractionated tract is entered into under another statutory authority, then tribal consent is not needed; Congress provided for this situation in stating that where a tribe did not consent to a lease of fractionated land, it is not considered a party to the lease. See 25 U.S.C. 2218(d)(2).

• Revise the consent provisions to apply to tribes, in addition to individual Indian landowners. Because the term "Indian landowners" includes both tribal landowners and individual Indian landowners, we did not revise these provisions. Another tribe asked that we add "individual" before "Indian landowner" everywhere the rule discusses consent. We did not incorporate this change because a tribal landowner must also consent to a lease of its land.

• Limit the parties' ability to allow for "deemed consent" in a lease to individual landowners. The regulations limit deemed consent lease provisions to individual Indian landowners only. One tribe requested adding tribes to allow for tribes to be deemed to have consented. We did not incorporate this change out of respect for tribal sovereignty and because other comments requested that it be limited to individual Indian landowners.

• Replace the term "consent" with "grant" because the landowners actually "grant" the lease. While it is true that landowners grant the lease, we adopted the language of ILCA in referring to "consent" to avoid potential confusion where there are several owners of fractional interests and one "grants" the lease but the others do not.

• Delete paragraph (c)(6), which empowers BIA to consent to a lease if the landowners have been unable to reach an agreement for 3 months, because it favors the prospective lessee rather than the landowner where a non-consenting landowner has legitimate reasons for not consenting. We did not delete this paragraph because it implements statutory authority (25 U.S.C. 380) and BIA will determine whether the lease is in the best interest of the landowners before exercising this authority.

162.014 (PR 162.013)—What Laws Apply to Leases

• Clarify when tribal laws apply to leases under part 162, and when BIA may waive part 162 due to conflicting or inconsistent tribal law. We revised this section by incorporating the tribes' suggested language to allow tribal laws to supersede or modify part 162 provisions, as long as certain conditions are fulfilled (e.g., the tribe notifies BIA of the modifying or superseding effect).

• Revise the proposed rule's language about when State law would be applied because a Federal court could read the proposed rule's provisions as providing authority for a court to apply State law. We revised the section to clarify that State law may apply where a Federal court made it applicable in the absence of Federal or tribal law. Another concern was that tribes should have the flexibility to apply State law in certain circumstances. The final rule's language clarifies that a tribe may apply State law.

• Clarify that the phrase "parties to a specific lease may subject it to State or local law in the absence * * *" does not give individuals the authority to establish that the State or locality has jurisdiction. We added language to clarify that the individuals will be subjecting only their lease to this jurisdiction.

• Add provisions that require BIA to recognize and acknowledge tribal laws regulating activities on land under a lease, including land use, environmental protection, and historic preservation, as in the 2004 draft regulations. The additional language in 162.016 regarding the applicability of tribal law covers this.

162.015 (PR N/A)—Tribal Employment Preference Laws (New Section)

• Add language recognizing the applicability of tribal preference laws to lessees. To clarify this applicability, we added a new section 162.015. Tribe-specific employment preferences as provided in these regulations are political preferences, not based on race or national origin. They run to members of a particular federally-recognized tribe or tribes whose trust or restricted lands are at issue and with whom the United States holds a political relationship. These preferences are rationally connected to the fulfillment of the federal government's trust relationship with the tribe that holds equitable or restricted title to the land at issue. These preferences also further the United States' political relationship with Indian tribes. Tribes have a sovereign interest in achieving and maintaining economic self-sufficiency, and the federal government has an established policy of encouraging tribal self-governance and tribal economic self-sufficiency. A tribe-specific preference in accord with tribal law ensures that the economic development of a tribe's land inures to the tribe and its members. Tribal sovereign authority, which carries with it the right to exclude non-members, allows the tribe to regulate economic relationships on its reservation between itself and non-members. See, generally, *Equal Employment Opportunity Commission* v. *Peabody Western Coal Company*, No. 2:01-cv-01050 JWS (D. Ariz., Oct. 18, 2012) (upholding tribal preferences in leases of coal held in trust for the Navajo Nation and Hopi Tribe, but also citing with approval the use of such preferences in business leases). These regulations implement the established policy of encouraging tribal self-governance and tribal economic self-sufficiency by explicitly allowing for tribal employment preferences.

162.016 (PR 162.014)—BIA Compliance With Tribal Laws

• Restrict when BIA will defer to tribal law by changing "making decisions regarding leases" to "making the decision to approve or disapprove the proposed lease." We did not incorporate this change because BIA will defer to tribal law in decisions regarding leases beyond just the approval decision.

162.017 (PR N/A)—What Taxes Apply (New Section)

All tribal commenters supported proposed provisions clarifying that improvements on trust or restricted land are not taxable by non-tribal entities; however, many tribes requested clarification regarding other taxation arising in the context of leasing Indian land. For this reason, we separated this topic into its own section and moved it from the residential, business, and WSR leasing subparts to subpart A. This section now addresses not only taxation of improvements on leased Indian land, but also taxation of the leasehold or possessory interest, and taxation of activities (e.g., excise or severance taxes) occurring or services performed on leased Indian land.

Tribes have inherent plenary and exclusive power over their citizens and territory, which has been subject to limitations imposed by Federal law, including but not limited to Supreme Court decisions, but otherwise may not be transferred except by the tribe affirmatively granting such power. *See, Cohen's Handbook of Federal Indian Law,* 2012 Edition, § 4.01[1][b]. The U.S. Constitution, as well as treaties entered into between the United States and Indian tribes, executive orders, statutes, and other Federal laws recognize tribes' inherent authority and power of self-government. *See, Worcester* v. *Georgia,* 31 U.S. 515 (1832); *U.S.* v. *Winans,* 198 U.S. 371, 381 (1905)("[T]he treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted."); *Cohen's Handbook of Federal Indian Law,* 2012 Edition, § 4.01[1][c] ("Illustrative statutes * * * include [but are not limited to] the Indian Civil Rights Act of 1968, the Indian Financing Act of 1974, the Indian Self-Determination and Education Assistance Act of 1975 * * * [and] the Tribe Self-Governance Act * * * In addition, congressional recognition of tribal authority is [also] reflected in statutes requiring that various administrative acts of... the Department of the Interior be carried out only with the consent of the Indian tribe, its head of government, or its council."); *Id.* ("Every recent president has affirmed the governmental status of Indian nations and their special relationship to the United States").

With a backdrop of "traditional notions of Indian self-government," Federal courts apply a balancing test to determine whether State taxation of non-Indians engaging in activity or owning property on the reservation is preempted. *White Mountain Apache Tribe* v. *Bracker,* 448 U.S. 136, 143 (1980). The *Bracker* balancing test requires a particularized examination of the relevant State, Federal, and tribal interests. In the case of leasing on Indian lands, the Federal and tribal interests are very strong.

The Federal statutes and regulations governing leasing on Indian lands (as well as related statutes and regulations concerning business activities, including leases, by Indian traders) occupy and preempt the field of Indian leasing. The Federal statutory scheme for Indian leasing is comprehensive, and accordingly precludes State taxation. In addition, the Federal regulatory scheme is pervasive and leaves no room for State law. Federal regulations cover all aspects of leasing:

- Whether a party needs a lease to authorize possession of Indian land;
- How to obtain a lease;
- How a prospective lessee identifies and contacts Indian landowners to negotiate a lease;
- Consent requirements for a lease and who is authorized to consent;
- What laws apply to leases;
- Employment preference for tribal members;
- Access to the leased premises by roads or other infrastructure;
- Combining tracts with different Indian landowners in a single lease;
- Trespass;
- Emergency action by us if Indian land is threatened;
- Appeals;
- Documentation required in approving, administering, and enforcing leases;
- Lease duration;
- Mandatory lease provisions;
- Construction, ownership, and removal of permanent improvements, and plans of development;
- Legal descriptions of the leased land;
- Amount, time, form, and recipient of rental payments (including non-monetary rent), and rental reviews or adjustments;
- Valuations;
- Performance bond and insurance requirements;
- Secretarial approval process, including timelines, and criteria for approval of leases;
- Recordation;
- Consent requirements, Secretarial approval process, criteria for approval, and effective date for lease amendments, lease assignments, subleases, leasehold mortgages, and subleasehold mortgages;
- Investigation of compliance with a lease;
- Negotiated remedies;
- Late payment charges or special fees for delinquent payments;
- Allocation of insurance and other payment rights;
- Secretarial cancellation of a lease for violations; and
- Abandonment of the leased premises.

The purposes of residential, business, and WSR leasing on Indian land are to promote Indian housing and to allow Indian landowners to use their land profitably for economic development, ultimately contributing to tribal well-being and self-government. The legislative history of section 415 demonstrates that Congress intended to maximize income to Indian landowners and encourage all types of economic development on Indian lands. *See* Sen. Rpt. No. 84–375 at 2 (May 24, 1955). Assessment of State and local taxes would obstruct Federal policies supporting tribal economic development, self-determination, and strong tribal governments. State and local taxation also threatens substantial tribal interests in effective tribal government, economic self-sufficiency, and territorial autonomy. The leasing of trust or restricted land is an instrumental tool in fulfilling "the traditional notions of sovereignty and [] the federal policy of encouraging tribal independence." *Bracker,* 448 U.S. at 145 (citing *McClanahan* v. *Arizona State Tax Comm'n,* 411 U.S. 164, 174–75 (1973)). The leasing of trust or restricted lands facilitates the implementation of the policy objectives of tribal governments through vital residential, economic, and governmental services. Tribal sovereignty and self-government are substantially promoted by leasing under these regulations, which require significant deference, to the maximum extent possible, to tribal determinations that a lease provision or requirement is in its best interest. *See* Joseph P. Kalt and Joseph William Singer, The Native Nations Institute for Leadership, Management, and Policy & The Harvard Project on American Indian Economic Development, Joint Occasional Papers on Native Affairs, *Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self-Rule,* No. 2004–03 (2004) ("economically and culturally, sovereignty is a key lever that provides American Indian communities with institutions and practices that can protect and promote their citizens interests and well-being [and] [w]ithout that lever, the social, cultural, and economic viability of American Indian communities and, perhaps, even identities is untenable over the long run").

Another important aspect of tribal sovereignty and self-governance is taxation. Permanent improvements and

activities on the leased premises and the leasehold interest itself may be subject to taxation by the Indian tribe with jurisdiction over the leased property. The Supreme Court has recognized that "[t]he power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management." *Merrion* v. *Jicarilla Apache Tribe,* 455 U.S. 130, 137 (1982). State and local taxation of lessee-owned improvements, activities conducted by the lessee, and the leasehold interest also has the potential to increase project costs for the lessee and decrease the funds available to the lessee to make rental payments to the Indian landowner. Increased project costs can impede a tribe's ability to attract non-Indian investment to Indian lands where such investment and participation are critical to the vitality of tribal economies. An increase in project costs is especially damaging to economic development on Indian lands given the difficulty Indian tribes and individuals face in securing access to capital. A 2001 study by the U.S. Department of the Treasury found that Indians' lack of access to capital and financial services is a key barrier to economic advancement. U.S. Dept. of the Treasury, Community Development and Financial Institutions Fund, The Report of the Native American Lending Study at 2 (Nov. 2001). Along the same line, 66 percent of survey respondents stated that private equity is difficult or impossible to obtain for Indian business owners. *Id.*

In many cases, tribes contractually agree to reimburse the non-Indian lessee for the expense of the tax, resulting in the economic burden of the tax ultimately being borne directly by the tribe. Accordingly, the very possibility of an additional State or local tax has a chilling effect on potential lessees as well as the tribe that as a result might refrain from exercising its own sovereign right to impose a tribal tax to support its infrastructure needs. Such dual taxation can make some projects less economically attractive, further discouraging development in Indian country. Economic development on Indian lands is critical to improving the dire economic conditions faced by American Indians and Alaska Natives. The U.S. Census Report entitled *We the People: American Indians and Alaska Natives in the United States,* issued February 2006, documented that a higher ratio of American Indians and Alaska Natives live in poverty compared to the total population, that participation in the labor force by American Indians and Alaska Natives was lower than the total population, and that those who worked full-time earned less than the general population.

162.017(a). Subject only to applicable Federal law, permanent improvements on trust or restricted land are not taxable by States or localities, regardless of who owns the improvements. Permanent improvements are, by their very definition, affixed to the land. Accordingly, a property tax on the improvements burdens the land, particularly if a State or local government were to attempt to place a lien on the improvement. Numerous provisions in the regulations address all aspects of improvements, requiring the Secretary to ensure himself that adequate consideration has been given to the enumerated factors under section 415(a). These include the height, safety, and quality of improvements; provisions requiring the lease to address ownership, construction, and removal of improvements; provisions imposing due diligence requirements on the construction of improvements, and provisions requiring plans of development for business and WSR leases. *See, e.g.,*162.314 through 162.316, 162.414 through 162.416, 162.514 through 162.516, and 162.543 through 162.545. In addition, the regulations require the BIA to comply with tribal law, including tribal laws regulating improvements, when making decisions concerning leases of trust or restricted land. *See* 162.016. State and local taxation of improvements undermine Federal and tribal regulation of improvements.

162.017(b). Subject only to applicable Federal law, activities conducted under a lease of trust or restricted land that occur on the leased premises are not taxable by States or localities, regardless of who conducts the activities. An example of this principle is in the trading business where the courts have held that taxation of such activities is preempted by the Indian Trader Statutes, *see* 25 U.S.C. 261, and the all-inclusive regulations under them, *see* 25 CFR 140.1–.26. Federal statutes and regulations are "sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for State laws imposing additional burdens upon traders." *Warren Trading Post Co.* v. *Arizona State Tax Comm'n,* 38 U.S. 685, 690 (1995) (precluding imposition of State sales taxes); *Central Machinery Co.* v. *Arizona State Tax Comm'n,* 448 U.S. 160 (1980) (preemption applies even if vendor is not licensed as long as goods or services are traded to a tribe or its members in a transaction occurring predominately on the reservation). As a general matter, myriad activities on leased lands related to economic development, infrastructure building, and governmental operations provide important revenue and services to the tribal economy and the generation of economic activity on leased land is an essential component of tribal self-sufficiency. State and local taxation undermines that important objective of federal regulation of the leasing of Indian lands. This subsection, like 162.017(a), is intended to achieve the dual purposes of supporting tribal economic development and promoting tribal self-government. The additional burden of State and local taxation on lease activities would significantly affect the marketability of Indian land for economic development, as noted above in the introductory paragraphs. In addition, tribes, as sovereigns, have inherent authority to regulate zoning and land use on Indian trust and restricted land, and the regulations require BIA to comply with tribal laws relating to land use. *See* 162.016. Such regulation is undermined by State and local taxation.

162.017(c). Subject only to applicable Federal law, the leasehold or possessory interest itself is not taxable by States or local governments. The ability of a tribe or individual Indian to convey an interest in trust or restricted land arises under Federal law, not State law; Federal legislation has left the State with no duties or responsibilities for such interests, even recordation (25 U.S.C. 5); and the leasehold interest is exhaustively regulated by this rule, as noted above. For example, a leasehold interest may not be conveyed, mortgaged, assigned, or subleased without Secretarial approval, with limited exceptions. Compelling Federal interests in self-determination, economic self-sufficiency, and self-government, as well as strong tribal interests in sovereignty and economic self-sufficiency, are undermined by State and local taxation of the leasehold interest.

Nothing in these regulations is intended to preclude tribes, States, and local governments from entering into cooperative agreements to address these taxation issues, and in fact, the Department strongly encourages such agreements.

In addition, we received the following comments:

- Move the language regarding the justification for the taxation provisions to the regulatory text. We did not make this change because the justification is explanatory and therefore more

appropriate in the preamble than in the regulatory text.

• Correct the ambiguity caused by the location of the phrase "without regard to ownership" in the proposed rule, because it could be construed as describing the State tax such that the section would bar only those State taxes imposed without regard to ownership of the improvements. Because that interpretation was not the intent of this provision, we have clarified the provision by moving the phrase "without regard to ownership" to indicate that no improvements on leased Indian land are subject to State taxation, regardless of who owns the improvements.

• Delete the language following the provision stating that improvements are subject to 25 CFR 1.4. We deleted the cross-reference to 25 CFR 1.4 and instead added the crux of section 1.4 directly into 162.014.

162.018 (PR 162.015)—Tribal Administration of Part 162

• Clarify the phrase "inherent Federal function." We accepted this comment by deleting the phrase and instead providing a list of functions that cannot be contracted or compacted by tribes in the leasing context.

162.019 (PR 162.016)—Access to Leased Premises

• Exempt roads and other infrastructure lease provisions from requiring part 169 approval where the access is incidental to the development and use of the leased lands. Rights-of-way across Indian land require Secretarial approval, by statute. If access to the leased premises is a new right-of-way across Indian land, then the access will require Secretarial approval through a right-of-way permit. If the leased premises include access roads, then no separate right-of-way permit is needed. We added the sentence "[r]oads or other infrastructure within the leased premises do not require compliance with 25 CFR part 169, unless otherwise stated in the lease" to clarify this.

• Provide for review of infrastructure for roads, etc., within the leased premises under part 162 because it can be done more efficiently than under part 169. Section 162.019 allows for the lease to cover roads and other infrastructure that are on the leased premises.

• Account for "implied access." Section 162.019 states that a lease may expressly address access. It is the obligation of the parties to a lease (not BIA) to ensure access to leased premises. We anticipate addressing other rights-of-way issues in future revisions to part 169.

162.020 (PR 162.017)—Unitized Leases

• Delete provisions basing rent of a unitized lease on acreage because different tracts may have different value. We did not make any change to the regulation in response to this comment because the regulation states "unless the lease provides otherwise," which allows the lease to establish a different rental scheme. The appraised value of an individual tract may be identified when consent is obtained or upon request.

162.021 (PR 162.018)—BIA Responsibilities in Approving Leases

• Add "and applicable tribal law" to recognize the need to comply with tribal law. We accepted this change.

162.022 (PR 162.019)—BIA Responsibilities in Enforcing Leases

• Add that an Indian landowner may exercise remedies available under a lease or applicable law. To address this comment, we added a provision clarifying that nothing in the section prevents an Indian landowner from exercising remedies available under applicable law.

• Add a cross-reference to 162.024 (PR 162.021) (regarding emergency action) in paragraph (d). We added this cross-reference.

• Add a new paragraph stating that BIA will carry out the duties assigned to it in the lease provisions. Because BIA's mission and duties are established by statute, we were unable to add this provision.

• Add a statement that tribes and TDHEs have independent authority to administer and enforce subleases, to prevent sublessees from arguing that only BIA can take enforcement action. We did not add a statement to this section, because BIA does not enforce subleases and therefore will always defer to the TDHE's enforcement of a sublease. We have clarified in each of the subparts (see 162.365, 162.366, 162.465, 162.466, 162.590, and 162.591) that BIA will defer to ongoing lease enforcement actions by the tribes where the lease provides for the tribe to address violations.

• Limit BIA's role in enforcing residential leases where its enforcement overlaps with enforcement by tribes and TDHEs, in the context of residential leasing. As stated above, TDHEs may enforce subleases without BIA interference, and each of the subparts clarifies that BIA will defer to ongoing enforcement actions to avoid overlap.

• Add a new paragraph stating that BIA will take prompt action to evict trespassers after lease expiration and upon consultation with the Indian landowner, to include an explicit duty to act and prevent situations like those that have led to litigation. Section 162.023 of the final rule addresses this situation. In that section, we did not assume a duty to evict because the circumstances may require different approaches (e.g., where there is a holdover in negotiation with the landowner); however, we did add an explicit mention of eviction as an action BIA may take.

• Expand the rule to provide that BIA will enforce the lease against the Indian landowner if the landowner does not comply with the terms and conditions of the lease. Because BIA is the trustee for the Indian landowner, rather than the lessee, we did not incorporate this change.

162.023 (PR 162.020)—Trespass

• Change the sentence stating that the Indian landowners may pursue any remedies under "tribal law" to "applicable law" to ensure that the landowners are not restricted to tribal law remedies. We incorporated this change.

• Provide that BIA will act when the Indian landowners make a written request. This provision is already included in each specific subpart at 162.364, 162.464, and 162.589; therefore, we did not add it to 162.023.

162.024 (PR 162.021)—Emergency Action

• Notify individual Indian landowners, but contact the Indian tribe with jurisdiction before taking emergency action. We incorporated this change.

• Require BIA to make reasonable efforts to give actual notice to all Indian landowners before taking emergency action, not just constructive notice. The final rule requires BIA to provide written notification to the tribe before taking emergency action, but not individual Indian landowners because of the practical difficulties in contacting all Indian landowners quickly enough to take emergency action.

• Require notification "in writing" to individual Indian landowners after taking emergency action. Because the requirement for "constructive notice" already means that the notice must be in writing, we did not incorporate this wording; however, we added that BIA may choose to give actual notice in lieu of constructive notice.

162.025 (PR 162.022)—Appeals

Several tribes supported the proposed rule's limitation of "interested party" in 162.025 to those whose direct economic interest is adversely affected. A few

tribes prefer a more expansive definition allowing for non-economic interests. We retained the proposed rule's limitation to direct economic interests. In response to comments regarding deemed approval and appeals, we note that deemed approvals occur by operation of law, and because there is no BIA action, the parties may not appeal under part 2. We also clarified that BIA decisions to disapprove a lease are appealable only by the Indian landowner, and decisions to disapprove any other lease document are appealable only by the Indian landowners and lessee.

162.026 (PR 162.023)—Contact for Questions

- Add that the prospective lessee should contact the tribe for a lease of tribal land, to encourage early communication. If BIA is fulfilling the leasing function, BIA will direct the prospective lessee to the tribe, for tribal land. We added that the prospective lessee should contact the tribe that is contracting or compacting the leasing function for answers to questions about the leasing process.

162.027 (PR 162.024)—NEPA & Records

- Expressly include the Department of Housing and Urban Development (HUD) in paragraph (b), which states that BIA will adopt environmental assessments and environmental impact statements of other Federal agencies, etc. We incorporated this change by including documents prepared under NAHASDA (25 U.S.C. 4115).
- Allow BIA to accept NEPA documentation from tribes, in addition to other Federal agencies. We added this requested language.
- Allow the use of pre-existing NEPA documentation, when appropriate. BIA encourages the use of pre-existing NEPA documentation, when appropriate, but we did not explicitly add this to 162.027(b) since the statement allowing the use of NEPA documentation from other entities addresses this.
- State that environmental review for an amendment will be required only if the amendment adds lands to the leased premises. We did not incorporate this change because an amendment may trigger the need for environmental review even if it does not add land (e.g., change in use).
- Restrict the WEEL phase of environmental review to study only the actual site locations used to install facilities and equipment, which is a fraction of the land studied at the WSR lease phase. BIA agrees this may be the case, depending on the circumstances, but encourages the parties to discuss each lease's scope with the BIA, as early as possible, to ensure the environmental review process is as focused as possible.
- Streamline the environmental review process to allow for expedited review under NEPA, the National Historic Preservation Act (NHPA), the Endangered Species Act, and other Federal laws. While we are bound by statutory requirements, BIA will use categorical exclusions where applicable, and has proposed a categorical exclusion for leasing and funding for single family homesites on Indian land, including associated improvements and easements, that encompass five acres or less of contiguous land. See 77 FR 26314 (May 3, 2012).
- Instead of stating in this section that all approved leases must include disclosure provisions, move the disclosure provisions to the sections in each subpart listing mandated lease terms. We incorporated this change.
- Add language requiring BIA to return documents once a lease is approved. Under the Federal Records Act, once a Federal agency is provided documents, the agency must archive and retain them in accordance with the Federal records schedule, although certain originals may be returned (e.g., BIA will return the deed of trust for recording in the county land titles and records office). For this reason, we could not accept this requested change.
- Define documents submitted to BIA in a way that they would fall under a Freedom of Information Act (FOIA) exemption from disclosure, to ensure that they are kept confidential. We did not incorporate this change. Even if we define the category of documents as "confidential" in part 162, it will not guarantee their exemption from disclosure because the final rule cannot override the FOIA statute; rather, we encourage each party submitting documents to clearly indicate whether they fall under a FOIA exemption.
- Provide a mechanism for BIA review that would not place the documents into BIA custody. Because BIA needs a record of the documents on which it makes its decision, generally, BIA will need custody of the documents.
- Add a cross-reference to FOIA rules (43 CFR part 2) to clarify that tribes and tribal entities will be given advance notice and opportunity to challenge any disclosure of their documents. We incorporated this suggested change in paragraph (c).
- Require a reasonable nexus between a BIA request for disclosure and an opportunity to consult if the lessee or tribe objects, to alleviate any negative impacts on project financing, constructability, and operational issues from the language that documents marked confidential propriety are protected from disclosure "to the extent allowed by law." The FOIA rules require BIA to consult with the tribes before disclosure. Much of the information may be subject to the fourth FOIA exemption covering trade secrets or commercial or financial information. *See, Utah* v. *U.S. Department of the Interior,* 256 F.3d 967 (10th Cir. 2001).
- Make it mandatory for BIA to exempt confidential information to the extent allowed by law. The regulation states that BIA will exempt confidential information to the extent allowed by law.

162.028 (PR N/A)—Obtaining Information on Leased Land (New Section)

- Clarify how tribes may obtain information about leases on their land so that they do not have to file FOIA requests for basic information regarding leases on trust land. We added a new 162.028 to clarify how a tribe may obtain information about leases on its land.

D. Residential Leases

A number of tribes, tribal organizations, and tribal housing authorities requested further revision to the residential leasing regulations to ensure they are compatible with the low-income housing programs carried out by tribes and TDHEs and avoid a "substantial disruption of longstanding Indian housing programs." One tribe requested that we withdraw the residential leasing subpart because of the requirement for valuations and fair market rental payments to non-consenting owners, periodic rental reviews, and bonding and insurance requirements. Some other tribes requested we defer promulgation pending further consultation and a comprehensive examination of the existing statutory and regulatory framework governing Native American housing and consideration of real world constraints. Withdrawal or deferral of promulgation of this subpart would leave in place on-size-fits-all non-agricultural leasing regulations that have been in place since 1961. We find that to be unacceptable and not at all supportive of Indian housing programs. While we are not withdrawing or deferring promulgation of this subpart, we incorporated many of the requested revisions and made additional revisions to address these concerns, including:

- Adding that a lease for housing for public purposes is a basis for granting a waiver of fair market value on individually owned Indian land (the

tribe may waive fair market value on tribal land—see 162.320(a));

• Deleting the requirement for periodic rental reviews for leases for housing for public purposes on individually owned Indian land (the tribe may waive periodic rental reviews on tribal land—see 162.328(a));

• Allowing for waiver of valuations and fair market rental for non-consenting landowners under certain circumstances—see 162.321(c); and

• Deleting the requirement for bonding and insurance for all residential leases—see 162.334 and 162.335.

One tribe stated that these regulations will do more harm than good by being administratively and financially burdensome, impractical, and heavy handed. We have made the revisions noted above to remove the specified administrative and financial burdens. Because we incorporated as many changes as legally possible to address these concerns, we decided to move forward with finalizing these regulations.

A tribe requested that we delete the requirement to obtain a valuation and pay fair market rental to owners who did not consent to the lease because the requirement to obtain 100 percent consent to waive a valuation is not feasible in many circumstances. We are unable to delete this requirement because all Indian landowners are entitled to just compensation for use of their land (and a valuation is required to determine what just compensation is), not just consenting landowners. However, we added provisions in 162.321(c) for a waiver of valuations and fair market rental under certain circumstances to account for the practical issues. Specifically, we added that we may waive the requirement for valuation and fair market rental for residential leases if:

• The lessee is a co-owner who, has been residing on the tract for at least 7 years as of the final rule's effective date, and no other co-owner raises an objection to his or her continued possession of the tract within 180 days after the final rule's effective date; or

• The tribe or lessee will construct infrastructure improvements on, or serving, the leased premises, and we determine it is in the best interest of all the landowners.

The tribe that was the biggest opponent of the residential leasing subpart also requested that BIA approve and record consent lists from before 2003; date them the year the home was constructed; and provide the lessees with a 50-year lease with renewal. Ultimately, this tribe's concern was the practical obstacle posed by requiring all landowners to consent to waiving the requirement for a valuation. Because it is sometimes impossible to obtain consent of all the landowners, the proposed rule would have required that the lessee/homeowner obtain a valuation and pay fair market rental to all the nonconsenting landowners, which the tribe argued was beyond what the lessee/homeowner could afford.

To address this situation, we are allowing in the final rule for waiver of valuations and fair market rental in the circumstance described above, where the lessee is a co-owner who has been living on the tract without objection from the other co-owners. In these cases, the co-owner will need to obtain the consent of the owners of the appropriate percentage of interests in the tract under ILCA, as amended by AIPRA. The lease may provide for less than fair market value if certain conditions are met, and the lessee need not obtain a valuation or pay non-consenting landowners fair market value.

In addition, we received the following comments specific to residential leasing:

• Add an expedited review and approval of leases for housing for public purposes and exempting subleases, assignments, and amendments of leases for housing for public purposes from BIA review. We made several revisions to expedite review of leases for housing for public purposes, but we did not include a separate approval timeline because the timeline established by this regulation is intended to be expedited for all residential leases, including leases for housing for public purposes.

• Make leases for housing for public purposes, as well as assignments, "deemed approved." Although we agree that allowing for "deemed approved" leases and assignments in these instances would expedite the process, we cannot incorporate this change because we are statutorily required to review and approve leases of Indian land.

• Defer to the Indian landowners' determination that the lease is in their best interest when the lease is for housing for public purposes. The proposed rule stated that BIA would defer where the lease is negotiated; we deleted this limitation and now provide that BIA will defer in all instances. (Note that we moved this provision to a new 162.341 addressing the standard BIA will use to determine whether to approve a lease).

• Clarify the applicability of the leasing regulations to tribal housing entities. We added a new 162.303 to address this. A number of housing authorities noted that if a public housing program is part of a tribal government (rather than a separate TDHE), each lease with an individual lessee must be approved by BIA. We note that this is the case, but we are statutorily required to review and approve leases of Indian land. One tribal housing authority asked what happens to tribal leases with a TDHE if the tribe abolishes the TDHE. The tribal documentation creating the TDHE would govern what happens with the leases and whether they merge with the tribal ownership and terminate by law.

• Revise 162.301(a)(2) to allow for office complexes supporting housing for public purposes. This would allow the current practice of TDHEs developing offices to house their operations within the housing project and subleasing office space to community development financial institutions (CDFIs). We incorporated this change.

• In 162.302, include the Department of Treasury as a partner in developing a model lease template to ensure inclusion of CDFIs and tax credit financing tools. This section refers to a form that was developed in coordination with HUD. We plan to engage the Department of Treasury, Federal Reserve, and tribes (in addition to the agencies listed in this section) in revising this form. Another tribe suggested the development of numerous model forms to improve processing times, including one for low-income housing tax credit-financed projects in which the general partner is a tribe or TDHE. BIA will consider this comment in implementation of the final rule.

• Clarify why, in 162.338, which requires submission of a lessee business's organizational documents, a business would obtain a residential lease. The purpose of the lease, rather than the lessee's identification, dictates whether residential or business leasing procedures apply; for example, a business that is obtaining a lease of Indian land to develop housing for public purposes would need to follow residential leasing procedures.

• Delete 162.340(e) (PR 162.339), which requires NAHASDA leases to be approved by both BIA and the tribe because it could be construed to require BIA to approve agreements between TDHEs and tenants. We did not delete this provision because it properly reflects statutory requirements, while other provisions of the rule exempt subleases for housing for public purposes between TDHEs and tenants from BIA approval. Another commenter asked whether this provision requires a tribe to approve leases even on individually-owned Indian land. Where the authority for the lease is NAHASDA,

NAHASDA requires that the tribe approve the lease.

- Include provisions requiring BIA to recognize tribal laws regulating activities on land under a residential lease, including laws governing land use, environmental protection, and historic or cultural preservation. This provision is included in the general provisions at 162.016.
- Adopt a standard for residential leasing to acknowledge the role of the United States in helping tribes improve housing conditions and socioeconomic status. We added an explicit standard for the approval of residential and other leases.
- Better account for the landlord-tenant relationships in the housing for public purposes context. Where public housing is provided through a TDHE that has leased land from the tribe, BIA will not be involved in enforcement of the individual subleases (because BIA does not enforce subleases). Where public housing is provided directly by a tribe (or TDHE, where the TDHE holds the land through some mechanism that is not a lease), BIA may be involved in enforcing individual leases, but the final rule provides that BIA will consult with the tribe before taking action and will defer to ongoing proceedings. These provisions should ensure that BIA does not interfere with tribal enforcement.
- Revise residential leasing provisions to require BIA to assist TDHEs in enforcing subleases. We did not incorporate this change because TDHEs will be responsible for enforcing their own subleases. BIA does not enforce subleases.
- Revise provisions treating individuals who stay after cancellation of a lease as "trespassers" because it is contrary to tribal law that provides for a hearing before eviction. To address this comment, in 162.371 (PR 162.368), we added that BIA will consult with the Indian landowners in determining whether to treat the unauthorized possession as a trespass.
- Require BIA to defer to the tribe's determination that a violation has occurred because tribes often know of violations before BIA, and a tribe's determination that a violation has occurred should be dispositive. We did not incorporate this change because BIA retains independent authority to determine whether there has been a violation. If a tribe learns of a violation, it may notify BIA that a violation has occurred (see 162.364).
- Require BIA to defer to applicable tribal law regarding landlord-tenant relations and due process in 162.366 (PR 162.363). BIA will first look to whether the lease allows tribal proceedings to address violations under 162.365(e) (PR 162.362), and whether these proceedings are occurring or have occurred. If there are no such proceedings, or if it is not appropriate for BIA to defer to the proceedings, then BIA will take action to address the violation. We clarified this process in 162.366 (PR 162.363).
- Include in 162.370 (PR 162.367) (governing effective date of a lease cancellation) language indicating that a tribe or TDHE may terminate a lease. Section 162.365 (PR 162.362), governing negotiated remedies, provides that the parties may include this option.
- Amend residential provisions to allow for incorporation of specific enforcement terms for tribes, TDHEs and others without BIA approval. The section allowing the lease to provide for negotiated remedies allows this; therefore, we did not revise the regulation as a result of this comment.
- Clarify whether BIA plans to evict individuals who are living on land but are in trespass. This commenter also asked who will undertake eviction of trespassers where the tribe contracts the realty program. If the tribe is contracting the realty functions, the tribe will be responsible for enforcement actions. Otherwise, we will implement and enforce our regulations, including eviction in appropriate cases.

E. Business Leases

Most tribes stated their support for the business leasing revisions. One commenter stated that clarifying and making uniform the business leasing regulations injects more predictability, reduces costs, and increases transparency for investors. One tribe stated that the regulations will frustrate Congress's desire to promote orderly and expeditious development through their long-term leasing authority. The regulations allow for long-term leasing where statutorily authorized, and we have reviewed the regulations and revised them where needed to ensure that they will not frustrate orderly and expeditious development. In addition, we received the following comments.

- Clarify, in 162.401, the scope of what is included in the business leasing subpart. We added language clarifying that any lease that is subject to part 162 but does not fit under another subpart is considered a "business lease."
- Clarify proposed 162.412(a)(6) ("any change to the terms of the lease will be considered an amendment"). We deleted this provision as unnecessary.
- Amend business leasing requirements for telecommunications facilities on tribal lands to better serve tribal people. The intent of these regulations is to streamline and clarify business leasing procedures for all intended uses to better serve tribes and individual Indian landowners.
- Clarify what effect the business leasing regulations will have on overlapping regulatory regimes for power generation, infrastructure, and transmission. We have limited our involvement in these matters under part 162 to what is required by statute and our trust responsibility. This commenter also had questions about the applicability of the regulations to leases under the Tribal Energy Resource Agreements (TERAs). These leases are not subject to part 162 (see 162.006), providing that land use agreements entered into under a special act of Congress are not subject to part 162.)
- Treat reviews of business leases of retail and office space within existing facilities on tribal land differently by exempting them from BIA approval. We have included a provision at 162.451(b) allowing for subleases without our approval. Leases of space within existing facilities on tribal land that is not already leased (i.e., not subleases) require BIA approval because they are a lease of the underlying land.

F. WEELs

Several tribes requested that we preserve the tribal permit option in the context of wind energy evaluation. We addressed this comment in 162.502 to clarify that a WEEL is not required in certain circumstances, including when the Indian landowners have granted a permit under 162.007 (PR 162.004) or a tribe authorizes wind energy evaluation activities on its own land under 25 U.S.C. 81. It is conceivable that there may be instances where possession to evaluate wind energy resources does not rise to the level of requiring a lease; parties should look to the guidance in 162.007 (PR 162.004) in light of planned activities and infrastructure. Several tribes stated their support for the two-phase WEEL/WSR lease process, and one stated that the WEEL approach is flexible and workable in the present environment, allowing a short-term lease while parties are engaging in due diligence and resource analysis. In addition, we received the following comments:

- Expand WEELS to include any type of evaluation for alternative energy uses (e.g., solar or biomass). We did not include other alternative energy uses in the WEEL because, generally, one does not need possession of the land to evaluate solar or biomass resources. This commenter also requested clarification on whether WSR leases include other alternative energies, such

as biomass. We added a cross-reference in 162.538 to clarify that leases for biomass are addressed in business leasing.

• Explain how the leasing process for a WEEL is fundamentally different from that of a WSR lease and why parties would have the incentive to pursue a WEEL. The process for a WEEL is different from a WSR lease in the following ways: (1) To obtain approval of a WEEL, as opposed to a WSR lease, the parties need not obtain a valuation or justify compensation at less than fair market rental; (2) BIA has a shorter timeframe for its review of a WEEL; and (3) obtaining a WEEL allows for a limited NEPA review, so BIA conducts a NEPA review only of the wind energy evaluation activities. This NEPA review can then be incorporated by reference, as appropriate, into a broader WSR review, whereas if no WEEL is obtained, the full NEPA review would be necessary at the time BIA reviews the WSR lease.

• Clarify whether there is an acreage limit to a WEEL. There is no acreage limit.

• Strengthen 162.520 (PR 162.519) to force the lessee to submit any wind energy data gathered if the WEEL is terminated. We did not make any change to the proposed rule in response. As written, the rule allows the parties to negotiate this point in order to afford maximum flexibility; but it provides that if they don't, then the information becomes the property of the Indian landowner.

• Clarify how BIA will enforce the provision in 162.520 (PR 162.519), establishing that wind energy data becomes the property of the Indian landowners in the absence of lease provisions stating otherwise. BIA may enforce this provision by refusing to release the bond.

• Delete provisions regulating the option to enter into a WSR lease because the time needed for the option period should be subject to negotiation and the option agreement is separate from a "lease" that BIA is statutorily required to approve. These commenters also stated that the provision limiting the WSR lease to only that land covered by the WEEL is unreasonable because the parties do not have enough information as to what land is needed at the time the option is entered into and would result in overly expansive WEELs. We addressed these comments by deleting conditions for approval of an option in 162.522 (PR 162.521).

• Limit the scope of environmental and archeological reports required by 162.528(f) to only the actual testing and monitoring locations and access routes for WEELs. We agree with this comment, but determined that no change to the regulation is necessary.

• Limit the total time allotted to BIA for review of a WEEL to 30 days. The final rule limits the time allotted to BIA to 20 days.

G. WSR Leases

A few tribes stated that BIA appears to bootstrap authority over business matters commonly governed by other agreements. In response to this comment, we made several revisions to limit BIA's role to only what is necessary for leasing approval. We deleted the requirement for BIA approval of option agreements; expressly provide for alternatives to WEELs (such as section 81 agreements), and loosened BIA review of technical capability where the lessee is owned and operated by the tribe.

One tribe asked whether a tribe could use business leasing procedures rather than WSR leasing procedures for a wind or solar energy project. Other tribes stated that WSR should not be treated separately from business leasing. We note the need for maximum flexibility, but we have tailored the WSR subpart to the unique issues raised by wind and solar energy projects; therefore, this subpart will generally provide the more appropriate procedures. While many of the business leasing and WSR provisions are the same, our intent in making WSR leasing a separate subpart is to encourage future WSR development of Indian land through making the procedures as transparent as possible.

One commenter questioned the efficacy of having the Office of Indian Energy and Economic Development (IEED) involved in valuation of a WSR lease and asked whether a landowner could instead obtain a valuation from a private entity with expertise in the economics of wind energy development. We addressed this comment by adding that a landowner may obtain its own economic analysis, as long as IEED approves it. Because tribes may negotiate their own compensation for tribal land, this will generally apply only to individually owned Indian land.

One commenter requested that BIA issue a policy statement exempting agreements with carbon offset sales from part 162. Whether an agreement is subject to part 162 depends upon whether the specific terms of the agreement meet the requirements for a lease in this part. This commenter also requested that BIA take a clear position on whether State rules apply to tribes seeking to sell carbon credits generated on Indian lands. We are not taking a position on these issues at this time.

One public commenter expressed concern that wind farms will result in bird kills. The NEPA analysis will consider this issue on a case-by-case basis.

In addition, we received the following comments:

• Add language allowing a tribe to enter into a simplified agreement with allottees, where a tribe is considering a wind or solar energy project that covers both tribal and individually owned Indian land. Tribes and individual Indian landowners are encouraged to enter into these agreements; however, the tribe will still be required to lease the land from the individual Indian landowners.

• Lengthen the 90-day delay in any phase of development before requiring a revised resource development plan. We revised this provision to require only submission of a revised plan to BIA, rather than requiring re-approval by BIA. We retained the 90-day period to ensure that BIA is kept apprised of any major delays.

• Waive the requirement for documents demonstrating technical capability for tribal corporations. We incorporated this change by limiting the requirement to instances where the lessee is not an entity owned and operated by the tribe. We also note that documents from an entity's parent corporation may fulfill this requirement.

• Clarify how these leases will interact with 169.27, which provides a process for obtaining approvals of rights-of-way for electric poles and lines greater than 66 kilovolts. This commenter requested language to allow part 162 to encompass transmission facilities directly associated with the WSR infrastructure. As written, 162.543 (PR 162.540) contemplates that the lease will include associated infrastructure necessary for the generation and delivery of electricity. We added a cross-reference to 162.019 (PR 162.016) to clarify that no rights-of-way approval is needed for infrastructure addressed in the lease and on the leased premises.

• Define the "resource development plan." Since this term is used so infrequently, we included the definition with the term at 162.563(i). This commenter also requested that we add a process for obtaining BIA approval if changes to the plan are made after approval of the lease. One tribe stated that requiring BIA to approve plan changes would be burdensome. In response to these comments, we revised 162.543(b) (PR 162.540) to require only submission of the revised plan for BIA's

file, rather than requiring BIA approval of the plan changes.

H. Cross-Cutting Comments

1. Lease Term

- Specifically allow a month-to-month term for residential leases authorized by NAHASDA. In response to these comments, we clarified the term of NAHASDA leases (leases approved under 25 U.S.C. 4211) versus the term of leases approved under 25 U.S.C. 415(a). Note also that many of these month-to-month arrangements are actually occupancy agreements not requiring BIA approval because they are essentially tribal land assignments.
- Remove the restriction to one renewal for tribes with authority to lease lands up to 99 years because this one-size-fits-all approach does not work for many lease situations. We revised this provision to allow for flexibility in the number of renewals where authorized by statute.
- Remove the two-year term restriction where the owners of trust and restricted interests are deceased and their heirs and devisees have not yet been determined. We deleted this provision as unnecessary.
- Allow parties the flexibility to negotiate holdover provisions for residential leases. We added this flexibility by adding that the prohibition on holdovers applies only if the residential lease does not provide otherwise.
- Clarify whether a lease amendment that extends the term of the lease is limited to a 25-year term and whether this amendment could include an option term. An amendment can amend the lease and include an option term, as long as the term meets statutory constraints.
- Restrict long lease terms because they may result in more permanent uses by non-Indian lessees that threaten preservation of tribal culture and society. There are statutory limitations to lease terms, but to the maximum extent possible, BIA will defer to the Indian landowners' decision that a lease is in their best interest.

2. Option To Renew

- Add to the requirement for providing BIA with a confirmation of a renewal the phrase "unless the lease provides for automatic renewal." We accepted this language.
- Clarify the proposed rule's provision requiring a lease with an option to renew to state that "any change in the terms of the lease will be considered an amendment," including whether this means that BIA must approve of payments due upon exercise of a renewal option. We deleted this provision as unnecessary.

3. Mandatory Lease Provisions

- Delete the provision requiring the lease to cite the authority under which BIA is approving the lease under because BIA, rather than the parties to the lease, should know the citation. We deleted this provision because we agree that it is BIA's responsibility to know its authority.
- Delete the mandatory lease provision stating that nothing would prevent termination of the Federal trust responsibility because there is no statutory requirement that this provision be included in leases and it reflects an offensive and outdated approach to tribal relations. In response, we deleted this provision.
- Clarify that wind energy projects shall not be deemed a "nuisance" for the purposes of BIA's review. While this statement is true, we did not add it to the mandatory lease provisions. These regulations anticipate and encourage the development of wind energy projects; BIA does not deem wind energy projects to be a nuisance.
- Restrict the mandatory provision stating that BIA has the right to enter the leased premises upon reasonable notice to allow BIA to enter only when it is consistent with notice requirements under applicable tribal law and lease requirements. We incorporated this language.
- Delete the mandatory provision stating that the lease is not a lease of fee interests because it places responsibility on the lessee to pay fee owners. Although this is the case, we deleted this provision from the mandatory provisions as unnecessary to include in the lease.
- Regarding the mandatory provisions requiring lessee to indemnify and hold harmless the Indian landowners and the United States:
  - Make it discretionary whether to include them in a lease because their inclusion could be contrary to law in certain contexts. We did not make inclusion of these provisions discretionary, but we moved these provisions to a new paragraph to clarify that they are not required where prohibited by law.
  - Make it discretionary whether to include the provision related to hazardous materials where there is no evidence that hazardous materials are present on the land. We retained this as a mandatory lease provision to account for any instances in which hazardous materials are discovered after the lease is signed or the lessee or other party introduces hazardous materials onto the leased premises during the term of the lease.
  - Delete the provision requiring lessees to indemnify the United States and Indian landowners for loss, liability, and damages because many lessees are not willing to assume liability for a tribe's simple negligence, and the indemnity provision requires the lessee to assume liability except in cases of gross negligence by the tribe. We narrowed the indemnification provision, in response.
  - Exempt leases for housing for public purposes from having to include these provisions because a tribal member seeking affordable housing may hesitate to enter into a lease with this requirement. We did not add an exemption because this provision is necessary to protect trust assets, the Indian landowners, and the United States.
  - Loosen these provisions because they are too restrictive and should be subject to negotiation. We retained the indemnification provisions, as revised, to protect the trust assets, the Indian landowners, and the United States.
- Delete the provision stating that BIA may treat any lease provision that violates Federal law as a violation of the lease, and instead provide that the parties may elect to terminate the lease or agree that Federal law will replace the superseded provisions. We did not incorporate this suggested change. We cannot approve a lease that violates Federal law and, during the cure period, the parties may agree to address the provision; and if, after the fact, we discover that a lease provision violates Federal law, we need the ability to correct the problem. Using the lease violation regulations (e.g., 162.366 and 162.367) affords the parties notice and an opportunity to either cure or dispute the violation. As part of this process, the parties are free to agree that Federal law will replace the offending lease provision.

4. Improvements

- Delete the requirement for the lease to generally describe the location of the improvements to be constructed. We require this information because it is necessary for NEPA and NHPA review and we are statutorily required to review, among other things, the relationship of the use of neighboring lands, the height, quality, and safety of any structures or other facilities to be constructed on these lands. See 25 U.S.C. 415(a).
- Allow lessees the right to make improvements on their houses without having to get the consent of other

owners. Nothing in the final rule states that lessees must obtain the consent of other landowners to make improvements to their houses; however, the lease may require consent for the construction of permanent improvements. The regulations require only that the lessee provide reasonable notice to the landowners of the construction of any permanent improvements not generally described in the lease.

- Clarify that the lessee does not have to obtain consent for replacement air conditioners, etc. We agree and clarified that the regulations are addressing "permanent improvements." A few tribes suggested including a new term, "major improvements," with a dollar limit, but we instead are referring to permanent improvements, which are affixed to the real property.
- Clarify whether a lease with phased development would require amendments to the lease for development phases after the initial phase. The lease may provide for development of a plan to avoid having to amend the lease to update the plan. The plan only needs to be as detailed as necessary for us to do a NEPA and NHPA review.
- Add that the lease may provide that improvements may remain on the leased premises "in compliance with minimum building and health and safety requirements of the tribe with jurisdiction." The lease may specify this, but we did not prescribe it in the regulation.
- Delete provisions regarding removal of improvements because they may dissuade outside developers. We did not delete the regulatory provisions because they apply as a default, only in the absence of lease provisions. The parties may negotiate other requirements regarding removal of improvements in the lease.

5. Due Diligence

- Revise due diligence provisions to confirm that the "schedule for construction of improvements" in the business leasing subpart requires only tentative commencement and completion dates, rather than a detailed schedule. We incorporated this change at 162.414 by adding "general" before "schedule for construction."
- Allow more flexibility in the construction schedule, including allowing a way for the construction schedule to be modified at later phases, as the parties may not be able to identify all improvements to be constructed over the course of a phased development and a construction schedule may lock them into an uneconomic schedule. We incorporated this suggestion at 162.417, by clarifying that the schedule may be a separate document from the business lease, and that the parties must agree to a process for modifying the schedule. For WSR leases, the resource development plan sets out the schedule for improvements. We revised 162.543 (PR 162.540) to provide that parties may make changes to the resource development plan, and they merely have to provide BIA with a copy if the changes affect certain items (rather than having to wait for BIA approval of the changes). Through these revisions, we added flexibility by allowing for a separate construction schedule and allow a process for obtaining the landowners' consent to changes in the schedule.
- Delete requirements for construction schedules, as BIA's interest in the timing of improvements should be minimal. We did not delete the requirements for providing a construction schedule (although we clarified that only a general schedule is necessary) because BIA's interest in the timing of the construction is to ensure that anticipated development occurs.
- Revise 162.417 to make it discretionary for the parties to include due diligence provisions in the lease. We did not incorporate this change because these provisions protect the Indian landowners by ensuring development consistent with landowners' intent when they signed the lease.
- Delete the requirement for BIA approval of a waiver of due diligence obligations because the time involved in obtaining a waiver could chill investment and requiring BIA approval of a waiver is paternalistic. We did not delete this provision because any waiver of the requirements will occur at the time of lease approval, so the waiver process will not cause a delay and BIA will defer to the landowners' determination that the lease (including the waiver) is in their best interest, to the maximum extent possible.
- Loosen the timelines in 162.546 (PR 162.543) for wind energy projects because it can take up to 9 months in northern climates to replace a substation. We addressed this comment by allowing the lease to define the time periods during which facilities or equipment must be repaired, placed into service, or removed.

6. Legal Description—Surveys

- Allow the use of survey grade global positioning system (GPS) for land descriptions. We revised the regulations to allow this because the Land Title and Records Office (LTRO) is now capable of accepting these descriptions.
- Delete the requirement for an official or certified survey, to be reviewed under the DOI Standards for Indian Trust Land Boundary Evidence, because it will be too costly to implement, result in fewer leases, and is redundant where BIA already has survey data available. In response to these comments, we added flexibility to the survey requirements, providing that where reference to an official or certified survey is not possible, the lease must include a legal description, a survey-grade GPS description, or other description prepared by a registered land surveyor that is sufficient to identify the leased premises.

7. Compatible Uses

- Retain the flexibility allowed by the proposed rule's wording because it leaves room for the lease to define compatible uses. We accepted this suggestion.
- Revise to allow for compatible uses by the landowner or someone authorized by the landowner, regardless of whether the lease specifies that the compatible use is allowed. We did not incorporate this change because the lease should specify if the Indian landowners will allow compatible uses. Another commenter suggested requiring the lease to identify what uses the landowner is reserving. While the lease may specify the uses, the final rule is not requiring it.

8. Rental/Payment Requirements—Tribal Land

Nearly all the tribal commenters supported the proposed rule's provisions allowing a tribe to negotiate its own rental amount and determine whether it wants a valuation, stating that they make the rules more workable, especially for housing for public purposes. One tribe did not support these provisions, stating that the tribe should not have to request a valuation in writing and BIA should require valuations to meet its trust responsibilities. Because most tribes were in support, we retained this provision. A tribal commenter stated its support of the language allowing for less than fair market rental during predevelopment stages of a business lease. Several tribes expressed their support of the proposed rule's flexibility for valuations of tribal land and allowing for alternative valuations in lieu of appraisals. Another tribe stated their support of the provisions requiring waivers to be in writing, to clarify the landowners' intent. In addition, we received the following comments:

• Allow a tribe to submit a certification, rather than a tribal authorization, stating that it determined that receiving less than fair market rental is in its best interest, for business and WSR leases (in addition to residential leases). We have addressed this comment by providing that the tribe may submit either a certification (meaning a statement signed by the appropriate tribal official or officials) or a tribal authorization.

• Remove the requirement for a tribal certification or authorization stating that the tribe has determined the amount to be in its best interest because it is an additional layer of bureaucracy. We added a provision to each of the subparts to clarify that one tribal authorization may meet several purposes (see 162.338, 162.438, and 162.563). The tribe need not submit multiple tribal authorizations; in fact, we encourage the tribe to provide this information and any other tribal authorization statements in the same authorization that it passes to authorize the lease (e.g., a single tribal authorization may authorize the lease and do any or all of the following: Allow for less than fair market rental, waive valuation, allow for alternative forms of compensation, waive rental reviews, and waive rental adjustments).

• Remove the requirement for the tribe to provide a certification or authorization to set the rental amount where the lease is for housing for public purposes. Many tribes noted that tribes use NAHASDA programs to provide housing for public purposes and that HUD already has provisions regarding rent. We incorporated this change at 162.320(a).

• Clarify that a tribe may use market analyses or other methods of determining fair market value. We incorporated this change.

• Encourage tribes to pursue a "zero charge" policy for permits and leases to service providers to place communications facilities infrastructure in tribal communities. BIA did not make any change to the regulation in response to this comment because tribes determine whether such a policy is appropriate for them. This commenter also requested a mechanism for adopting a market-based appraisal's determination of fair market rental where the Indian landowners and lessees cannot agree on compensation. We did not incorporate this change because a lease requires the agreement of the Indian landowners and the lessees to all terms of the lease, including compensation. This commenter stated its concern that allowing tribes to establish their own rental rates could cause an impasse between the lessee and the tribe. BIA notes that tribal landowners have the right to establish compensation.

9. Rental/Payment Requirements—Individually Owned Indian Land

• Add "the land is to be used for housing for public purposes" as a basis for BIA to waive fair market value for individually owned Indian land. We incorporated this change.

• Remove the requirement for non-consenting individual Indian landowners to receive fair market rental. We have determined that all non-consenting landowners are entitled to fair market value, as our trust responsibility is to all landowners, not just those who have consented. This requires a valuation to determine the amount of the fair market rental. However, as described above, we added that, for residential leases, BIA may waive valuation and fair market rental if the lessee is a co-owner who has been living on the tract for at least 7 years and no other co-owner raises an objection to his or her continued possession of the tract by a certain date. In addition, for all leases, we added that BIA may waive valuation and fair market rental if the lessee or tribe will provide infrastructure improvements and it is in the best interest of the landowners.

• Exempt housing for public purposes from the requirement for a valuation. We did not categorically exempt leases for housing for public purposes on individually owned Indian land from valuations. BIA will waive the requirement for a valuation of individually owned land if all individual Indian landowners agree. We retained the requirement for 100 percent of the landowners to waive the valuation for individually owned Indian land to ensure that each owner who did not consent to leasing for less than fair market rental ("non-consenting owner") obtains fair market rental, unless that non-consenting owner waived the right to a valuation. However, as described above, we added that, for all residential leases, BIA may waive valuation and fair market rental if the lessee is a co-owner who has been living on the tract for at least 7 years and no other co-owner raises an objection to his or her continued possession of the tract by a certain date.

• Balance the risk of exploitation by unscrupulous developers against increased flexibility when allowing less than fair market rental for business leases of individually owned Indian land. We did not make any change to the regulations in response to this comment because the best interest determination of whether to waive fair market rental allows BIA to balance this risk on a case-by-case basis. The risk of exploitation is higher for business leases; therefore, we explicitly require the balancing test in 162.421, while for residential leases we automatically waive fair market rental if all landowners request the waiver.

10. Rental/Payment Requirements—Valuations

Several tribes noted that requiring all landowners to waive the right to a valuation is unworkable in some instances, and may result in having to conduct a valuation in order to ensure that non-consenting landowners are paid fair market rental even when other landowners have agreed to less than fair market rental. Tribes stated that BIA is in effect forcing consent of all landowners for the lease. One tribe alleged that if this consent is required, homesite leasing on allotted land will stop. This tribe stated that the consent requirements will change the tribal members' way of life and will cause a hardship, especially where co-owners' whereabouts are unknown. The tribe has over 400 leases that don't have proper consent, but which followed the procedures at the time, and tribal members constructed homes on those tracts. We added flexibility by allowing BIA to waive the requirement for valuation for non-consenting landowners in certain circumstances, described above.

• Apply the ILCA percentages to consent for waiving fair market rental and valuations. BIA has determined that these percentages in ILCA apply to consents for a lease, but has determined to require the payment of fair market rental to non-consenting landowners because we have a trust responsibility to all landowners, not just the consenting ones. Each individual can waive his or her own right to receive fair market rental; however, even if a majority waives their right to fair market rental, they may not waive the right of the other, non-consenting owners to fair market rental.

• Allow the option to use competitive bidding as a form of valuation. We added this option.

• Delete the provision stating what type of valuation may be used in 162.322, because appraisal costs and delays negatively affect the ability to provide homesites. We retained this provision, but note that it is drafted to allow as much flexibility as possible in allowing valuations other than appraisals.

• Ensure the appraiser meets education, licensure, and experience requirements. We agree with this requirement but did not make any change to the regulation since appraiser competence will be necessary to comply with the Uniform Standards of Professional Appraisal Practice (USPAP).

• Add provisions stating when an appraisal expires and how much time can lapse from its completion. We did not address this issue in the regulations because the Office of the Special Trustee for American Indians (OST), rather than BIA, is responsible for conducting and reviewing appraisals. We also received a number of other questions regarding payment for appraisals, preparation of income tax forms, timing of appraisals, and returning the appraisal function to BIA from OST that were beyond the scope of this rulemaking.

11. Rental/Payment Requirements—When Payment Is Due

• Revise 162.323 to apply only when rent is required periodically throughout the life of the lease, so that lessees may make a one-time ("lump") rental payment when a home is constructed and incorporate the amount of the rental payment into their mortgage. We did not revise this section in response to these comments because the regulations, as written, allow for this situation. Section 162.323 provides that a lease can provide for the timing of rental payments (which may include one lump sum) and that the lease can provide that payments be made more than a year in advance.

• Delete the provision that prohibits payments from being made more than one year in advance because lessees should be allowed to make advance payments. We did not delete the section because it implements 25 U.S.C. 415b, and the phrase "unless the lease provides otherwise" means the parties may include in the lease an allowance for payments more than one year in advance.

12. Rental/Payment Requirements—Direct Pay

• Delete provisions allowing for "direct pay" because the number of landowners should not have an impact on whether BIA is complying with its trust responsibility. Allowing for direct payment of rent to the landowners is not a derogation of the trust responsibility. We have limited direct pay to 10 or fewer landowners to ensure that direct pay is administratively workable.

• Delete direct pay provisions because they impose a burden on the lessee to know about the individual status of each landowner at all times throughout the lease. We did not make any changes in response to this comment because the regulations provide that direct pay is optional, and available under limited circumstances. The addresses to which the payments should be sent will be provided in the lease and, because direct pay is limited to 10 or fewer landowners, the burden on the lessee to know the status of each is limited.

• Delete the limit on the number of landowners and allow all landowners the option for direct pay. We did not incorporate this change because the Assistant Secretary made a policy decision to limit when direct pay is available to those situations when there are 10 or fewer landowners who all consent to direct pay for administrative efficiency.

• Exempt crop share leases from direct pay consent requirements. The direct pay requirements included in this final rule do not affect agricultural leases and therefore do not affect crop share leases.

• Clarify the timeframe for locating a landowner whose whereabouts are unknown so the lessee can send his or her direct pay to BIA instead. The lessee will know when a landowner's whereabouts are unknown because the direct payment will be returned as undeliverable. This commenter also asked when a lessee making direct payments will know that a landowner has been declared non compos mentis. A court of competent jurisdiction must make a determination of non compos mentis. Once BIA receives notice of a landowner's non compos mentis status, the BIA will notify the lessee that all future payments under the lease must be sent to BIA.

13. Rental/Payment Requirements—Payment Methods

• Allow cash rental payments for residential leases, and make any necessary adjustments to the lockbox system to accept cash, because the refusal to accept cash imposes a hardship. This request is outside the scope of this rulemaking, but BIA has passed the request on to the Office of the Special Trustee for American Indians (OST).

• Allow personal checks for business and WSR lease payments because BIA's refusal to accept personal checks for business and WSR leasing imposes a hardship. We accepted this comment by allowing for payment by personal check for all types of leasing because many lessees rely on personal checks as a form of payment.

14. Rental/Payment Requirements—Types of Compensation

• Clarify "in-kind consideration" to reduce the subjectivity in determining its value. We have allowed for alternative forms of consideration, such as "in-kind consideration" in order to afford the maximum flexibility to Indian landowners in negotiating leases. BIA will not determine the value of in-kind consideration. We have revised 162.326 to provide that we will defer to a tribe's determination that alternative forms of consideration are in its best interest, and we will determine whether the alternative forms of consideration are in individual Indian landowners' best interest on a case-by-case basis.

• Do not force lessees to provide in-kind consideration. The regulations provide the parties the freedom to negotiate for monetary or in-kind consideration.

• Consider, in 162.555 (PR 162.552), the value of the energy generated back to the community as in-kind consideration. In-kind consideration is not considered in the valuation because the valuation is a monetary figure. The final rule allows for alternative forms of compensation, and BIA will consider whether energy generated back to the community is an alternative form of compensation that is in the landowners' best interest for individually owned Indian land.

15. Rental/Payment Reviews and Adjustments

• Remove the requirement for rental reviews, in 162.328, where a tribe negotiates and certifies a rental amount. We addressed this comment by excluding residential, business, and WSR leases of tribal land from the periodic rental review and adjustment requirements, where the tribe states in its authorization or certification that it has determined that rental reviews and adjustments are not in its best interest. In addition, there are a number of circumstances in which rental reviews are not required for residential leases of individually owned Indian land, including where the lease provides for automatic adjustments and where the lease is for less than fair market rental.

• Exempt residential leases from rental review and adjustment requirements because it is burdensome when applied to tribes and TDHEs and NAHASDA already provides limits on the rent, its review and adjustment. In response, we added that no periodic review of the adequacy of rent or periodic adjustment is required if the lease is for housing for public purposes (or, as stated above, if the tribe's

authorization or certification states that it is in the tribe's best interest not to have these requirements for tribal land).

- Change the phrase "at least every fifth year" to "no less frequently than every fifth year." We did not incorporate this change because these phrases are equally clear.
- Add a requirement for a landowner to consent to a waiver of rental adjustments in the lease, because when the lease is for housing for public purposes, the amount of rent affects the amount investors are willing to invest. We did not add this requirement because the landowner may refuse to waive rental adjustments as part of their lease negotiations.
- Revise the factors in 162.428(b)(3) and parallel WSR provisions (factors for determining that waiving the Federal review of the adequacy of compensation is in the landowners' best interest) to add a factor that reflects the needs of large investments that may only be recouped over a period of many years. We added a factor to account for these situations where "the lease provides for graduated rent or non-monetary or various types of compensation."
- Delete or limit 162.424(b)(4), which allows the lease to provide for payment to parties other than the Indian landowners. We retained this provision to allow the parties maximum flexibility in negotiating lease terms, but note that the parties may include limits on who receives payments in the lease. Other tribes requested that we revise this provision to add the phrase "unless otherwise provided by these regulations." We did not incorporate this change because the regulations do not restrict to whom rental payments may be made.

16. Bonding & Insurance

Commenters overwhelmingly opposed requiring insurance and bonding for residential leases because they create barriers to homeownership due to credit requirements, availability of liquid assets, and income thresholds. In response to these comments, we deleted the requirements in these regulations for insurance and bonding for residential leases. We received one other comment for residential leasing that requested we revise 162.369 (PR 162.366) (stating that landowners get proceeds from an insurance policy in the absence of lease provisions) to protect the lessee's interests. We did not revise the rule in response to this comment because the parties may agree to a different approach, while the rule provides a default rule in the absence of an agreed-to approach in the lease. In addition, we addressed the following comments regarding insurance and bonding for business and WSR leases:

- Clarify that a tribe may waive the insurance requirement upon certifying that a waiver is in its best interest. We added that BIA will defer to the tribe's determination that a waiver is in its best interest.
- Add alternative forms (other than performance bonds) of securing payment for lessee obligations, in order to avoid placing Indian lands at a disadvantage, to allow tribes to retain their sovereign immunity (some bonding companies require tribes to provide broad waivers of sovereign immunity for a bond), and to provide maximum flexibility. We incorporated this change by allowing for alternative forms of security.
- Revise business leasing provisions to state that any bond may be made payable to the tribe and that BIA may adjust the bond only based on consultation with the tribe. We incorporated these revisions at 162.434(b) by allowing a lease to include these requirements.
- Revise the process for waiving the bonding requirement, because BIA's decision to waive is based on its determination as to the best interest of the landowners, which introduces uncertainty and delay. To address this comment, the final rule provides that BIA will defer to the tribe, for tribal land, that the waiver is in its best interest, to the maximum extent possible.
- Allow cash as a form of security. We did not incorporate this change because the lockbox cannot accept cash, but clarified that it is not an acceptable form of security in the regulations. This commenter also stated that any interest earned on a security posted as a bond shall be payable to the lessee. We did not incorporate this change because the parties may negotiate this point.
- Revise 162.559(c) because allowing BIA to adjust security or bonding requirements at any time creates too much unpredictability. We revised this provision and the parallel provision in the business leasing subpart at 162.434(c) to state that the lease must specify conditions under which BIA may adjust security or bonding requirements, including consultation with the tribe for tribal land before making adjustments.

17. Approvals—Documents Required

The final rule defines with as much certainty as possible exactly what documents BIA will require. We reviewed each category and provided as much specificity as possible while attempting to be flexible enough to account for all types of leases.

- Revise the requirement for a statement from the appropriate tribal authority that the proposed use is in compliance with tribal law because some tribes do not currently examine proposed leases to determine whether the lease complies with land use regulations and, further, do not consider such examination to be within the scope of their responsibility. To accommodate situations where the tribe may not require such a statement, we added the qualifier "if required by the tribe."
- Delete the requirement for environmental and archeological reports because this requirement causes lessees to expend resources before even knowing if a lease will be approved. One tribal corporation also stated that the documents required may cause a potential lessee to spend several months conducting due diligence and negotiating a lease, with no certainty of BIA approval. We did not delete this requirement because environmental and archeological assessments are required by statute. To help provide some guidance in the BIA approval process, we added an "acknowledgment process" whereby the parties may submit to BIA a proposed lease while still preparing NEPA documentation or obtaining a valuation. BIA will respond within 10 days identifying any provisions that may justify BIA's disapproval of a lease. Although this provision does not preclude BIA from identifying other issues at a later time in exceptional circumstances or disapproving the lease, it does provide some measure of certainty that the lease would be acceptable if NEPA, valuation, and any other issues BIA identifies are adequately addressed).
- Requiring a restoration and reclamation plan:
  - Revise this requirement because this plan may not be appropriate, depending on the land use. We added that a restoration and reclamation plan is required only "if appropriate."
  - Require only a preliminary plan. We did not incorporate this change because the plan will form the basis for setting the reclamation bond amount, if appropriate.
- A tribe stated that the requirements for a restoration and reclamation plan, bonding, and a survey may be overwhelming to a new entrepreneur and may cause delays, making it difficult to establish sustainable small Indian-owned businesses on tribal land. BIA requires plans and bonding, where

appropriate, to protect the Indian land and the interests of the Indian landowner. We have replaced the requirement for a survey with a requirement for a legal description of the land.

- Delete the requirement for providing documentation of the lessee's history with similar projects because many commercial lessees are single-project companies formed specifically for that project, with no previous development history, and, in the WSR context, many renewable energy companies are new and do not have such a history. We addressed this comment by replacing "history in" with "ability to."
- Explain BIA's authority to question a lessee's technical capability, especially given that the landowner investigates these factors in choosing a lessee. BIA will examine the technical capability only to determine if there is a compelling reason not to approve the lease, and will defer, to the maximum extent possible, to the Indian landowners' determination that the lease is in its best interest.
- Explain whether an aliquot part description based on a BLM survey will be acceptable without providing an additional survey. An aliquot part description will be acceptable; however, we have added flexibility to allow for other methods of obtaining a legal description.
- Delete the requirement for a preliminary plan of development because such a plan may be premature when a tribe or TDHE is working with lending institutions to arrange financing for housing for public purposes. We removed this requirement in those cases in which the tribe certifies the lease is for housing for public purposes.
- Delete the provision allowing BIA to request "any additional documentation * * * reasonably necessary for approval" or require BIA to provide a compelling reason for the additional documentation. We deleted this provision in an effort to better define what a complete lease proposal package includes.
- Allow tribes to waive the mandatory provisions where inappropriate. Tribes can seek a waiver of one or more of these provisions under 25 CFR 1.2.
- Revise the mandatory provisions to require compliance with all tribal business licensing, land use; permitting, and zoning laws. Compliance with these tribal laws is already required by section 162.014 (PR 162.013).
- Allow the lessee and tribe the option to develop a cultural mitigation plan in case archeological resources are encountered. Tribes have the option of developing this plan under the NHPA. We did not revise the regulations to include this as it is outside the scope of this rulemaking.

18. Approval Process & Timelines

Most commenters stated their strong support for including timelines for BIA decisions on lease documents. In addition, we received the following comments:

- Require BIA to provide notice to the landowner of the date it received the complete lease proposal package. We incorporated this change and now require BIA to notify the parties of the date of receipt, so all are aware of when the timeline for approval begins. The timeline will still begin upon BIA's receipt of the complete lease proposal package.
- Clarify that the timelines do not begin to run until BIA has received all supporting documents, and address the fact that it could take BIA years to determine that it has received all the documents. This comment is correct that the timelines do not begin to run until BIA has received all supporting documents. To provide certainty as to the timeline, BIA will provide the parties with the date on which the timeline begins to run. Also, the final rule establishes a limited list of documents that must be submitted in support of a lease. The final rule also includes new sections (see 162.339, e.g.) to allow for BIA review of a lease pending completion of any required NEPA and valuation documentation. The intent of this new provision is to provide some guidance as to whether there are any red flags that would prevent BIA approval of the lease.
- Clarify how BIA will meet its timelines for approval when it may take much longer to obtain landowner consent. The timeline for BIA approval begins when BIA receives the lease and all supporting documents, including the required consents.
- Require BIA to show good cause for extending its review of a residential lease beyond 30 days because residential leases are generally not voluminous or complex; alternatively, delete the second review period or decrease both the initial and second review period. We addressed these comments by deleting the extra 30 days for residential lease review. We also deleted the extra 30-day review time for subleases and amendments to residential leases.
- Shorten the 60-day timeline to approve a residential lease plus the 30-day timeline for review of leasehold mortgages because it is too long, considering that the lessee may only submit a leasehold mortgage for approval after the lease has been approved. As stated earlier, we decreased the total time period for review of a residential lease to 30 days. In response to this comment, we also decreased the time period for leasehold mortgage approval for residential leases to 20 days.
- Shorten the timelines for review of business leases (BIA has an initial 60-day period in which to issue a decision, plus 30 days if it exercises its option for additional time) because this time may cost the landowner almost 3 months of revenue while waiting for a BIA decision and may not be commercially feasible. Because these timelines are intended to be the outer bounds of the time it will take for BIA review of business leases and are intended to cover all business leases, from the simplest to the most complex, we did not make any changes to the timeline in response to these comments.
- Define the additional period for review as beginning either from the day BIA sends the notification that it needs more time, or from the end of the initial 60-day period, whichever is earlier. Because BIA is required to send its notification during the initial 60-day period, the date BIA sends its notification will always be earlier than the end of the initial 60-day period. For this reason, we did not incorporate this change.
- Delete provisions allowing BIA to unilaterally decide it has an additional 30 days to issue a decision. We deleted this option for residential leasing and WEELs, but have retained it for business and WSR leases because we believe this option is necessary to account for particularly complex leases.

19. How BIA Decides To Approve Lease Documents

Several tribes supported provisions exempting lease actions from further BIA approval where the lease so provides. A few tribes opposed the "deemed approved" result because it may result in uncertainty about whether a provision of the lease is consistent with Federal law. These tribes believe BIA must take affirmative action. Because most tribes support the "deemed approved" provisions, we are retaining them for amendments and subleases. In addition, we received the following comments:

• Extend "deemed approved" provisions to leases, assignments, and leasehold mortgages. We did not accept this request for leases because we are statutorily required to review and approve leases of Indian land. We did not accept this request for assignments because we believe we are also statutorily bound to review them as they are, in effect, new leases. Many of these commenters did not agree that lenders would rely only on affirmative BIA approval of leasehold mortgages. We did not incorporate "deemed approved" for leasehold mortgages because, based on our consultation with representatives of HUD, affirmative BIA approval is required by mortgagees and lenders even if the regulations were to provide for a deemed approved process.

• Include a written BIA approval with a "deemed approved" amendment or sublease. We did not make a change to the regulation in response to this comment but note that the parties may request written confirmation from BIA that a document has been deemed approved and/or that its provisions are consistent with Federal law.

• Clarify whether the qualification that a document is "deemed approved" only "to the extent consistent with Federal law" devours the whole deemed approved process, such that there may be pieces of what has been "deemed approved" that are not actually approved. Our goal is to have affirmative approvals by BIA, so that the "deemed approval" acts only as a guarantee that a decision will occur by a certain time. To reduce potential uncertainty that could result from a deemed approved action, we added a provision stating that any amendment or sublease provision that is inconsistent with Federal law will be severed and the remainder of the amendment or sublease will be enforceable.

• Clarify whether, after an amendment or sublease is deemed approved, BIA will review it to determine whether any provisions conflict with Federal law. We did not revise the regulation in response to this comment, but note that the deemed approval provisions are intended as backstops, and we anticipate that BIA will be actively reviewing amendments and subleases before the deadline to ensure consistency with Federal law.

• Delete the requirement for BIA to determine that a lease is in the best interest of the Indian landowners because leases should automatically be in the best interest of Indian landowners. In response to these comments, we clarified the approval process for leases. We were unable to provide that leases are always in the best interest of the Indian landowners because BIA is required to determine whether this is true.

• Always defer to the tribe's discretion that something is in its best interest, not just "to the maximum extent possible." We retained this qualifier because it is necessary in light of our statutory obligation to review leases.

• Automatically consider leases for housing for public purposes to be in the best interest of the Indian landowner. We expect that BIA will determine that leases for housing for public purposes are in the best interest of the landowner. But in order to implement its statutory mandate to review leases, BIA must examine whether there is some reason the lease is not in the landowners' best interest, even while deferring to the landowners' determination to the maximum extent possible.

• Consider in the "best interest" determination factors beyond just fair market rental, including traditional and cultural values, the need for adequate housing in Indian country, and the ability of tribal member lessees to pay fair market rental for residential leases. We agree that the best interest determination includes factors beyond monetary compensation and that it will vary according to circumstances.

• Add a provision requiring BIA to approve leases unless there is a compelling reason not to do so. In response to this comment, we added a new section at 162.341 (and parallel sections for business, WEEL, and WSR leases) specifically addressing the standard by which BIA will determine whether to approve a lease. The rule requires BIA to approve leases unless there is a compelling reason not to do so and to provide a basis for its determination.

• Add examples of what a "compelling reason" to disapprove may be. We could not identify an example, but believe the provision is necessary if a unique situation arises that is not contemplated by these regulations but would clearly warrant disapproval. Two other tribal commenters objected to the "compelling reason" standard as paternalistic and effectively standard-less. The rule uses the "compelling reason" standard as the highest administrative standard of review; the rule also requires that BIA articulate its basis for disapproval, so if it relies on a "compelling reason," it must state what that reason is in writing. This determination may be appealed.

• Delete the factors of what BIA will consider in determining whether there is a compelling reason to disapprove a lease document to protect the best interest of the Indian landowners. We did not delete these factors because others had requested clarification of the "compelling reason" standard.

• Provide that short-term leases will be routinely approved but that BIA will find a compelling reason to withhold approval for long-term leases only when the lease could imperil the tribal land base or tribal community. Because there may be other compelling reasons to withhold approval, we did not incorporate this change. The timelines and standards for approval are intended to provide the certainty associated with routine approvals, while still allowing BIA the ability to fulfill its responsibilities in reviewing leases.

• Clarify that provisions governing the BIA approval process for amendments, assignments, subleases, and leasehold mortgages apply only to leases approved under part 162, and that documents that can be agreed to without BIA approval are exempt from these approval procedures. We did not make any change to the rule in response to this comment because the general provisions establish the applicability of part 162 to certain lease documents, including amendments, assignments, subleases, and leasehold mortgages. As written, the regulation does not allow BIA to require approval of amendments, assignments, subleases, and leasehold mortgages related to documents that are not otherwise governed by part 162.

• Require BIA to inquire into whether a lease applicant has complied with all pertinent tribal laws before approving a business lease. A tribe may choose to require the lessee to obtain a statement from the tribal authority that the proposed use is in conformance with tribal law. Where the tribe requires this, BIA will require the statement from the tribe to be included in the package submitted to BIA. See 162.438.

• Restrict BIA approval to a "confirmation that the lease is within the tribe's authority under applicable tribal law," without considering compliance with Federal law, in those situations where BIA approval of a specified tribe's lease is not required under 25 U.S.C. 415(b), but tribal law requires BIA approval of the lease. We did not accept this change. The criteria, if any, for approval of these leases will be those in the applicable tribal law.

20. Effective Date of Leases

• Clarify provisions regarding the effective date of lease documents, by adding that documents not requiring BIA approval are effective upon execution by the parties unless the document provides for a different effective date. We incorporated this

change (see 162.342, 162.442, 162.532, and 162.567).

21. Recording

• TDHEs and CDFIs stated that the requirement to record residential subleases should be removed as onerous. In response, we deleted the requirement to record residential subleases.

• Clarify that "lease documents" rather than just "leases" must be recorded in 162.343, 162.434, 162.533, and 162.568. We clarified that all lease documents must be recorded except for residential subleases.

• Several tribes asked whether the LTRO will record a document that has been "deemed approved" or a lease document that does not require BIA approval (e.g., an assignment to a leasehold mortgage acquiring through foreclosure). BIA realty staff will work with the LTRO to ensure that these documents are recorded. One tribe stated that the absence of an affirmative BIA approval will prevent maintaining accurate records at county offices because the county recorder may not record something without BIA approval. We are working on implementation issues to ensure that it is clear on the face of a document that it has been approved (either through affirmative approval or deemed approval).

• Allow recording of an original memorandum of lease rather than the full lease. This is a broader issue regarding title records, which is governed by another regulation, 25 CFR 150.11.

• Address alternative recording with tribal and State recording offices because the tribe has had difficulty recording with the LTRO where the lease is on restricted fee lands. The LTRO records leases on restricted fee lands.

• Clarify whether there is a lease tracking system in place with lease amounts and details on each lease that is readily available to realty offices. BIA realty staff uses the Title Asset Accounting and Management System (TAAMS) as the lease tracking system.

22. Appeal Bonds

• Delete the proposed rule's requirement that the lessee post an appeal bond for residential leasing as unnecessary. We deleted this requirement.

• Revise appeal bond requirements for business leases to state that an appeal bond will not be required for an appeal of a decision on a leasehold mortgage or if the tribe is a party to the appeal and the tribe requests a waiver. We incorporated these changes and also simplified the definition of "appeal bond" and provisions regarding appeal bonds to refer to 25 CFR part 2.

23. Amendments

• Define "amendment" to clarify that it does not include an alteration of lease provisions that was expressly contemplated in the original lease. We did not incorporate this change because any amendment of the provisions of the original lease will be an amendment, whereas compliance with provisions of the original lease would not.

• Delete the provision stating that a lease may not be amended if the lease prohibits amendments because it is unlikely a lease would state this. We deleted this provision.

• Add that landowners may not be deemed to have consented, and their representatives may not consent on their behalf, to any amendments that would modify the dispute resolution provisions. We incorporated this change.

• Clarify that a lease may be amended to secure financing of the project that is the subject of the lease. We did not incorporate this change because a lease may be amended for any reason.

• Add that BIA will approve amendments where the lease is for housing for public purposes and is in the tribe's best interest. To address this comment, we added that we will defer, to the maximum extent possible, to the Indian landowner's determination that the amendment is in their best interest.

• Exempt amendments that are not material from the requirement for consent. We did not incorporate this change because, unless the lease provides for deemed consent or consent by representatives, the landowners must consent to all amendments.

24. Assignments

• Authorize assignments without further BIA approval or landowner consent if the lease is for housing for public purposes and the assignee is a TDHE or other tribal entity. We incorporated this change at 162.349 (PR 162.347).

• Delete the provision at 162.352(c) (PR 162.350) requiring the assignee to pay fair market rental to the landowner where the assignee is not a member of the landowner's immediate family, because it would limit assignments in the housing for public purposes context. The final rule provides that assignments of leases for housing for public purposes do not require BIA approval, so this restriction will not affect assignments of leases for housing for public purposes.

• Delete provisions allowing assignments to subsidiaries without consent or BIA approval because they circumvent due diligence to ensure the assignee is suitable and capable of performing; alternatively, limit these provisions to only those of lessee's subsidiaries that are solvent and in good standing in the State where the corporation is registered. We did not make any changes to this section because the regulations provide that assignments do not need consent or approval in these circumstances only if the lease so provides; the parties have the opportunity to negotiate this.

• Clarify that a lessee may assign the lease as collateral for any financing or refinancing of the project. We did not incorporate this change because a lease may be assigned for any reason.

• Add a process by which a financing party can obtain acknowledgment from the tribe that the assignment provisions are valid: Because this is a matter between the tribe, lessee, and mortgagee, we did not incorporate this change.

• Allow a lease to provide for assignments without BIA approval or landowner consent to any number of distinct legal entities identified in the lease. We rejected this change to keep BIA review of the original lease manageable, but increased the number of distinct legal entities that may be identified from two to three.

• Treat assignments of residential, business and WSR leases the same. We reorganized the provisions related to assignments of residential leases to address this comment.

25. Subleases

Nearly all tribes opposed the conditions for residential subleasing without consent or BIA approval, which required an approved rent schedule, plan of development, and sublease form. They objected to these provisions because, for leases for housing for public purposes, HUD already regulates these items. We deleted these conditions so that a lessee may sublease without obtaining BIA approval or landowner consent, as long as the lease so provides.

Several commenters expressed their concern with regard to tribes that operate their housing programs as departments, rather than as separate entities such as TDHEs. These tribes directly lease to individuals and, under the regulations, must obtain a BIA approval for each individual lease. While this is true of the proposed and final rule, it is also true of the current regulations. Because BIA is statutorily obligated to review and approve each lease, we could not identify a legally

permissible means of exempting these leases.

In addition, we received the following comments:

• Exempt commercial leases of retail and office space within existing facilities from BIA review. The final rule provides that the lease may allow for subleasing without BIA review. A tribe noted that mall developers who sublease for retail or office space need flexibility to meet the needs of individual retailers, and asked that these types of review be exempted. While we did not categorically exempt these, they may be exempt from BIA approval if the lease so provides.

• Exempt subleases between parents and children from the requirement for BIA approval and landowner consent. Because the final rule states that all residential subleases are exempt from approval and consent where the lease provides, we determined this change was unnecessary.

• Establish a default rule that subleases do not need BIA approval unless the lease specifically requires. The regulations are intended to be as flexible as possible, consistent with our trust responsibility, by allowing for subleasing without further approval if the lease so provides.

• Delete the provision allowing lessees to sublease without BIA approval if the lease so provides, as inconsistent with the Department's trust responsibility. BIA did not incorporate this suggestion because of tribal comments stating that flexibility in subleasing is necessary to meet housing and economic development needs.

• Limit or prohibit subleasing because it can result in the lessee's obtaining rental income far in excess of what the landowner receives. The comment related to leasing for oil and gas, which is not subject to this rulemaking, whereas in the residential context this is generally not an issue.

• Involve the tribe in any assignment or sublease decision if it owns any portion of the affected land. We added a provision to require notification to all Indian landowners of these actions, unless the lease provides otherwise.

• Add that BIA will defer, to the maximum extent possible, to the Indian landowners' determination that the sublease is in their best interest. We added this provision.

• Delete the proposed rule's provision requiring the sublessee to be bound by the terms of the lease because it is overly restrictive and would prohibit partial subleases. We deleted this provision and instead included a provision requiring the lessee to remain liable under the lease.

26. Leasehold Mortgages

• Clarify what is meant by the lease providing a "general authorization" for leasehold mortgages, to exempt the leasehold mortgage from consent requirements. We clarified the final rule to state that no landowners' consent is required if the lease so provides.

• Delete the requirement for obtaining consent from all landowners for a leasehold mortgage because there may be privacy issues related to the lessee's financial situation. We clarified that the lease may allow for leasehold mortgages without landowner consent.

• Exempt leasehold mortgages from BIA approval where the lease is for housing for public purposes because of situations where a TDHE records a mortgage and may file an additional mortgage if the costs exceed the original projected amount. We did not include an exemption because BIA approval of leasehold mortgages is required in all instances to ensure that only the leasehold is encumbered.

• Add that where the leasehold mortgage is for a lease for housing for public purposes, BIA will defer, to the maximum extent possible, to the judgment of the tribe and will complete its review in 30 days. Because we defer to the judgment of the tribe with regard to all leasehold mortgages, and we have reduced the timeline for BIA approval of leasehold mortgages to 20 days (see approvals and timelines section, above), we did not incorporate this suggested language.

• Clarify the role of BIA staff, and whether they have the knowledge to determine if a leasehold mortgage is in the lessee's best interest or are assuming the role of an underwriter. The scope of BIA's review of the leasehold mortgage is limited to determining whether the landowners have consented, the requirements of the subpart have been met, and there is a compelling reason to disapprove the leasehold mortgage. We deleted several factors and replaced them with a factor regarding whether mortgage proceeds would be used for purposes unrelated to the lease to clarify this limited scope of BIA's review. We also revised the provision stating that BIA "will" consider certain factors in determining whether there is a compelling reason to disapprove to instead state that BIA "may" consider those factors. This revision provides BIA with flexibility to rely on another Federal agency's approval or guarantee of the leasehold mortgage. Likewise, when a leasehold mortgage is associated with housing for public purposes, BIA's review of the compelling reasons will be less intensive.

27. Appeal From Inaction

• Include a different remedy for BIA's failure to act on a lease proposal package because the appeals process under 25 CFR part 2 is so slow that it is not an effective remedy for delays in BIA's decisions on lease documents. In response, we added a new process to enforce timelines on BIA whereby the matter is first elevated from the Superintendent to the Regional Director, and from the Regional Director to the Director of BIA. This will instill more accountability for issuing timely decisions and will provide a more effective remedy for parties seeking a decision. These procedures are intended to supplant 25 CFR 2.8 entirely, so a party is not required to submit a section 2.8 demand letter giving the official a certain time period to act before allowing an appeal. We acknowledge that the formal adjudication process before the Interior Board of Indian Appeals may not be the most appropriate or expeditious process when a BIA official fails to meet regulatory deadlines. Our hope is that inserting a supervisory official, the BIA Director, into the process will obviate the need for any further relief; and we may consult with tribes on the Board's role with respect to instances of BIA inaction in the future.

• Revise the appeal process to allow for an informal conference process similar to 25 CFR 900.153, rather than the part 2 process. We did not incorporate this process for appeals from inaction because an informal conference would likely further delay issuance of a decision. We did incorporate an abbreviated form of this process for appeals of disapprovals of WEELs because these are intended to be short-term leases on a particularly expedited approval schedule.

28. Compliance and Enforcement

• Clarify cancellation versus termination. We added definitions for each of these terms to clarify that only BIA may cancel a lease, but an Indian landowner may terminate a lease.

• Clarify how BIA will "defer" to tribal court judgments, because if BIA can take unilateral action regardless of tribal court proceedings addressing the same issue, then it will undermine parties' efforts to provide for appropriate forums to resolve disputes. If the parties are addressing a lease compliance issue in tribal court or other court of competent jurisdiction, through a tribal governing body or an alternative dispute resolution method, BIA generally will wait for those

proceedings to close and defer to the outcome.

• Restore the current rule's provision that BIA will assist Indian landowners in the enforcement of negotiated remedies. We added a provision in 162.365(d), 162.465(d), and 162.590(d) to provide that landowners may request BIA assistance in enforcing negotiated remedies.

• Delete the requirement for BIA to contact each individual Indian landowner to ensure removal of improvements because it is unrealistic. We did not change the rule in response to this comment because the rule provides that BIA will contact individual Indian landowners, where feasible, and other commenters had requested that BIA attempt to contact individual Indian landowners to ensure removal.

• Clarify the statement that BIA may order the lessee to "stop work." We revised this provision to clarify that BIA may order the lessee to "cease operations under the lease."

• Restrict BIA's ability to enforce leases so that BIA action is triggered only by a "material" violation. We did not restrict BIA's authority to material violations, but note that BIA will consult with Indian landowners regarding violations.

• Require written notice of nonpayment from Indian landowners in 162.366(c)(1)(ii) (PR 62.363). We did not incorporate this change because "actual notice" provides more flexibility to the Indian landowners, allowing them to notify BIA either in writing, in person, or by phone.

• Allow the tribe, rather than BIA, to establish fees. The fees referred to in 162.368 (PR 162.365) and parallel provisions are those due to the United States under the Debt Collection Act. This section does not affect whether tribes may impose their own fees. Another tribe stated that if a lessee doesn't have the resources to pay rent on time, they won't have the resources to pay the fees. These fees are required under the Debt Collection Act. The parties to a lease may agree not to charge late payment charges or other fees under the lease.

• Include mandatory language to force BIA to make a trespass finding or take other enforcement action. We did not incorporate this change in order to retain enforcement discretion.

• Require BIA, in 162.464 (PR 162.461), to coordinate with other Federal, tribal, or State law enforcement officials as needed to evict, in order to prevent litigation on this matter. We did not make a change to the regulation in response to this comment, but note that BIA may coordinate with other law enforcement officials, as necessary.

• Add timeframes for BIA to provide a notice of violation. We did not incorporate these changes because BIA has enforcement discretion in determining when to issue a notice of violation. This commenter requested that the timeframe for the lessee to cure a violation be extended from 10 days to 30 or 60 days. We did not incorporate this change because the regulations allow the lessee to request a longer time period to cure.

• Require the lessee to notify the tribe, in addition to BIA, that it has cured a violation. We incorporated this change.

• Add specific timeframes (rather than "promptly") for BIA to investigate a potential violation. Because BIA's ability to investigate potential violations varies with the availability of resources, we did not add a specific timeframe.

• Allow financing parties the right to cure on behalf of the lessee. The regulations allow financing parties this right, as they continue to be responsible for the obligations in the lease.

• Clarify that enforcement of program occupancy documents is left to the tribes. BIA does not enforce program occupancy documents.

• Provide that tribal courts should be the ultimate arbiter of land disputes. We did not make a change to the rule in response to this comment, but note that the parties may include in the lease that the tribal court is the ultimate arbiter of any lease disputes between the parties.

• Allow a one-time lump sum rental payment, to render much of the compliance and enforcement process unnecessary. The regulations do allow for a one-time lump sum rental payment, but the compliance and enforcement process is still necessary for violations other than failure to pay rent.

29. Miscellaneous

• Carefully consider the implication of the Helping Expedite and Advance Responsible Tribal Home Ownership Act of 2012 (HEARTH Act) on implementation of these regulations, to avoid two conflicting systems. These regulations would allow for two independent, consistent processes, if a tribe develops its own leasing regulations under the HEARTH Act. One tribe suggested that instead of promulgating leasing regulations, BIA should incorporate the essence of the HEARTH Act. BIA is statutorily required to approve leases; the HEARTH Act removes that requirement under certain conditions (e.g., the tribe develops its own leasing regulations). To the extent we can do so within the current statutory framework, we have attempted to remove BIA as a barrier to fostering business opportunities and economic development through leasing on Indian land.

• Add a new section to allow BIA to amend or correct a lease due to a mistake, such as an incorrect legal land description, a mistake allowing a party to avoid legal obligations under an approved mortgage, or other mistake as necessary to protect the interests of the Indian landowners. We did not add this section because the parties must agree to any amendments of the lease; BIA has no authority to interfere with the contractual agreement of the parties even where it determines that a "mistake" has occurred.

• Develop a model lease to expedite the review and approval process. A model lease has been developed for residential leases of tribal land. BIA has not developed a model lease for business or WSR because the leases vary widely; however, we will develop checklists for guidance.

• Allow for the right to receive lease income from exchange assignments, which had been encouraged by BIA. The parties may address exchange assignments in the lease.

• We received several comments regarding rights-of-way, utility easements, encouraging broadband network investment, agricultural leasing, BIA resources, assisting tribes in preparing their own tax regulations, LTROs, TAAMS, Government Performance and Results Act (GPRA) reporting, carbon sequestration and cap-and-trade programs, administration of individual Indian money (IIM) accounts, procedures for contacting landowners whose whereabouts are unknown, and background checks; we are not addressing these comments here because they are outside the scope of this rulemaking.

IV. Procedural Requirements

A. Regulatory Planning and Review (E.O. 12866 and 13563)

Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB) will review all significant rules. OIRA has determined that this rule is significant because it raises novel legal or policy issues.

E.O. 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome

tools for achieving regulatory ends. The E.O. directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements. This rule is also part of the Department's commitment under the Executive Order to reduce the number and burden of regulations.

B. Regulatory Flexibility Act

The Department of the Interior certifies that this rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Small entities are not likely to enter into residential leases on Indian land because tribal housing authorities and tribal members usually enter into these leases. It is possible that small entities may enter into business leases or wind or solar resources leases but this rule does not impose any requirements in obtaining or complying with a lease that would have a significant economic effect on those entities.

C. Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. It will not result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year. The rule's requirements will not result in a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. The rule continues to require lessees to pay at least fair market rental, with certain exceptions, and adds that lessees may agree to some other amount negotiated by the Indian tribe. Nor will this rule have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of the U.S.-based enterprises to compete with foreign-based enterprises because the rule is limited to Indian land and is intended to promote economic development.

D. Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than $100 million per year. The rule does not have a significant or unique effect on State, local, or tribal governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

E. Takings (E.O. 12630)

Under the criteria in Executive Order 12630, this rule does not affect individual property rights protected by the Fifth Amendment nor does it involves a compensable "taking." A takings implication assessment is not required.

F. Federalism (E.O. 13132)

Under the criteria in Executive Order 13132, this rule has no 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. This rule governs leasing on Indian land, which is land held by the Federal Government in trust or restricted status for individual Indians or Indian tribes. This land is subject to tribal law and Federal law, only, except in limited circumstances and areas where Congress or a Federal court has made State law applicable. This rule therefore does not affect the relationship between the Federal Government and States or among the various levels of government.

G. Civil Justice Reform (E.O. 12988)

This rule complies with the requirements of Executive Order 12988. Specifically, this rule has been reviewed to eliminate errors and ambiguity and written to minimize litigation; and is written in clear language and contains clear legal standards.

H. Consultation With Indian Tribes (E.O. 13175)

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments," Executive Order 13175 (59 FR 22951, November 6, 2000), and 512 DM 2, we have evaluated the potential effects on federally recognized Indian tribes and Indian trust assets. During development of the proposed rule, the Department discussed the rule with tribal representatives at several consultation sessions. We distributed a preliminary draft of the rule to tribes in February 2011 and held three consultation sessions: Thursday, March 17, 2011 at the Reservation Economic Summit (RES) 2011 in Las Vegas; March 31, 2011 in Minnesota; and April 6, 2011, in Albuquerque, New Mexico. We requested that tribes submit written comments by April 18, 2011. We received written and oral comments from over 70 Indian tribes during tribal consultation. We reviewed each comment in depth and revised the rule accordingly. The proposed rule incorporated those revisions. We also compiled a summary of tribal comments received and our responses to those comments and are making that document available to tribes at *http://www.bia.gov/WhoWeAre/AS-IA/Consultation/index.htm*. We notified tribes of the publication of the proposed rule on November 28, 2011, provided them with a Web site link to responses to tribal comments and other materials, and announced additional consultation sessions. Following publication of the proposed rule, we held additional tribal consultation sessions on January 10, 2012, in Seattle, Washington; January 12, 2012, in Palm Springs, California; and January 18, 2012, in Rapid City, South Dakota. We received written and oral comments from approximately 50 tribes, and several tribal organizations and tribal members and took them into consideration in formulating this final rule, as described above.

I. Paperwork Reduction Act

The Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, prohibits a Federal agency from conducting or sponsoring a collection of information that requires OMB approval, unless this approval has been obtained and the collection request displays a currently valid OMB control number. No person is required to respond to an information collection request that has not complied with the PRA.

In the **Federal Register** of November 29, 2011, the Department published the proposed rule and invited comments on the proposed collection of information. The Department submitted the information collection request to the Office of Management and Budget (OMB) for review and approval. OMB did not approve this collection of information, but instead, filed comment. In filing comment on this collection of information, OMB requested that, before publication of the final rule, the Department provide all comments on the recordkeeping and reporting requirements in the proposed rule, the Department's response to these comments, and a summary of any changes to the information collections. We did not receive any public comments regarding the information collection burden estimates in response to publication of the proposed rule in

the **Federal Register**; however, some of the comments on the rule related to comments on information collections, including comments on NEPA documentation and supporting documents. These are discussed in Section III.C. under the heading for section 162.027, above, and Section III.H.17, above. Because the changes made as a result to these comments do not change the overall estimates of how long it takes to collect and provide information, these did not affect the burden estimates.

OMB has approved the revision to the information collections approved under OMB Control No. 1076–0155 to reflect the information collections in this final rule. This approval will expire on XX/XX/XXXX. Questions or comments concerning this information collection should be directed to the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

OMB Control No. 1076–0155 currently authorizes the collections of information in 25 CFR part 162, totaling an estimated 106,065 annual burden hours. The final rule increases the annual burden hours by an estimated 2,910 hours. Because the sections where the information collections occur changes, we are including a table showing the section changes and whether a change to the information collection requirement associated with those sections has changed.

Current CFR cite	New CFR cite	Information collection requirement	Explanation of change
162.109, 162.204, 162.205	162.109, 162.204, 162.205, 162.338(e), 162.438(e), 162.528(d), 162.570(e).	Provide notice of tribal leasing laws, regulations, exemptions.	No change. Previously required, but now listed in specific subparts.
	162.320, 162.420, 162,549	Request for fair market rental/valuation on tribal land.	New.
	162.321, 162.421, 162.550	Request for waiver of fair market rental/valuation for individually owned land.	New.
	162.324, 162.424, 162.553	Agreement to suspend direct pay	New.
	162.371, 162.471, 162.596	Notification of good faith negotiations with holdover.	New.
162.207, 162.242–244, 162.604(a), 162.610.	162.009, 162.207, 162.242–244, 162.347, 351, 355, 359, 162.447, 451, 455, 459, 162.529, 534, 565, 572, 576, 580, 584.	Submit lease, assignment, amendment, leasehold mortgage for approval.	No change. Previously required, but now listed in separate subparts.
162.213, 162.604(a)	162.024 162.213, 162.338, 162.438, 162.528, 162.563.	Provide supporting documentation	No change. Previously required, but now listed in separate subparts.
	162.007	Submit permits to BIA for file	Permits must now be submitted to BIA for file.
162.217, 162.246	162.217, 162.246, 162.343, 162.443, 162.568.	Submit lease for recording	No change. Previously required, but now listed in separate subparts.
162.234, 162.604(c)	162.234, 162.434, 162.525, 162.559.	Provide a bond	No change. Previously required, but now listed in separate subparts.
162.237, 162.604(d)	162.237, 162.437, 162.527, 162.562.	Provide information for acceptable insurance.	No change. Previously required, but now listed in separate subparts.
162.241	162.241	Administrative fees	No change.
162.247, 162.613	162.247, 162.325, 329, 162.425, 429, 162.523, 551.	Pay rent	No change. Previously required, but now listed in separate subparts.
162.248, 162.616	162.248, 162.368, 162.468, 162.593.	Pay penalties for late payment	No change. Previously required, but now listed in separate subparts.
162.212, 162.606	162.009, 162.212	Bidding on advertised lease	No change. Previously required, but now listed in separate subparts.
162.603	162.005(b)(2)	Use of minor's land	No change. Previously required, but now listed in separate subparts.
162.251, 162.618	162.251, 162.366, 162.466, 162.591.	Provide notice of curing violation	No change. Previously required, but now listed in separate subparts.
162.256, 162.623	162.256, 162.371, 162.471, 162.596.	Respond to notice of trespass	No change. Previously required, but now listed in separate subparts.
162.113	162.025, 162.113	Appealing decisions	No change. Previously required, but now listed in separate subparts.

The table showing the burden of the information collection is included below for your information.

CFR cite	Description	Respondent type	Number respondents	Annual responses	Burden hours per response	Total annual burden hours
162.109, 162.204, 162.205, 162.338(e) 162.438(e), 162.528(d), 162.570(e).	Provide notice of tribal leasing laws, regulations, exemptions.	Tribal	500	500	0.5	250
162.320, 162.420, 162,549.	Request for fair market rental/valuation on tribal land.	Tribal	50	50	0.5	25
162.321, 162.421, 162.550.	Request for waiver of fair market rental/valuation for individually-owned land.	Individuals	5,000	5,000	0.5	2,500
162.324, 162.424 162.553	Agreement to suspend direct pay.	Individuals	20	20	0.5	10
162.371, 162.471, 162.596.	Notification of good faith negotiations with holdover.	Tribal	100	100	0.5	50
		Individuals	500	500	0.5	250
162.009, 162.207, 242–244, 162, 347, 351, 355, 359, 162.447, 451, 455, 459, 162.529, 534, 565, 572, 576, 580, 584.	Submit lease, assignment, amendment, leasehold mortgage for approval.	Individuals	10,000	10,000	1	10,000
		Businesses	2,500	2,500	1	2,500
		Tribal	2,000	2,000	1	2,000
162.024, 162.213, 162.338, 162.438, 162.528, 162.563.	Provide supporting documentation.	Individuals	5,000	5,000	0.25	1,250
		Businesses	2,000	2,000	0.25	500
		Tribal	250	250	0.25	62.5
162.007	Submit permits to BIA for file.	Individuals	100	100	0.25	25
		Businesses	100	100	0.25	25
		Tribal	100	100	0.25	25
162.217, 162.246, 162.343, 162.443, 162.568.	Submit lease for recording	Individuals	10,000	10,000	0.5	5,000
		Businesses	2,500	2,500	0.5	1,250
		Tribal	2,000	2,000	0.5	1,000
162.234, 162.434, 162.525, 162.559.	Provide a bond	Individuals	10,000	10,000	0.5	5,000
		Businesses	2,500	2,500	0.5	1,250
		Tribal	2,000	2,000	0.5	1,000
162.237, 162.437, 162.527, 162.562.	Provide information for acceptable insurance.	Individuals	10,000	10,000	0.25	2,500
		Businesses	2,500	2,500	0.25	625
		Tribal	2,000	2,000	0.25	500
162.241	Administrative fees	Individuals	10,000	10,000	2	20,000
		Businesses	2,500	2,500	2	5,000
		Tribal	2,000	2,000	2	4,000
162.247, 162.325, 329, 162.425, 429, 162.523, 551.	Pay rent	Individuals	10,000	10,000	0.25	2,500
		Businesses	2,500	2,500	0.25	625
		Tribal	2,000	2,000	0.25	500
162.248, 162.368, 162.468, 162.593.	Pay penalties for late payment.	Individuals	3,000	3,000	0.25	750
		Businesses	600	600	0.25	150
		Tribal	25	25	0.25	6
162.009, 162.212	Bidding on advertised lease.	Individuals	10,000	10,000	1	10,000
		Businesses	2,500	2,500	1	2,500
		Tribal	2,000	2,000	1	2,000
162.005(b)(2)	Use of a minor's land	All	7,250	7,250	3	21,750
162.251, 162.366, 162.466, 162.591.	Provide notice of curing violation.	Individuals	100	100	0.5	50
		Businesses	45	45	0.5	23
162.256, 162.371, 162.471, 162.596.	Respond to notice of trespass.	Individuals	100	100	0.5	50
		Businesses	45	45	0.5	23
162.025, 162.113	Appealing decisions	Individuals	400	400	2	800
		Businesses	225	225	2	450
		Tribal	100	100	2	200

CFR cite	Description	Respondent type	Number respondents	Annual responses	Burden hours per response	Total annual burden hours
.....	Total	.....	127,110	127,110	.....	108,975

J. National Environmental Policy Act

This rule does not constitute a major Federal action significantly affecting the quality of the human environment because these are "regulations * * * whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case." 43 CFR 46.210(j). No extraordinary circumstances exist that would require greater NEPA review.

K. Effects on the Energy Supply (E.O. 13211)

This rule is not a significant energy action under the definition in Executive Order 13211. A Statement of Energy Effects is not required.

List of Subjects in 25 CFR Part 162

Indians—lands.

For the reasons stated in the preamble, the Department of the Interior, Bureau of Indian Affairs, amends part 162 in Title 25 of the Code of Federal Regulations as follows:

PART 162—LEASES AND PERMITS

■ 1. Revise the authority citation for part 162 to read as follows:

Authority: 5 U.S.C. 301, R.S. 463 and 465; 25 U.S.C. 2 and 9. Interpret or apply sec. 3, 26 Stat. 795, sec. 1, 28 Stat. 305, secs. 1, 2, 31 Stat. 229, 246, secs. 7, 12, 34 Stat. 545, 34 Stat. 1015, 1034, 35 Stat. 70, 95, 97, sec. 4, 36 Stat. 856, sec. 1, 39 Stat. 128, 41 Stat. 415, as amended, 751, 1232, sec. 17, 43 Stat. 636, 641, 44 Stat. 658, as amended, 894, 1365, as amended, 47 Stat. 1417, sec. 17, 48 Stat. 984, 988, 49 Stat. 115, 1135, sec. 55, 49 Stat. 781, sec. 3, 49 Stat. 1967, 54 Stat. 745, 1057, 60 Stat. 308, secs. 1, 2, 60 Stat. 962, sec. 5, 64 Stat. 46, secs. 1, 2, 4, 5, 6, 64 Stat. 470, 69 Stat. 539, 540, 72 Stat. 968, 107 Stat. 2011, 108 Stat. 4572, March 20, 1996, 110 Stat. 4016; 25 U.S.C. 380, 393, 393a, 394, 395, 397, 402, 402a, 403, 403a, 403b, 403c, 409a, 413, 415, 415a, 415b, 415c, 415d, 416, 477, 635, 2201 *et seq.*, 3701, 3702, 3703, 3712, 3713, 3714, 3715, 3731, 3733, 4211; 44 U.S.C. 3101 *et seq.*

§ 162.100 [Removed]

■ 2. Remove § 162.100.

§§ 162.101 through 162.113 [Transferred to Subpart B]

■ 3. Transfer §§ 162.101 through 162.113 from subpart A to subpart B.

■ 4. Revise subpart A to read as follows:

Subpart A—General Provisions

Purpose, Definitions, and Scope

When To Get a Lease

How To Get a Lease

Lease Administration

Subpart A—General Provisions

Purpose, Definitions, and Scope

§ 162.001 What is the purpose of this part?

(a) The purpose of this part is to promote leasing on Indian land for housing, economic development, and other purposes.

(b) This part specifies:

(1) Conditions and authorities under which we will approve leases of Indian land and may issue permits on Government land;

(2) How to obtain leases;

(3) Terms and conditions required in leases;

(4) How we administer and enforce leases; and

(5) Special requirements for leases made under special acts of Congress that apply only to certain Indian reservations.

(c) If any section, paragraph, or provision of this part is stayed or held invalid, the remaining sections, paragraphs, or provisions of this part remain in full force and effect.

§ 162.002 How is this part subdivided?

(a) This part includes multiple subparts relating to:

(1) General Provisions (Subpart A);

(2) Agricultural Leases (Subpart B);

(3) Residential Leases (Subpart C);

(4) Business Leases (Subpart D);

(5) Wind Energy Evaluation, Wind Resource, and Solar Resource Leases (Subpart E);

(6) Special Requirements for Certain Reservations (Subpart F); and

(7) Records (Subpart G).

(b) Leases covered by subpart B are not subject to the provisions in subpart A. Leases covered by subpart B are subject to the provisions in subpart G, except that if a provision in subpart B conflicts with a provision of subpart G, then the provision in subpart B will govern.

(c) Subpart F applies only to leases made under special acts of Congress covering particular Indian reservations. Leases covered by subpart F are also subject to the provisions in subparts A through G, except to the extent that subparts A through G are inconsistent with the provisions in subpart F or any act of Congress under which the lease is made, in which case the provisions in subpart F or any act of Congress under which the lease is made will govern.

§ 162.003 What key terms do I need to know?

Adult means a person who is 18 years of age or older.

Appeal bond means a bond posted upon filing of an appeal.

Approval means written authorization by the Secretary or a delegated official or, where applicable, the "deemed approved" authorization of an amendment or sublease.

Assignment means an agreement between a lessee and an assignee, whereby the assignee acquires all or some of the lessee's rights, and assumes all or some of the lessee's obligations, under a lease.

BIA means the Secretary of the Interior or the Bureau of Indian Affairs within the Department of the Interior and any tribe acting on behalf of the Secretary or Bureau of Indian Affairs under § 162.018.

Business day means Monday through Friday, excluding federally recognized holidays and other days that the applicable office of the Federal Government is closed to the public.

Cancellation means BIA action to end a lease.

Consent or consenting means written authorization by an Indian landowner to a specified action.

Constructive notice means notice:

(1) Posted at the tribal government office, tribal community building, and/or the United States Post Office; and

(2) Published in the local newspaper(s) nearest to the affected land and/or announced on a local radio station(s).

Court of competent jurisdiction means a Federal, tribal, or State court with jurisdiction.

Day means a calendar day, unless otherwise specified.

Emancipated minor means a person less than 18 years of age who is married or who is determined by a court of competent jurisdiction to be legally able to care for himself or herself.

Equipment installation plan means a plan that describes the type and location of any improvements to be installed by the lessee to evaluate the wind resources and a schedule showing the tentative commencement and completion dates for installation of those improvements.

Fair market rental means the amount of rental income that a leased tract of Indian land would most probably command in an open and competitive market, or as determined by competitive bidding.

Fee interest means an interest in land that is owned in unrestricted fee status, and is thus freely alienable by the fee owner.

Fractionated tract means a tract of Indian land owned in common by Indian landowners and/or fee owners holding undivided interests therein.

Government land means any tract, or interest therein, in which the surface estate is owned and administered by the United States, not including Indian land.

Holdover means circumstances in which a lessee remains in possession of the leased premises after the lease term expires.

Housing for public purposes means multi-family developments, single-family residential developments, and single-family residences:

(1) Administered by a tribe or tribally designated housing entity (TDHE); or

(2) Substantially financed using a tribal, Federal, or State housing assistance program or TDHE.

Immediate family means, in the absence of a definition under applicable tribal law, a spouse, brother, sister, aunt, uncle, niece, nephew, first cousin, lineal ancestor, lineal descendant, or member of the household.

Indian means:

(1) Any person who is a member of any Indian tribe, is eligible to become a member of any Indian tribe, or is an owner as of October 27, 2004, of a trust or restricted interest in land;

(2) Any person meeting the definition of Indian under the Indian Reorganization Act (25 U.S.C. 479) and the regulations promulgated thereunder; and

(3) With respect to the inheritance and ownership of trust or restricted land in the State of California under 25 U.S.C. 2206, any person described in paragraph (1) or (2) of this definition or any person who owns a trust or restricted interest in a parcel of such land in that State.

Indian land means any tract in which any interest in the surface estate is owned by a tribe or individual Indian in trust or restricted status and includes both individually owned Indian land and tribal land.

Indian landowner means a tribe or individual Indian who owns an interest in Indian land.

Individually owned Indian land means any tract, or interest therein, in which the surface estate is owned by an individual Indian in trust or restricted status.

Indian tribe means an Indian tribe under section 102 of the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 479a).

Interest, when used with respect to Indian land, means an ownership right to the surface estate of Indian land.

Lease means a written contract between Indian landowners and a lessee, whereby the lessee is granted a right to possess Indian land, for a specified purpose and duration. The lessee's right to possess will limit the Indian landowners' right to possess the leased premises only to the extent provided in the lease.

Lease document means a lease, amendment, assignment, sublease, or leasehold mortgage.

Leasehold mortgage means a mortgage, deed of trust, or other instrument that pledges a lessee's leasehold interest as security for a debt or other obligation owed by the lessee to a lender or other mortgagee.

Lessee means person or entity who has acquired a legal right to possess Indian land by a lease under this part.

Life estate means an interest in property held only for the duration of a designated person(s)' life. A life estate may be created by a conveyance document or by operation of law.

LTRO means the Land Titles and Records Office of the BIA.

Mail means to send something by U.S. Postal Service or commercial delivery service.

Minor means an individual who is less than 18 years of age.

Mortgagee means the holder of a leasehold mortgage.

NEPA means the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*

Nominal rental or nominal compensation means a rental amount that is so insignificant that it bears no relationship to the value of the property that is being leased.

Non compos mentis means that the person to whom the term is applied has been legally determined by a court of competent jurisdiction to be of unsound mind or incapable of managing his or her own affairs.

Notice of violation means a letter notifying the lessee of a violation of the lease and providing the lessee with a specified period of time to show cause why the lease should not be cancelled for the violation. A 10-day show cause letter is one type of notice of violation.

Orphaned minor means a minor whose parents are deceased.

Performance bond means security for the performance of certain lease obligations, as furnished by the lessee, or a guaranty of such performance as furnished by a third-party surety.

Permanent improvements means buildings, other structures, and associated infrastructure attached to the leased premises.

Permit means a written, non-assignable agreement between Indian landowners or BIA and the permittee, whereby the permittee is granted a

temporary, revocable privilege to use Indian land or Government land, for a specified purpose.

Permittee means a person or entity who has acquired a privilege to use Indian land or Government land by a permit.

Power of attorney means an authority by which one person enables another to act for him or her as attorney-in-fact.

Remainder interest means an interest in Indian land that is created at the same time as a life estate, for the use and enjoyment of its owner after the life estate terminates.

Restoration and reclamation plan means a plan that defines the reclamation, revegetation, restoration, and soil stabilization requirements for the project area, and requires the expeditious reclamation of construction areas and revegetation of disturbed areas to reduce invasive plant infestation and erosion.

Secretary means the Secretary of the Interior.

Single-family residence means a building with one to four dwelling units on a tract of land under a single residential lease, or as defined by applicable tribal law or other tribal authorization.

Single-family residential development means two or more single-family residences owned, managed, or developed by a single entity.

Sublease means a written agreement by which the lessee grants to an individual or entity a right to possession no greater than that held by the lessee under the lease.

Surety means one who guarantees the performance of another.

TDHE means a tribally designated housing entity under 25 U.S.C. 4103(22), a tribally-sponsored or tribally sanctioned not-for-profit entity, or any limited partnership or other entity organized for the purpose of developing or improving low-income housing utilizing tax credits.

Termination means action by Indian landowners to end a lease.

Trespass means any unauthorized occupancy, use of, or action on any Indian land or Government land.

Tribal authorization means a duly adopted tribal resolution, tribal ordinance, or other appropriate tribal document authorizing the specified action.

Tribal land means any tract, or interest therein, in which the surface estate is owned by one or more tribes in trust or restricted status, and includes such lands reserved for BIA administrative purposes. The term also includes the surface estate of lands held by the United States in trust for an Indian corporation chartered under section 17 of the Act of June 18, 1934 (48 Stat. 988; 25 U.S.C. 477).

Tribal land assignment means a contract or agreement that conveys to tribal members or wholly owned tribal corporations any rights for the use of tribal lands, assigned by an Indian tribe in accordance with tribal laws or customs.

Tribal law means the body of non-Federal law that governs lands and activities under the jurisdiction of a tribe, including ordinances or other enactments by the tribe, and tribal court rulings.

Trust or restricted land means any tract, or interest therein, held in trust or restricted status.

Trust or restricted status means:

(1) That the United States holds title to the tract or interest in trust for the benefit of one or more tribes or individual Indians; or

(2) That one or more tribes or individual Indians holds title to the tract or interest, but can alienate or encumber it only with the approval of the United States because of limitations in the conveyance instrument under Federal law or limitations in Federal law.

Undivided interest means a fractional share in the surface estate of Indian land, where the surface estate is owned in common with other Indian landowners or fee owners.

USPAP means the Uniform Standards of Professional Appraisal Practice promulgated by the Appraisal Standards Board of the Appraisal Foundation to establish requirements and procedures for professional real property appraisal practice.

Us/we/our means the BIA.

Violation means a failure to take an action, including payment of compensation, when required by the lease, or to otherwise not comply with a term of the lease. This definition applies for purposes of our enforcement of a lease under this part no matter how "violation" or "default" is defined in the lease.

§ 162.004 To what land does this part apply?

(a) This part applies to Indian land and Government land, including any tract in which an individual Indian or Indian tribe owns an interest in trust or restricted status.

(1) We will not take any action on a lease of fee interests or collect rent on behalf of fee interest owners. We will not condition our approval of a lease of the trust and restricted interests on your having obtained a lease from the owners of any fee interests. The lessee will be responsible for accounting to the owners of any fee interests that may exist in the property being leased.

(2) We will not include the fee interests in a tract in calculating the applicable percentage of interests required for consent to a lease document.

(b) This paragraph (b) applies if there is a life estate on the land to be leased.

(1) When all of the trust or restricted interests in a tract are subject to a single life estate, the life tenant may lease the land without the consent of the owners of the remainder interests or our approval, for the duration of the life estate.

(i) The lease will terminate upon the death of the life tenant.

(ii) The life tenant must record the lease in the LTRO.

(iii) The lessee must pay rent directly to the life tenant under the terms of the lease unless the whereabouts of the life tenant are unknown, in which case we may collect rents on behalf of the life tenant.

(iv) We may monitor the use of the land on behalf of the owners of the remainder interests, as appropriate, but will not be responsible for enforcing the lease on behalf of the life tenant.

(v) We will not lease the remainder interests or join in a lease by the life tenant on behalf of the owners of the remainder interests except as needed to preserve the value of the land.

(vi) We will be responsible for enforcing the terms of the lease on behalf of the owners of the remainder interests.

(2) When less than all of the trust or restricted interests in a tract are subject to a single life estate, the life tenant may lease his or her interest without the consent of the owners of the remainder interests, but must obtain the consent of the co-owners and our approval.

(i) We will not lease on the life tenant's behalf.

(ii) The lease must provide that the lessee pays the life tenant directly, unless the life tenant's whereabouts are unknown in which case we may collect rents on behalf of the life tenant.

(iii) The lease must be recorded in the LTRO, even where our approval is not required.

(iv) We will be responsible for enforcing the terms of the lease on behalf of the owners of the remainder interests.

(3) Where the remaindermen and the life tenant have not entered into a lease or other written agreement approved by the Secretary providing for the distribution of rent monies under the lease, the life tenant will receive payment in accordance with the

distribution and calculation scheme set forth in Part 179 of this chapter.

(4) The life tenant may not cause or allow permanent injury to the land.

(5) The life tenant must provide a copy of the executed lease to all owners of the remainder interests.

When to Get a Lease

§ 162.005 When do I need a lease to authorize possession of Indian land?

(a) You need a lease under this part to possess Indian land if you meet one of the criteria in the following table, unless you are authorized to possess or use the Indian land by a land use agreement not subject to this part under § 162.006(b) or by a permit.

If you are . . .	then you must obtain a lease under this part . . .
(1) A person or legal entity (including an independent legal entity owned and operated by a tribe) who is not an owner of the Indian land.	from the owners of the land before taking possession of the land or any portion thereof.
(2) An Indian landowner of a fractional interest in the land	from the owners of other trust and restricted interests in the land, unless all of the owners have given you permission to take or continue in possession without a lease.

(b) You do not need a lease to possess Indian land if:

(1) You are an Indian landowner who owns 100 percent of the trust or restricted interests in a tract; or

(2) You meet any of the criteria in the following table.

You do not need a lease if you are . . .	but the following conditions apply . . .
(i) A parent or guardian of a minor child who owns 100 percent of the trust or restricted interests in the land.	We may require you to provide evidence of a direct benefit to the minor child and when the child is no longer a minor, you must obtain a lease to authorize continued possession.
(ii) A 25 U.S.C. 477 corporate entity that manages or has the power to manage the tribal land directly under its Federal charter or under a tribal authorization (not under a lease from the Indian tribe).	You must record documents in accordance with § 162.343, § 162.443, and § 162.568.

§ 162.006 To what types of land use agreements does this part apply?

(a) This part applies to leases of Indian land entered into under 25 U.S.C. 380, 25 U.S.C. 415(a), and 25 U.S.C. 4211, and other tribe-specific statutes authorizing surface leases of Indian land with our approval.

(b) This part does not apply to:

(1) Land use agreements entered into under other statutory authority, such as the following:

This part does not apply to . . .	which are covered by . . .
(i) Contracts or agreements that encumber tribal land under 25 U.S.C. 81.	25 CFR part 84.
(ii) Traders' licenses	25 CFR part 140.
(iii) Timber contracts	25 CFR part 163.
(iv) Grazing permits	25 CFR part 166.
(v) Rights-of-way	25 CFR part 169.
(vi) Mineral leases, prospecting permits, or mineral development agreements.	25 CFR parts 211, 212, 213, 225, 226, 227.
(vii) Tribal land assignments and similar instruments authorizing uses of tribal land.	tribal laws.

(2) Leases of water rights associated with Indian land, except to the extent the use of water rights is incorporated in a lease of the land itself.

(3) The following leases, which do not require our approval, except that you must record these leases in accordance with §§ 162.343, 162.443, and 162.568:

(i) A lease of tribal land by a 25 U.S.C. 477 corporate entity under its charter to a third party for a period not to exceed 25 years; and

(ii) A lease of Indian land under a special act of Congress authorizing leasing without our approval.

§ 162.007 To what permits does this part apply?

(a) Permits for the use of Indian land do not require our approval; however, you must fulfill the following requirements:

(1) Ensure that permitted activities comply with all applicable environmental and cultural resource laws; and

(2) Submit all permits to the appropriate BIA office to allow us to maintain a copy of the permit in our records. If we determine within 10 days of submission that the document does not meet the definition of "permit" and grants a legal interest in Indian land, we will notify you that a lease is required.

(b) The following table provides examples of some common characteristics of permits versus leases.

Permit	Lease
Does not grant a legal interest in Indian land	Grants a legal interest in Indian land.
Shorter term	Longer term.
Limited use	Broader use with associated infrastructure.

Permit	Lease
Permittee has non-possessory right of access	Lessee has right of possession, ability to limit or prohibit access by others.
Indian landowner may terminate at any time	Indian landowner may terminate under limited circumstances.

(c) We will not administer or enforce permits on Indian land.

(d) We may grant permits for the use of Government land. The leasing regulations in this part will apply to such permits, as appropriate.

§ 162.008 Does this part apply to lease documents I submitted for approval before January 4, 2013?

This part applies to all lease documents, except as provided in § 162.006. If you submitted your lease document to us for approval before January 4, 2013, the qualifications in paragraphs (a) and (b) of this section also apply.

(a) If we approved your lease document before January 4, 2013, this part applies to that lease document; however, if the provisions of the lease document conflict with this part, the provisions of the lease govern.

(b) If you submitted a lease document but we did not approve it before January 4, 2013, then:

(1) We will review the lease document under the regulations in effect at the time of your submission; and

(2) Once we approve the lease document, this part applies to that lease document; however, if the provisions of the lease document conflict with this part, the provisions of the lease document govern.

§ 162.009 Do I need BIA approval of a subleasehold mortgage?

Unless the lease provides otherwise, sublease, or by request of the parties, you do not need our approval of a subleasehold mortgage. If the lease or sublease requires, or parties request, our approval, we will use the procedures governing our review of leasehold mortgages.

How to Get a Lease

§ 162.010 How do I obtain a lease?

(a) This section establishes the basic steps to obtain a lease.

(1) Prospective lessees must:

(i) Directly negotiate with Indian landowners for a lease; and

(ii) For fractionated tracts, notify all Indian landowners and obtain the consent of the Indian landowners of the applicable percentage of interests, under § 162.012; and

(2) Prospective lessees and Indian landowners must:

(i) Prepare the required information and analyses, including information to facilitate our analysis under applicable environmental and cultural resource requirements; and

(ii) Ensure the lease complies with the requirements in subpart C for residential leases, subpart D for business leases, or subpart E for wind energy evaluation, wind resource, or solar resource leases; and

(3) Prospective lessees or Indian landowners must submit the lease, and required information and analyses, to the BIA office with jurisdiction over the lands covered by the lease, for our review and approval.

(b) Generally, residential, business, wind energy evaluation, wind resource, and solar resource leases will not be advertised for competitive bid.

§ 162.011 How does a prospective lessee identify and contact individual Indian landowners to negotiate a lease?

(a) Prospective lessees may submit a written request to us to obtain the following information. The request must specify that it is for the purpose of negotiating a lease:

(1) Names and addresses of the individual Indian landowners or their representatives;

(2) Information on the location of the parcel; and

(3) The percentage of undivided interest owned by each individual Indian landowner.

(b) We may assist prospective lessees in contacting the individual Indian landowners or their representatives for the purpose of negotiating a lease, upon request.

(c) We will assist individual Indian landowners in lease negotiations, upon their request.

§ 162.012 What are the consent requirements for a lease?

(a) For fractionated tracts:

(1) Except in Alaska, the owners of the following percentage of undivided trust or restricted interests in a fractionated tract of Indian land must consent to a lease of that tract:

If the number of owners of the undivided trust or restricted interest in the tract is . . .	Then the required percentage of the undivided trust or restricted interest is . . .
(i) One to five,	90 percent;
(ii) Six to 10,	80 percent;
(iii) 11 to 19,	60 percent;
(iv) 20 or more,	Over 50 percent.

(2) Leases in Alaska require consent of all of the Indian landowners in the tract.

(3) If the prospective lessee is also an Indian landowner, his or her consent will be included in the percentages in paragraphs (a)(1) and (2) of this section.

(4) Where owners of the applicable percentages in paragraph (a)(1) of this section consent to a lease document:

(i) That lease document binds all non-consenting owners to the same extent as if those owners also consented to the lease document; and

(ii) That lease document will not bind a non-consenting Indian tribe, except with respect to the tribally owned fractional interest, and the non-consenting Indian tribe will not be treated as a party to the lease. Nothing in this paragraph affects the sovereignty or sovereign immunity of the Indian tribe.

(5) We will determine the number of owners of, and undivided interests in, a fractionated tract of Indian land, for the purposes of calculating the percentages in paragraph (a)(1) of this section based on our records on the date on which the lease is submitted to us for approval.

(b) Tribal land subject to a tribal land assignment may only be leased with the consent of the tribe.

§ 162.013 Who is authorized to consent to a lease?

(a) Indian tribes, adult Indian landowners, and emancipated minors, may consent to a lease of their land,

including undivided interests in fractionated tracts.

(b) The following individuals or entities may consent on behalf of an individual Indian landowner:

(1) An adult with legal custody acting on behalf of his or her minor children;

(2) A guardian, conservator, or other fiduciary appointed by a court of competent jurisdiction to act on behalf of an individual Indian landowner;

(3) Any person who is authorized to practice before the Department of the Interior under 43 CFR 1.3(b) and has been retained by the Indian landowner for this purpose;

(4) BIA, under the circumstances in paragraph (c) of this section; or

(5) An adult or legal entity who has been given a written power of attorney that:

(i) Meets all of the formal requirements of any applicable law under § 162.014;

(ii) Identifies the attorney-in-fact; and

(iii) Describes the scope of the powers granted, to include leasing land, and any limits on those powers.

(c) BIA may give written consent to a lease, and that consent must be counted in the percentage ownership described in § 162.012, on behalf of:

(1) The individual owner if the owner is deceased and the heirs to, or devisees of, the interest of the deceased owner have not been determined;

(2) An individual whose whereabouts are unknown to us, after we make a reasonable attempt to locate the individual;

(3) An individual who is found to be non compos mentis or determined to be an adult in need of assistance who does not have a guardian duly appointed by a court of competent jurisdiction, or an individual under legal disability as defined in part 115 of this chapter;

(4) An orphaned minor who does not have a guardian duly appointed by a court of competent jurisdiction;

(5) An individual who has given us a written power of attorney to lease their land; and

(6) The individual Indian landowners of a fractionated tract where:

(i) We have given the Indian landowners written notice of our intent to consent to a lease on their behalf;

(ii) The Indian landowners are unable to agree upon a lease during a 3 month negotiation period following the notice; and

(iii) The land is not being used by an Indian landowner under § 162.005(b)(1).

Lease Administration

§ 162.014 What laws will apply to leases approved under this part?

(a) In addition to the regulations in this part, leases approved under this part:

(1) Are subject to applicable Federal laws and any specific Federal statutory requirements that are not incorporated in this part;

(2) Are subject to tribal law, subject to paragraph (b) of this section; and

(3) Are not subject to State law or the law of a political subdivision thereof except that:

(i) State law or the law of a political subdivision thereof may apply in the specific areas and circumstances in Indian country where the Indian tribe with jurisdiction has made it expressly applicable;

(ii) State law may apply in the specific areas and circumstances in Indian country where Congress has made it expressly applicable; and

(iii) State law may apply where a Federal court has expressly applied State law to a specific area or circumstance in Indian country in the absence of Federal or tribal law.

(b) Tribal laws generally apply to land under the jurisdiction of the tribe enacting the laws, except to the extent that those tribal laws are inconsistent with these regulations or other applicable Federal law. However, these regulations may be superseded or modified by tribal laws, as long as:

(1) The tribe has notified us of the superseding or modifying effect of the tribal laws;

(2) The superseding or modifying of the regulation would not violate a Federal statute or judicial decision, or conflict with our general trust responsibility under Federal law; and

(3) The superseding or modifying of the regulation applies only to tribal land.

(c) Unless prohibited by Federal law, the parties to a lease may subject that lease to State or local law in the absence of Federal or tribal law, if:

(1) The lease includes a provision to this effect; and

(2) The Indian landowners expressly agree to the application of State or local law.

(d) An agreement under paragraph (c) of this section does not waive a tribe's sovereign immunity unless the tribe expressly states its intention to waive sovereign immunity in the lease of tribal land.

§ 162.015 May a lease contain a preference consistent with tribal law for employment of tribal members?

A lease of Indian land may include a provision, consistent with tribal law, requiring the lessee to give a preference to qualified tribal members, based on their political affiliation with the tribe.

§ 162.016 Will BIA comply with tribal laws in making lease decisions?

Unless contrary to Federal law, BIA will comply with tribal laws in making decisions regarding leases, including tribal laws regulating activities on leased land under tribal jurisdiction, including, but not limited to, tribal laws relating to land use, environmental protection, and historic or cultural preservation.

§ 162.017 What taxes apply to leases approved under this part?

(a) Subject only to applicable Federal law, permanent improvements on the leased land, without regard to ownership of those improvements, are not subject to any fee, tax, assessment, levy, or other charge imposed by any State or political subdivision of a State. Improvements may be subject to taxation by the Indian tribe with jurisdiction.

(b) Subject only to applicable Federal law, activities under a lease conducted on the leased premises are not subject to any fee, tax, assessment, levy, or other charge (e.g., business use, privilege, public utility, excise, gross revenue taxes) imposed by any State or political subdivision of a State. Activities may be subject to taxation by the Indian tribe with jurisdiction.

(c) Subject only to applicable Federal law, the leasehold or possessory interest is not subject to any fee, tax, assessment, levy, or other charge imposed by any State or political subdivision of a State. Leasehold or possessory interests may be subject to taxation by the Indian tribe with jurisdiction.

§ 162.018 May tribes administer this part on BIA's behalf?

A tribe or tribal organization may contract or compact under the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450f *et seq.*) to administer any portion of this part that is not an approval or disapproval of a lease document, waiver of a requirement for lease approval (including but not limited to waivers of fair market rental and valuation, bonding, and insurance), cancellation of a lease, or an appeal.

§ 162.019 May a lease address access to the leased premises by roads or other infrastructure?

A lease may address access to the leased premises by roads or other infrastructure, as long as the access complies with applicable statutory and regulatory requirements, including 25 CFR part 169. Roads or other infrastructure within the leased premises do not require compliance with 25 CFR part 169 during the term of the lease, unless otherwise stated in the lease.

§ 162.020 May a lease combine tracts with different Indian landowners?

(a) We may approve a lease that combines multiple tracts of Indian land into a unit, if we determine that unitization is:

(1) In the Indian landowners' best interest; and

(2) Consistent with the efficient administration of the land.

(b) For a lease that covers multiple tracts, the minimum consent requirements apply to each tract separately.

(c) Unless the lease provides otherwise, the rent or other compensation will be prorated in proportion to the acreage each tract contributes to the entire lease. Once prorated per tract, the rent will be distributed to the owners of each tract based upon their respective percentage interest in that particular tract.

§ 162.021 What are BIA's responsibilities in approving leases?

(a) We will work to provide assistance to Indian landowners in leasing their land, either through negotiations or advertisement.

(b) We will promote tribal control and self-determination over tribal land and other land under the tribe's jurisdiction, including through contracts and self-governance compacts entered into under the Indian Self-Determination and Education Assistance Act, as amended, 25 U.S.C. 450f *et. seq.*

(c) We will promptly respond to requests for BIA approval of leases, as specified in §§ 162.340, 162.440, 162.530, and 162.565.

(d) We will work to ensure that the use of the land is consistent with the Indian landowners' wishes and applicable tribal law.

§ 162.022 What are BIA's responsibilities in administering and enforcing leases?

(a) Upon written notification from an Indian landowner that the lessee has failed to comply with the terms and conditions of the lease, we will promptly take appropriate action, as specified in §§ 162.364, 162.464, and 162.589. Nothing in this part prevents an Indian landowner from exercising remedies available to the Indian landowners under the lease or applicable law.

(b) We will promptly respond to requests for BIA approval of amendments, assignments, leasehold mortgages, and subleases, as specified in subparts C, D, and E.

(c) We will respond to Indian landowners' concerns regarding the management of their land.

(d) We will take emergency action as needed to preserve the value of the land under § 162.024.

§ 162.023 What if an individual or entity takes possession of or uses Indian land without an approved lease or other proper authorization?

If an individual or entity takes possession of, or uses, Indian land without a lease and a lease is required, the unauthorized possession or use is a trespass. We may take action to recover possession, including eviction, on behalf of the Indian landowners and pursue any additional remedies available under applicable law. The Indian landowners may pursue any available remedies under applicable law.

§ 162.024 May BIA take emergency action if Indian land is threatened?

(a) We may take appropriate emergency action if there is a natural disaster or if an individual or entity causes or threatens to cause immediate and significant harm to Indian land. Emergency action may include judicial action seeking immediate cessation of the activity resulting in or threatening the harm.

(b) We will make reasonable efforts to notify the individual Indian landowners before and after taking emergency action. In all cases, we will notify the Indian landowners after taking emergency action by actual or constructive notice. We will provide written notification of our action to the Indian tribe exercising jurisdiction over the Indian land before and after taking emergency action.

§ 162.025 May decisions under this part be appealed?

Appeals from BIA decisions under this part may be taken under part 2 of this chapter, except for deemed approvals and as otherwise provided in this part. For purposes of appeals from BIA decisions under this part, "interested party" is defined as any person whose own direct economic interest is adversely affected by an action or decision. Our decision to disapprove a lease may be appealed only by an Indian landowner. Our decision to disapprove any other lease document may be appealed only by the Indian landowners or the lessee.

§ 162.026 Who can answer questions about leasing?

An Indian landowner or prospective lessee may contact the local BIA realty office (or of any tribe acting on behalf of BIA under § 162.018) with jurisdiction over the land for answers to questions about the leasing process.

§ 162.027 What documentation may BIA require in approving, administering, and enforcing leases?

(a) We may require that the parties provide any pertinent environmental and technical records, reports, and other information (e.g., records of lease payments), related to approval of lease documents and enforcement of leases.

(b) We will adopt environmental assessments and environmental impact statements prepared by another Federal agency, Indian tribe, entity, or person under 43 CFR 46.320 and 42 CFR 1506.3, including those prepared under 25 U.S.C. 4115 and 25 CFR part 1000, but may require a supplement. We will use any reasonable evidence that another Federal agency has accepted the environmental report, including but not limited to, letters of approval or acceptance.

(c) Upon our request, the parties must make appropriate records, reports, or information available for our inspection and duplication. We will keep confidential any information that is marked confidential or proprietary and will exempt it from public release to the extent allowed by law and in accordance with 43 CFR part 2. We may, at our discretion, treat a lessee's failure to cooperate with such request, provide data, or grant access to information or records as a lease violation.

§ 162.028 How may an Indian tribe obtain information about leases on its land?

Upon request of the Indian tribe with jurisdiction, BIA will promptly provide information on the status of leases on tribal land, without requiring a Freedom of Information Act request.

§ 162.029 How does BIA provide notice to the parties to a lease?

(a) When this part requires us to notify the parties of the status of our review of a lease document (including but not limited to, providing notice to the parties of the date of receipt of a lease document, informing the parties of the need for additional review time, and informing the parties that a lease proposal package is not complete):

(1) For leases of tribal land, we will notify the lessee and the tribe by mail; and

(2) For leases of individually owned Indian land, we will notify the lessee by mail and, where feasible, the individual Indian landowners either by constructive notice or by mail.

(b) When this part requires us to notify the parties of our determination to approve or disapprove a lease document, and to provide any right of appeal:

(1) For leases of tribal land, we will notify the lessee and the tribe by mail; and

(2) For leases of individually owned Indian land, we will notify the lessee by mail and the individual Indian landowners either by constructive notice or by mail.

Subpart B—Agricultural Leases

■ 5. In newly transferred § 162.101, revise the section heading and the introductory text to read as follows:

§ 162.101 What key terms do I need to know for this subpart?

For the purposes of this subpart:

* * * * *

§§ 162.102 through 162.104 [Removed]

■ 6. Remove newly transferred §§ 162.102 through 162.104.

§ 162.105 [Amended]

■ 7a. In newly transferred § 162.105, remove the word "leasing" from the section heading and add in its place the words "agricultural leasing" and remove the word "lease" and add in its place the words "agricultural lease" wherever it appears.

§ 162.106 [Amended]

■ 7b. In newly transferred § 162.106, remove the word "lease" and add in its place the words "agricultural lease" wherever it appears.

■ 8. In newly transferred § 162.107, revise the section heading and add introductory text to read as follows:

§ 162.107 What are BIA's objectives in granting and approving agricultural leases?

We will assist Indian landowners in leasing their land for agricultural purposes. For the purposes of §§ 162.102 through 162.256:

* * * * *

§ 162.108 [Amended]

■ 9a. In newly transferred § 162.108, remove the word "leases" from the section heading and paragraph (b) and add in its place the words "agricultural leases" in its place and remove the word "lease" in paragraph (b) and add in its place the words "agricultural lease".

§ 162.109 [Amended]

■ 9b. In newly transferred § 162.109, remove the word "leases" from the section heading and paragraph (a) and add in its place the words "agricultural leases" in its place and remove the three occurrences of the word "lease" in paragraph (c) and add in their place the words "agricultural lease".

§ 162.110 [Amended]

■ 9c. In newly transferred § 162.110, remove the word "leases" wherever it appears and add in its place the words "agricultural leases".

■ 10. In newly transferred § 162.111, revise the section heading, paragraph (a) introductory text, and paragraph (b) to read as follows:

§ 162.111 Who owns the records associated with this subpart?

(a) Records associated with this subpart are the property of the United States if they:

* * * * *

(b) Records associated with this subpart not covered by paragraph (a) of this section that are made or received by a tribe or tribal organization in the conduct of business with the Department of the Interior under this subpart are the property of the tribe.

■ 11. Revise the heading for § 162.112 to read as follows:

§ 162.112 How must records associated with this part be preserved?

* * * * *

§ 162.113 [Amended]

■ 12. In newly transferred § 162.113 remove the word "part" wherever it appears and add in its place the word "subpart".

■ 13. Add new subparts C through D to read as follows:

Subpart C—Residential Leases

Residential Leasing General Provisions

Sec.

Lease Requirements

Rental Requirements

Bonding and Insurance

Approval

Amendments

Assignments

Subpart C—Residential Leases

Residential Leasing General Provisions

§ 162.301 What types of leases does this subpart cover?

(a) This subpart covers both ground leases (undeveloped land) and leases of developed land (together with the permanent improvements thereon) on Indian land, for housing purposes. Leases covered by this subpart would authorize the construction or use of:

(1) A single-family residence; and

(2) Housing for public purposes, which may include office space necessary to administer programs for housing for public purposes.

(b) Leases for other residential development (for example, single-family residential developments and multi-family developments that are not housing for public purposes) are covered under subpart D of this part.

§ 162.302 Is there a model residential lease form?

(a) We will make available one or more model lease forms that satisfy the formal requirements of this part, including, as appropriate, the model tribal lease form jointly developed by BIA, the Department of Housing and Urban Development, the Department of Veterans' Affairs, and the Department of Agriculture. Use of a model lease form is not mandatory, provided all requirements of this part are met.

(b) If a model lease form prepared by us is not used by the parties to a residential lease, we will assist the Indian landowners, upon their request, in drafting lease provisions or in using tribal lease forms that conform to the requirements of this part.

§ 162.303 Who needs a lease for housing for public purposes?

A TDHE or tribal housing authority must obtain an approved residential lease under this subpart from the Indian landowners if, under the terms of its charter, it is a legal entity independent from the tribe, regardless of whether it is owned and operated by the tribe. A TDHE or tribal housing authority does not need an approved residential lease under this subpart if the tribe has authorized the TDHE's or tribal housing authority's possession through a tribal land assignment.

Lease Requirements

§ 162.311 How long may the term of a residential lease run?

(a) A residential lease must provide for a definite lease term, state if there is an option to renew, and if so, provide for a definite term for the renewal period.

(1) The maximum term of a lease approved under 25 U.S.C. 4211 may not exceed 50 years or may be month-to-month. The lease may provide for an initial term of less than 50 years with a provision for one or more renewals, so long as the maximum term, including all renewals, does not exceed 50 years.

(2) The maximum term of a lease approved under 25 U.S.C. 415(a) may not exceed 50 years (consisting of an initial term not to exceed 25 years and one renewal not to exceed 25 years), unless a Federal statute provides for a longer maximum term (e.g., 25 U.S.C. 415(a) allows for a maximum term of 99 years for certain tribes), a different initial term, renewal term, or number of renewals.

(b) For tribal land, we will defer to the tribe's determination that the lease term, including any renewal, is reasonable. For individually owned Indian land, we will review the lease term, including any renewal, to ensure it is reasonable, given the:

(1) Purpose of the lease;

(2) Type of financing; and

(3) Level of investment.

(c) Unless the lease provides otherwise, a residential lease may not be extended by holdover.

§ 162.312 What must the lease include if it contains an option to renew?

(a) If the lease provides for an option to renew, the lease must specify:

(1) The time and manner in which the option must be exercised or is automatically effective;

(2) That confirmation of the renewal will be submitted to us, unless the lease provides for automatic renewal;

(3) Whether Indian landowner consent to the renewal is required;

(4) That the lessee must provide notice of the renewal to the Indian landowners and any mortgagees;

(5) The additional consideration, if any, that will be due upon the exercise of the option to renew or the start of the renewal term; and

(6) Any other conditions for renewal (e.g., that the lessee not be in violation of the lease at the time of renewal).

(b) We will record any renewal of a lease in the LTRO.

§ 162.313 Are there mandatory provisions that a residential lease must contain?

(a) All residential leases must identify:

(1) The tract or parcel of land being leased;

(2) The purpose of the lease and authorized uses of the leased premises;

(3) The parties to the lease;

(4) The term of the lease;

(5) The ownership of permanent improvements and the responsibility for constructing, operating, maintaining, and managing permanent improvements under § 162.315; and

(6) Payment requirements and late payment charges, including interest.

(b) Where a representative executes a lease on behalf of an Indian landowner or lessee, the lease must identify the landowner or lessee being represented and the authority under which the action is taken.

(c) All residential leases must include the following provisions:

(1) The obligations of the lessee to the Indian landowners are also enforceable by the United States, so long as the land remains in trust or restricted status;

(2) There must not be any unlawful conduct, creation of a nuisance, illegal activity, or negligent use or waste of the leased premises;

(3) The lessee must comply with all applicable laws, ordinances, rules, regulations, and other legal requirements under § 162.014;

(4) If historic properties, archeological resources, human remains, or other cultural items not previously reported are encountered during the course of any activity associated with this lease, all activity in the immediate vicinity of the properties, resources, remains, or items will cease and the lessee will contact BIA and the tribe with jurisdiction to determine how to proceed and appropriate disposition;

(5) BIA has the right, at any reasonable time during the term of the lease and upon reasonable notice in accordance with § 162.364, to enter the leased premises for inspection and to ensure compliance; and

(6) BIA may, at its discretion, treat as a lease violation any failure by the lessee to cooperate with a BIA request to make appropriate records, reports, or information available for BIA inspection and duplication.

(d) Unless the lessee would be prohibited by law from doing so, the lease must also contain the following provisions:

(1) The lessee holds the United States and the Indian landowners harmless from any loss, liability, or damages resulting from the lessee's use or occupation of the leased premises; and

(2) The lessee indemnifies the United States and the Indian landowners against all liabilities or costs relating to use, handling, treatment, removal, storage, transportation, or disposal of hazardous materials, or release or discharge of any hazardous material from the leased premises that occurs during the lease term, regardless of fault, with the exception that the lessee is not required to indemnify the Indian landowners for liability or cost arising from the Indian landowners' negligence or willful misconduct.

(e) We may treat any provision of a lease document that violates Federal law as a violation of the lease.

§ 162.314 May permanent improvements be made under a residential lease?

(a) The lessee may construct permanent improvements under a residential lease if the residential lease authorizes the construction and generally describes the type and location of the permanent improvements to be constructed during the lease term.

(b) The lessee must provide reasonable notice to the Indian landowners of the construction of any permanent improvements not generally described in the lease.

§ 162.315 How must a residential lease address ownership of permanent improvements?

(a) A residential lease must specify who will own any permanent improvements the lessee constructs during the lease term. In addition, the lease must indicate whether each specific permanent improvement the lessee constructs will:

(1) Remain on the leased premises upon expiration, termination, or cancellation of the lease, in a condition satisfactory to the Indian landowners and become the property of the Indian landowners;

(2) Be removed within a time period specified in the lease, at the lessee's expense, with the leased premises to be restored as closely as possible to their condition before construction of the permanent improvements; or

(3) Be disposed of by other specified means.

(b) A lease that requires the lessee to remove the permanent improvements must also provide the Indian landowners with an option to take possession of and title to the permanent improvements if the improvements are not removed within the specified time period.

§ 162.316 How will BIA enforce removal requirements in a residential lease?

We may take appropriate enforcement action to ensure removal of the permanent improvements and restoration of the premises at the lessee's expense:

(a) In consultation with the tribe for tribal land or, where feasible, with Indian landowners for individually owned Indian land; and

(b) Before or after expiration, termination, or cancellation of the lease.

§ 162.317 How must a residential lease describe the land?

(a) A residential lease must describe the leased premises by reference to a public or private survey, if possible. If the land cannot be so described, the lease must include one or more of the following:

(1) A legal description;

(2) A survey-grade global positioning system description; or

(3) Another description prepared by a registered land surveyor that is sufficient to identify the leased premises.

(b) If the tract is fractionated, we will identify the undivided trust or restricted interests in the leased premises.

Rental Requirements

§ 162.320 How much rent must be paid under a residential lease of tribal land?

(a) A residential lease of tribal land may allow for any payment amount negotiated by the tribe, and we will defer to the tribe and not require a valuation, if:

(1) The lease is for housing for public purposes; or

(2) The tribe submits a signed certification or tribal authorization stating that it has determined the negotiated amount to be in its best interest.

(b) The tribe may request, in writing, that we determine fair market rental, in which case we will use a valuation in accordance with § 162.322. After providing the tribe with the fair market rental, we will defer to a tribe's decision to allow for any payment amount negotiated by the tribe.

(c) If the conditions in paragraph (a) or (b) of this section are not met, we will require that the lease provide for fair market rental based on a valuation in accordance with § 162.322.

§ 162.321 How much rent must be paid under a residential lease of individually owned Indian land?

(a) A residential lease of individually owned Indian land must require payment of not less than fair market rental except that we may approve a lease of individually owned Indian land that provides for the payment of nominal rent, or less than a fair market rental, if:

(1) One hundred percent of the Indian landowners execute a written waiver of the right to receive fair market rental; or

(2) We waive the requirement under paragraph (c) of this section.

(b) We will require a valuation in accordance with § 162.322, unless:

(1) One hundred percent of the Indian landowners submit to us a written request to waive the valuation requirement; or

(2) We waive the requirement under paragraph (c) of this section.

(c) If the owners of the applicable percentage of interests under § 162.012 consent to a residential lease on behalf of all the Indian landowners of a fractionated tract, the lease must provide that the non-consenting Indian landowners (and those on whose behalf we have consented) receive fair market rental, as determined by a valuation, unless we waive the requirement because:

(1) The lessee is a co-owner who, as of January 4, 2013, has been residing on the tract for at least 7 years, and no other co-owner raises an objection to BIA by July 3, 2013 to the lessee's continued possession of the tract; or

(2) The tribe or lessee will construct infrastructure improvements on, or serving, the leased premises, and we determine it is in the best interest of all the landowners.

§ 162.322 How will BIA determine fair market rental for a residential lease?

(a) We will use a market analysis, appraisal, or other appropriate valuation method to determine the fair market rental for residential leases of individually owned Indian land. We will also do this, at the request of the tribe, for tribal land.

(b) We will either:

(1) Prepare, or have prepared, a market analysis, appraisal, or other appropriate valuation method; or

(2) Use an approved market analysis, appraisal, or other appropriate valuation method from the Indian landowners or lessee.

(c) We will use or approve a market analysis, appraisal, or other appropriate valuation method for use only if it:

(1) Has been prepared in accordance with USPAP or a valuation method developed by the Secretary under 25 U.S.C. 2214; and

(2) Complies with Department policies regarding appraisals, including third-party appraisals.

§ 162.323 When are rental payments due under a residential lease?

(a) A residential lease must specify the dates on which payments are due.

(b) Unless the lease provides otherwise, payments may not be made or accepted more than one year in advance of the due date.

(c) Payments are due at the time specified in the lease, regardless of whether the lessee receives an advance billing or other notice that a payment is due.

§ 162.324 Must a residential lease specify who receives rental payments?

(a) A residential lease must specify whether the lessee will make payments directly to the Indian landowners (direct pay) or to us on their behalf.

(b) The lessee may make payments directly to the Indian landowners if:

(1) The Indian landowners' trust accounts are unencumbered;

(2) There are 10 or fewer beneficial owners; and

(3) One hundred percent of the beneficial owners (including those on whose behalf we have consented) agree to receive payment directly from the lessee at the start of the lease.

(c) If the lease provides that the lessee will directly pay the Indian landowners, then:

(1) The lease must include provisions for proof of payment upon our request.

(2) When we consent on behalf of an Indian landowner, the lessee must make payment to us on behalf of that landowner.

(3) The lessee must send direct payments to the parties and addresses specified in the lease, unless the lessee receives notice of a change of ownership or address.

(4) Unless the lease provides otherwise, payments may not be made payable directly to anyone other than the Indian landowners.

(5) Direct payments must continue through the duration of the lease, except that:

(i) The lessee must make all Indian landowners' payments to us if 100 percent of the Indian landowners agree to suspend direct pay and provide us with documentation of their agreement; and

(ii) The lessee must make an individual Indian landowner's payment to us if that individual Indian landowner who dies, is declared non compos mentis, owes a debt resulting in a trust account encumbrance, or his or her whereabouts become unknown.

§ 162.325 What form of payment is acceptable under a residential lease?

(a) When payments are made directly to Indian landowners, the form of payment must be acceptable to the Indian landowners.

(b) When payments are made to us, our preferred method of payment is electronic funds transfer payments. We will also accept:

(1) Money orders;

(2) Personal checks;

(3) Certified checks; or

(4) Cashier's checks.

(c) We will not accept cash or foreign currency.

(d) We will accept third-party checks only from financial institutions or Federal agencies.

§ 162.326 May a residential lease provide for non-monetary or varying types of compensation?

(a) A lease may provide for the following, subject to the conditions in paragraphs (b) and (c) of this section:

(1) Alternative forms of rental, including, but not limited to in-kind consideration; or

(2) Varying types of compensation at specific stages during the life of the lease.

(b) For tribal land, we will defer to the tribe's determination that the compensation under paragraph (a) of this section is in its best interest, if either:

(1) The lease is for housing for public purposes; or

(2) The tribe submits a signed certification or tribal authorization stating that it has determined the compensation under paragraph (a) of this section to be in its best interest.

(c) For individually owned Indian land, we may approve a lease that provides for compensation under paragraph (a) of this section if we determine that it is in the best interest of the Indian landowners.

§ 162.327 Will BIA notify a lessee when a payment is due under a residential lease?

Upon request of the Indian landowners, we may issue invoices to a lessee in advance of the dates on which payments are due under a residential lease. The lessee's obligation to make these payments in a timely manner will not be excused if invoices are not issued, delivered, or received.

§ 162.328 Must a residential lease provide for rental reviews or adjustments?

(a) For a residential lease of tribal land, unless the lease provides otherwise, no periodic review of the adequacy of rent or rental adjustment is required if:

(1) The tribe states in a tribal certification or authorization that it has determined that not having rental reviews and/or adjustments is in its best interest; or

(2) The lease is for housing for public purposes.

(b) For a residential lease of individually Indian owned land, unless the lease provides otherwise, no periodic review of the adequacy of rent or rental adjustment is required if:

(1) The lease is for housing for public purposes;

(2) The term of the lease is 5 years or less;

(3) The lease provides for automatic rental adjustments; or

(4) We determine it is in the best interest of the Indian landowners not to require a review or automatic adjustment based on circumstances including, but not limited to, the following:

(i) The lease provides for payment of less than fair market rental; or

(ii) The lease provides for most or all rent to be paid during the first 5 years of the lease term or before the date the review would be conducted.

(c) If the conditions in paragraph (a) or (b) of this section are not met, a review of the adequacy of rent must occur at least every fifth year, in the manner specified in the lease. The lease must specify:

(1) When adjustments take effect;

(2) Who can make adjustments;

(3) What the adjustments are based on; and

(4) How to resolve disputes arising from the adjustments.

(d) When a review results in the need for adjustment of rent, the Indian landowners must consent to the adjustment in accordance with § 162.012, unless the lease provides otherwise.

§ 162.329 What other types of payments are required under a residential lease?

(a) The lessee may be required to pay additional fees, taxes, and assessments associated with the use of the land, as determined by entities having jurisdiction, except as provided in § 162.017. The lessee must pay these amounts to the appropriate office.

(b) If the leased premises are within an Indian irrigation project or drainage district, except as otherwise provided in part 171 of this chapter, the lessee must pay all operation and maintenance charges that accrue during the lease term. The lessee must pay these amounts to the appropriate office in charge of the irrigation project or drainage district. We will treat failure to make these payments as a violation of the lease.

Bonding and Insurance

§ 162.334 Is a performance bond required for a residential lease document?

We will not require a lessee or assignee to provide a performance bond or alternative form of security for a residential lease document.

§ 162.335 Is insurance required for a residential lease document?

We will not require a lessee or assignee to provide insurance for a residential lease document.

§ 162.336 [Reserved]

§ 162.337 [Reserved]

Approval

§ 162.338 What documents are required for BIA approval of a residential lease?

A lessee or the Indian landowners must submit the following documents to us to obtain BIA approval of a residential lease:

(a) A lease executed by the Indian landowners and the lessee that meets the requirements of this part;

(b) For tribal land, a tribal authorization for the lease and, if applicable, meeting the requirements of §§ 162.320(a), 162.326(b), and 162.328(a), or a separate signed certification meeting the requirements of §§ 162.320(a), 162.326(b), and 162.328(a);

(c) A valuation, if required under § 162.320 or § 162.321;

(d) A statement from the appropriate tribal authority that the proposed use is in conformance with applicable tribal law, if required by the tribe;

(e) Reports, surveys, and site assessments as needed to facilitate compliance with applicable Federal and tribal environmental and land use requirements, including any documentation prepared under § 162.027(b);

(f) A preliminary site plan identifying the proposed location of residential development, roads, and utilities, if applicable, unless the lease is for housing for public purposes;

(g) A legal description of the land under § 162.317;

(h) If the lease is being approved under 25 U.S.C. 415, information to assist us in our evaluation of the factors in 25 U.S.C. 415(a); and

(i) If the lessee is a corporation, limited liability company, partnership, joint venture, or other legal entity, except a tribal entity, information such as organizational documents, certificates, filing records, and resolutions, that demonstrates that:

(1) The representative has authority to execute a lease;

(2) The lease will be enforceable against the lessee; and

(3) The legal entity is in good standing and authorized to conduct business in the jurisdiction where the land is located.

§ 162.339 Will BIA review a proposed residential lease before or during preparation of the NEPA review documentation?

Upon request of the Indian landowners, we will review the proposed residential lease after negotiation by the parties, before or during preparation of the NEPA review documentation and any valuation. Within 10 days of receiving the proposed lease, we will provide an acknowledgement of the terms of the lease and identify any provisions that, based on this acknowledgment review, would justify disapproval of the lease, pending results of the NEPA review and any valuation.

§ 162.340 What is the approval process for a residential lease?

(a) Before we approve a residential lease, we must determine that the lease is in the best interest of the Indian landowners. In making that determination, we will:

(1) Review the lease and supporting documents;

(2) Ensure compliance with applicable laws and ordinances;

(3) If the lease is being approved under 25 U.S.C. 415, assure ourselves that adequate consideration has been given to the factors in 25 U.S.C. 415(a); and

(4) Require any lease modifications or mitigation measures necessary to satisfy any requirements including any other Federal or tribal land use requirements.

(b) Upon receiving a residential lease package, we will promptly notify the parties whether the package is or is not complete. A complete package includes all the information and supporting documents required under this subpart, including but not limited to, NEPA review documentation and valuation documentation, where applicable.

(1) If the residential lease package is not complete, our letter will identify the missing information or documents required for a complete package. If we do not respond to the submission of a residential lease package, the parties may take action under § 162.363.

(2) If the residential lease package is complete, we will notify the parties of the date of receipt. Within 30 days of the receipt date, we will approve or disapprove the lease or return the package for revision.

(c) If we do not meet the deadlines in this section, then the parties may take action under § 162.363.

(d) We will provide any lease approval or disapproval and the basis for the determination, along with notification of any appeal rights under part 2 of this chapter, in writing to the parties to the lease.

(e) Any residential lease issued under the authority of the Native American Housing Assistance and Self-Determination Act, 25 U.S.C 4211(a), whether on tribal land or on individually owned Indian land, must be approved by us and by the affected tribe.

(f) We will provide approved residential leases on tribal land to the lessee and provide a copy to the tribe. We will provide approved residential leases on individually owned Indian land to the lessee, and make copies available to the Indian landowners upon written request.

§ 162.341 How will BIA decide whether to approve a residential lease?

(a) We will approve a residential lease unless:

(1) The required consents have not been obtained from the parties to the lease;

(2) The requirements of this subpart have not been met; or

(3) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) We will defer, to the maximum extent possible, to the Indian landowners' determination that the residential lease is in their best interest.

(c) We may not unreasonably withhold approval of a lease.

§ 162.342 When will a residential lease be effective?

(a) A residential lease will be effective on the date that we approve the lease, even if an appeal is filed under part 2 of this chapter.

(b) The lease may specify a date on which the obligations between the parties to a residential lease are triggered. Such date may be before or after the approval date under paragraph (a) of this section.

§ 162.343 Must a residential lease document be recorded?

(a) Any residential lease, amendment, assignment, or leasehold mortgage must be recorded in the LTRO with jurisdiction over the leased land. A residential sublease need not be recorded.

(1) We will record the lease or other document immediately following our approval.

(2) When our approval of an assignment is not required, the parties must record the assignment in the LTRO with jurisdiction over the leased land.

(b) The tribe must record lease documents for the following types of leases in the LTRO with jurisdiction over the leased lands, even though BIA approval is not required:

(1) Leases of tribal land that a corporate entity leases to a third party under 25 U.S.C. 477; and

(2) Leases of tribal land under a special act of Congress authorizing leases without our approval under certain conditions.

§ 162.344 Will BIA require an appeal bond for an appeal of a decision on a residential lease document?

BIA will not require an appeal bond for an appeal of a decision on a residential lease document.

Amendments

§ 162.345 May the parties amend a residential lease?

The parties may amend a residential lease by obtaining:

(a) The lessee's signature;

(b) The Indian landowners' consent under the requirements in § 162.346; and

(c) BIA approval of the amendment under §§ 162.347 and 162.348.

§ 162.346 What are the consent requirements for an amendment of a residential lease?

(a) Unless the lease provides otherwise, the lessee must notify all Indian landowners of the proposed amendment.

(b) The Indian landowners, or their representatives under § 162.013, must consent to an amendment of a residential lease in the same percentages and manner as a new residential lease under § 162.012, unless the lease:

(1) Provides that individual Indian landowners are deemed to have consented if they do not object in writing to the amendment within a specified period of time following Indian landowners' receipt of the amendment and the lease meets the requirements of paragraph (c) of this section;

(2) Authorizes one or more representatives to consent to an amendment on behalf of all Indian landowners; or

(3) Designates us as the Indian landowners' representative for the purposes of consent to an amendment.

(c) If the lease provides for deemed consent under paragraph (b)(1) of this section, it must require the parties to submit to us:

(1) A copy of the executed amendment or other documentation of any Indian landowners' actual consent;

(2) Proof of mailing of the amendment to any Indian landowners who are deemed to have consented; and

(3) Any other pertinent information for review.

(d) Unless specifically authorized in the lease, a written power of attorney, or a court document, Indian landowners may not be deemed to have consented to, and an Indian landowner's designated representative may not negotiate or consent to, an amendment that would:

(1) Reduce the payment obligations to the Indian landowners;

(2) Increase or decrease the lease area; or

(3) Terminate or change the term of the lease.

§ 162.347 What is the approval process for an amendment of a residential lease?

(a) When we receive an amendment that meets the requirements of this subpart, we will notify the parties of the date we receive it. We have 30 days from receipt of the executed amendment, proof of required consents, and required documentation to approve or disapprove the amendment. Our determination whether to approve the amendment will be in writing and will state the basis for our approval or disapproval.

(b) If we do not send a determination within 30 days from receipt of the required documents, the amendment is deemed approved to the extent consistent with Federal law. Unless the lease provides otherwise, provisions of the amendment that are inconsistent with Federal law will be severed and unenforceable; all other provisions of the amendment will remain in force.

§ 162.348 How will BIA decide whether to approve an amendment of a residential lease?

(a) We may disapprove a residential lease amendment only if at least one of the following is true:

(1) The Indian landowners have not consented and their consent is required;

(2) The lessee's mortgagees have not consented;

(3) The lessee is in violation of the lease;

(4) The requirements of this subpart have not been met; or

(5) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) We will defer, to the maximum extent possible, to the Indian landowners' determination that the amendment is in their best interest.

(c) We may not unreasonably withhold approval of an amendment.

Assignments

§ 162.349 May a lessee assign a residential lease?

(a) A lessee may assign a residential lease by meeting the consent requirements in § 162.350 and obtaining our approval of the assignment under §§ 162.351 and 162.352 or by meeting the conditions in paragraph (b) of this section.

(b) The lessee may assign the lease without our approval or meeting consent requirements if:

(1) The lease is for housing for public purposes, or the assignee is a leasehold mortgagee or its designee, acquiring the lease either through foreclosure or by conveyance;

(2) The assignee agrees in writing to assume all of the obligations and conditions of the lease; and

(3) The assignee agrees in writing that any transfer of the lease will be in accordance with applicable law under § 162.014.

§ 162.350 What are the consent requirements for an assignment of a residential lease?

(a) Unless the lease provides otherwise, the lessee must notify all Indian landowners of the proposed assignment.

(b) The Indian landowners, or their representatives under § 162.013, must consent to an assignment of a residential lease in the same percentages and manner as a new residential lease under § 162.012, unless the lease:

(1) Provides for assignments without further consent of the Indian landowners or with consent in specified percentages and manner;

(2) Provides that individual Indian landowners are deemed to have consented where they do not object in writing to the assignment within a specified period of time following the landowners' receipt of the assignment and the lease meets the requirements of paragraph (c) of this section;

(3) Authorizes one or more of the Indian landowners to consent on behalf of all Indian landowners; or

(4) Designates us as the Indian landowners' representative for the purposes of consenting to an assignment.

(c) If the lease provides for deemed consent under paragraph (b)(2) of this section, it must require the parties to submit to us:

(1) A copy of the executed assignment or other documentation of any Indian landowners' actual consent;

(2) Proof of mailing of the assignment to any Indian landowners who are deemed to have consented; and

(3) Any other pertinent information for us to review.

(d) The lessee must obtain the consent of the holders of any mortgages.

§ 162.351 What is the approval process for an assignment of a residential lease?

(a) When we receive an assignment that meets the requirements of this subpart, we will notify the parties of the date we receive it. If our approval is required, we have 30 days from receipt of the executed assignment, proof of required consents, and required documentation to approve or disapprove the assignment. Our determination whether to approve the assignment will be in writing and will state the basis for our approval or disapproval.

(b) If we do not meet the deadline in this section, the lessee or Indian landowners may take appropriate action under § 162.363.

§ 162.352 How will BIA decide whether to approve an assignment of a residential lease?

(a) We may disapprove an assignment of a residential lease only if at least one of the following is true:

(1) The Indian landowners have not consented, and their consent is required;

(2) The lessee's mortgagees have not consented;

(3) The lessee is in violation of the lease;

(4) The assignee does not agree to be bound by the terms of the lease;

(5) The requirements of this subpart have not been met; or

(6) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) In making the finding required by paragraph (a)(6) of this section, we may consider whether the value of any part of the leased premises not covered by the assignment would be adversely affected.

(c) We will defer, to the maximum extent possible, to the Indian landowners' determination that the assignment is in their best interest.

(d) We may not unreasonably withhold approval of an assignment.

Subleases

§ 162.353 May a lessee sublease a residential lease?

(a) A lessee may sublease a residential lease by meeting the consent requirements in § 162.354 and obtaining our approval of the sublease under §§ 162.355 and 162.356, or by meeting the conditions in paragraph (b) of this section.

(b) The lessee may sublease without meeting consent requirements or obtaining BIA approval of the sublease, if:

(1) The lease provides for subleasing without meeting consent requirements or obtaining BIA approval; and

(2) The sublease does not relieve the lessee/sublessor of any liability.

§ 162.354 What are the consent requirements for a sublease of a residential lease?

(a) Unless the lease provides otherwise, the lessee must notify all Indian landowners of the proposed sublease.

(b) The Indian landowners must consent to a sublease of a residential lease in the same percentages and manner as a new residential lease under § 162.012, unless the lease:

(1) Provides that individual Indian landowners are deemed to have consented where they do not object in writing to the sublease within a specified period of time following the landowners' receipt of the sublease and the lease meets the requirements of paragraph (c) of this section;

(2) Authorizes one or more of the Indian landowners to consent on behalf of all Indian landowners; or

(3) Designates us as the Indian landowners' representative for the purposes of consenting to a sublease.

(c) If the lease provides for deemed consent under paragraph (b)(1) of this section, it must require the parties to submit to us:

(1) A copy of the executed sublease or other documentation of any landowner's actual consent;

(2) Proof of mailing of the sublease to any Indian landowners who are deemed to have consented; and

(3) Any other pertinent information for us to review.

(d) The lessee must obtain the consent of any mortgagees.

§ 162.355 What is the approval process for a sublease of a residential lease?

(a) When we receive a sublease that meets the requirements of this subpart, we will notify the parties of the date we receive it. If our approval is required, we have 30 days from receipt of the executed sublease, proof of required consents, and required documentation to approve or disapprove the sublease.

(b) If we do not send a determination within 30 days from receipt of required documents, the sublease is deemed approved to the extent consistent with Federal law. Unless the lease provides otherwise, provisions of the sublease that are inconsistent with Federal law will be severed and unenforceable; all other provisions of the sublease will remain in force.

§ 162.356 How will BIA decide whether to approve a sublease of a residential lease?

(a) We may disapprove a sublease of a residential lease only if at least one of the following is true:

(1) The Indian landowners have not consented, and their consent is required;

(2) The lessee's mortgagees have not consented;

(3) The lessee is in violation of the lease;

(4) The lessee will not remain liable under the lease;

(5) The requirements of this subpart have not been met; or

(6) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) In making the finding required by paragraph (a)(6) of this section, we may consider whether the value of any part of the leased premises not covered by the sublease would be adversely affected.

(c) We will defer, to the maximum extent possible, to the Indian landowners' determination that the sublease is in their best interest.

(d) We may not unreasonably withhold approval of a sublease.

Leasehold Mortgages

§ 162.357 May a lessee mortgage a residential lease?

(a) A lessee may mortgage a residential lease by meeting the consent requirements in § 162.358 and obtaining BIA approval of the leasehold mortgage under in §§ 162.359 and 162.360.

(b) Refer to § 162.349(b) for information on what happens if a sale or foreclosure under an approved mortgage of the leasehold interest occurs.

§ 162.358 What are the consent requirements for a leasehold mortgage of a residential lease?

(a) Unless the lease provides otherwise, the lessee must notify all Indian landowners of the proposed leasehold mortgage.

(b) The Indian landowners, or their representatives under § 162.013, must consent to a leasehold mortgage of a residential lease in the same percentages and manner as a new residential lease under § 162.012, unless the lease:

(1) States that landowner consent is not required for a leasehold mortgage and identifies what law would apply in case of foreclosure;

(2) Provides that individual Indian landowners are deemed to have consented where they do not object in writing to the leasehold mortgage within a specified period of time following the landowners' receipt of the leasehold mortgage and the lease meets the requirements of paragraph (c) of this section;

(3) Authorizes one or more representatives to consent to a leasehold mortgage on behalf of all Indian landowners; or

(4) Designates us as the Indian landowners' representative for the purposes of consenting to a leasehold mortgage.

(c) If the lease provides for deemed consent under paragraph (b)(2) of this section, it must require the parties to submit to us:

(1) A copy of the executed leasehold mortgage or other documentation of any Indian landowners' actual consent;

(2) Proof of mailing of the leasehold mortgage to any Indian landowners who are deemed to have consented; and

(3) Any other pertinent information for us to review.

§ 162.359 What is the approval process for a leasehold mortgage of a residential lease?

(a) When we receive leasehold mortgage that meets the requirements of this subpart, we will notify the parties of the date we receive it. We have 20 days from receipt of the executed leasehold mortgage, proof of required consents, and required documentation to approve or disapprove the leasehold mortgage. Our determination whether to approve the leasehold mortgage will be in writing and will state the basis for our approval or disapproval.

(b) If we do not meet the deadline in this section, the lessee may take appropriate action under § 162.363.

§ 162.360 How will BIA decide whether to approve a leasehold mortgage of a residential lease?

(a) We may disapprove a leasehold mortgage of a residential lease only if at least one of the following is true:

(1) The Indian landowners have not consented, and their consent is required;

(2) The requirements of this subpart have not been met; or

(3) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) In making the finding required by paragraph (a)(3) of this section, we may consider whether:

(1) The leasehold mortgage proceeds would be used for purposes unrelated to the leased premises; and

(2) The leasehold mortgage is limited to the leasehold.

(c) We will defer, to the maximum extent possible, to the Indian landowners' determination that the leasehold mortgage is in their best interest.

(d) We may not unreasonably withhold approval of a leasehold mortgage.

Effectiveness, Compliance, and Enforcement

§ 162.361 When will an amendment, assignment, sublease, or leasehold mortgage of a residential lease be effective?

(a) An amendment, assignment, sublease, or leasehold mortgage of a residential lease will be effective when approved, even if an appeal is filed under part 2 of this chapter, except:

(1) If the amendment or sublease was deemed approved under § 162.347(b) or § 162.355(b), the amendment or sublease becomes effective 45 days from the date the parties mailed or delivered the document to us for our review; and

(2) An assignment that does not require our approval under § 162.349(b) or a sublease that does not require our approval under § 162.353(b) becomes effective on the effective date specified in the assignment or sublease. If the assignment or sublease does not specify the effective date, it becomes effective upon execution by the parties.

(b) We will provide copies of approved documents to the party requesting approval, to the tribe for tribal land, and upon request, to other parties to the lease document.

§ 162.362 What happens if BIA disapproves an amendment, assignment, sublease, or leasehold mortgage?

If we disapprove an amendment, assignment, sublease, or leasehold mortgage of a residential lease, we will notify the parties immediately and advise the landowners of their right to appeal the decision under part 2 of this chapter.

§ 162.363 What happens if BIA does not meet a deadline for issuing a decision on a lease document?

(a) If a Superintendent does not meet a deadline for issuing a decision on a lease, assignment, or leasehold mortgage, the parties may file a written notice to compel action with the appropriate Regional Director.

(b) The Regional Director has 15 days from receiving the notice to:

(1) Issue a decision; or

(2) Order the Superintendent to issue a decision within the time set out in the order.

(c) The parties may file a written notice to compel action with the BIA Director if:

(1) The Regional Director does not meet the deadline in paragraph (b) of this section;

(2) The Superintendent does not issue a decision within the time set by the Regional Director under paragraph (b)(2) of this section; or

(3) The initial decision on the lease, assignment, or leasehold mortgage is with the Regional Director, and he or she does not meet the deadline for such decision.

(d) The BIA Director has 15 days from receiving the notice to:

(1) Issue a decision; or

(2) Order the Regional Director or Superintendent to issue a decision within the time set out in the order.

(e) If the Regional Director or Superintendent does not issue a decision within the time set out in the order under paragraph (d)(2) of this section, then the BIA Director must issue a decision within 15 days from the expiration of the time set out in the order.

(f) The parties may file an appeal from our inaction to the Interior Board of Indian Appeals if the Director does not meet the deadline in paragraph (d) or (e) of this section.

(g) The provisions of 25 CFR 2.8 do not apply to the inaction of BIA officials with respect to a decision on a lease, amendment, assignment, sublease, or leasehold mortgage under this subpart.

§ 162.364 May BIA investigate compliance with a residential lease?

(a) We may enter the leased premises at any reasonable time, upon reasonable notice, and consistent with any notice requirements under applicable tribal law and applicable lease documents, to protect the interests of the Indian landowners and ensure that the lessee is in compliance with the requirements of the lease.

(b) If an Indian landowner notifies us that a specific lease violation has occurred, we will promptly initiate an appropriate investigation.

§ 162.365 May a residential lease provide for negotiated remedies if there is a violation?

(a) A residential lease of tribal land may provide either or both parties with negotiated remedies in the event of a lease violation, including, but not limited to, the power to terminate the lease. If the lease provides one or both parties with the power to terminate the lease:

(1) BIA approval of the termination is not required;

(2) The termination is effective without BIA cancellation; and

(3) The Indian landowners must notify us of the termination so that we may record it in the LTRO.

(b) A residential lease of individually owned Indian land may provide either or both parties with negotiated remedies, so long as the lease also specifies the manner in which those remedies may be exercised by or on behalf of the Indian landowners of the applicable percentage of interests under § 162.012 of this part. If the lease provides one or both parties with the power to terminate the lease:

(1) BIA concurrence with the termination is required to ensure that the Indian landowners of the applicable percentage of interests have consented; and

(2) BIA will record the termination in the LTRO.

(c) The parties must notify any mortgagee of any violation that may result in termination and the termination of a residential lease.

(d) Negotiated remedies may apply in addition to, or instead of, the cancellation remedy available to us, as specified in the lease. The landowners may request our assistance in enforcing negotiated remedies.

(e) A residential lease may provide that lease violations will be addressed by the tribe, and that lease disputes will be resolved by a tribal court, any other court of competent jurisdiction, or by a tribal governing body in the absence of a tribal court, or through an alternative dispute resolution method. We may not be bound by decisions made in such forums, but we will defer to ongoing actions or proceedings, as appropriate, in deciding whether to exercise any of the remedies available to us.

162.366 What will BIA do about a violation of a residential lease?

(a) In the absence of actions or proceedings described in § 162.365(e), or if it is not appropriate for us to defer to the actions or proceedings, we will follow the procedures in paragraphs (b), (c), and (d) of this section and, as applicable, ensure consistency with 25 U.S.C. 4137.

(b) If we determine there has been a violation of the conditions of a residential lease other than a violation of payment provisions covered by paragraph (c) of this section, we will promptly send the lessee and any mortgagee a notice of violation by certified mail, return receipt requested.

(1) We will send a copy of the notice of violation to the tribe for tribal land, or provide constructive notice to Indian landowners for individually owned Indian land.

(2) The notice of violation will advise the lessee that, within 10 business days of the receipt of a notice of violation, the lessee must:

(i) Cure the violation and notify us, and the tribe for tribal land, in writing that the violation has been cured;

(ii) Dispute our determination that a violation has occurred; or

(iii) Request additional time to cure the violation.

(3) The notice of violation may order the lessee to cease operations under the lease.

(c) A lessee's failure to pay rent in the time and manner required by a residential lease is a violation of the lease, and we will issue a notice of violation in accordance with this paragraph.

(1) We will send the lessee and any mortgagee a notice of violation by certified mail, return receipt requested:

(i) Promptly following the date on which the payment was due, if the lease requires that rental payments be made to us; or

(ii) Promptly following the date on which we receive actual notice of non-payment from the Indian landowners, if the lease provides for payment directly to the Indian landowners.

(2) We will send a copy of the notice of violation to the tribe for tribal land, or provide constructive notice to Indian landowners for individually owned Indian land.

(3) The notice of violation will require the lessee to provide adequate proof of payment.

(d) The lessee will continue to be responsible for the obligations in the lease until the lease expires or is terminated or cancelled.

§ 162.367 What will BIA do if the lessee does not cure a violation of a residential lease on time?

(a) If the lessee does not cure a violation of a residential lease within the required time period, or provide adequate proof of payment as required in the notice of violation, we will consult with the tribe for tribal land or, where feasible, with Indian landowners for individually owned Indian land, and determine whether:

(1) We should cancel the lease;

(2) The Indian landowners wish to invoke any remedies available to them under the lease;

(3) We should invoke other remedies available under the lease or applicable law, including collection on any available performance bond or, for failure to pay rent, referral of the debt to the Department of the Treasury for collection; or

(4) The lessee should be granted additional time in which to cure the violation.

(b) Following consultation with the tribe for tribal land or, where feasible, with Indian landowners for individually owned Indian land, we may take action to recover unpaid rent and any associated late payment charges.

(1) We do not have to cancel the lease or give any further notice to the lessee before taking action to recover unpaid rent.

(2) We may still take action to recover any unpaid rent if we cancel the lease.

(c) If we decide to cancel the lease, we will send the lessee and any mortgagee a cancellation letter by certified mail, return receipt requested within 5 business days of our decision. We will send a copy of the cancellation letter to the tribe for tribal land, and will provide Indian landowners for individually owned Indian land with actual or constructive notice of the cancellation. The cancellation letter will:

(1) Explain the grounds for cancellation;

(2) If applicable, notify the lessee of the amount of any unpaid rent or late payment charges due under the lease;

(3) Notify the lessee of the lessee's right to appeal under part 2 of this chapter;

(4) Order the lessee to vacate the property within 31 days of the date of receipt of the cancellation letter, if an appeal is not filed by that time; and

(5) Order the lessee to take any other action BIA deems necessary to protect the Indian landowners.

(d) We may invoke any other remedies available to us under the lease, including collecting on any available performance bond, and the Indian landowners may pursue any available remedies under tribal law.

(e) We will ensure that any action we take is consistent with 25 U.S.C. 4137, as applicable.

§ 162.368 Will late payment charges or special fees apply to delinquent payments due under a residential lease?

(a) Late payment charges will apply as specified in the lease. The failure to pay these amounts will be treated as a lease violation.

(b) We may assess the following special fees to cover administrative costs incurred by the United States in the collection of the debt, if rent is not paid in the time and manner required, in addition to late payment charges that must be paid to the Indian landowners under the lease:

The lessee will pay . . .	For . . .
(1) $50.00	Any dishonored check.
(2) $15.00	Processing of each notice or demand letter.
(3) 18 percent of balance due	Treasury processing following referral for collection of delinquent debt.

§ 162.369 How will payment rights relating to a residential lease be allocated?

The residential lease may allocate rights to payment for insurance proceeds, trespass damages, condemnation awards, settlement funds, and other payments between the Indian landowners and the lessee. If not specified in the lease, insurance policy, order, award, judgment, or other document, the Indian landowners will be entitled to receive these payments.

§ 162.370 When will a cancellation of a residential lease be effective?

(a) A cancellation involving a residential lease will not be effective until 31 days after the lessee receives a cancellation letter from us, or 41 days from the date we mailed the letter, whichever is earlier.

(b) The cancellation decision will not be effective if an appeal is filed unless the cancellation is made immediately effective under part 2 of this chapter. While a cancellation decision is ineffective, the lessee must continue to pay rent and comply with the other terms of the lease.

§ 162.371 What will BIA do if a lessee remains in possession after a residential lease expires or is terminated or cancelled?

If a lessee remains in possession after the expiration, termination, or cancellation of a residential lease, we may treat the unauthorized possession as a trespass under applicable law in consultation with the Indian landowners. Unless the Indian landowners of the applicable percentage of interests under § 162.012 have notified us in writing that they are engaged in good faith negotiations with the holdover lessee to obtain a new lease, we may take action to recover possession on behalf of the Indian landowners, and pursue any additional remedies available under applicable law, such as a forcible entry and detainer action.

§ 162.372 Will BIA appeal bond regulations apply to cancellation decisions involving residential leases?

(a) Except as provided in paragraph (b) of this section, the appeal bond provisions in part 2 of this chapter will apply to appeals from lease cancellation decisions.

(b) The lessee may not appeal the appeal bond decision. The lessee may, however, request that the official to whom the appeal is made reconsider the appeal bond decision, based on extraordinary circumstances. Any reconsideration decision is final for the Department.

§ 162.373 When will BIA issue a decision on an appeal from a residential leasing decision?

BIA will issue a decision on an appeal from a leasing decision within 30 days of receipt of all pleadings.

§ 162.374 What happens if the lessee abandons the leased premises?

If a lessee abandons the leased premises, we will treat the abandonment as a violation of the lease. The lease may specify a period of non-use after which the lease premises will be considered abandoned.

Subpart D—Business Leases

Business Leasing General Provisions

§ 162.401 What types of leases does this subpart cover?

(a) This subpart covers both ground leases (undeveloped land) and leases of developed land (together with the permanent improvements thereon) on Indian land that are not covered in another subpart of this part, including:

(1) Leases for residential purposes that are not covered in subpart C;

(2) Leases for business purposes that are not covered in subpart E;

(3) Leases for religious, educational, recreational, cultural, or other public purposes; and

(4) Commercial or industrial leases for retail, office, manufacturing, storage, biomass, waste-to-energy, or other business purposes.

(b) Leases covered by this subpart may authorize the construction of single-purpose or mixed-use projects designed for use by any number of lessees or occupants.

§ 162.402 Is there a model business lease form?

There is no model business lease form because of the need for flexibility in negotiating and writing business leases; however, we may:

(a) Provide other guidance, such as checklists and sample lease provisions, to assist in the lease negotiation process; and

(b) Assist the Indian landowners, upon their request, in developing appropriate lease provisions or in using tribal lease forms that conform to the requirements of this part.

Lease Requirements

§ 162.411 How long may the term of a business lease run?

(a) A business lease must provide for a definite term, state if there is an option to renew, and if so, provide for a definite term for the renewal period. The maximum term of a lease approved under 25 U.S.C. 415(a) may not exceed 50 years (consisting of an initial term not to exceed 25 years and one renewal not to exceed 25 years), unless a Federal statute provides for a longer maximum term (e.g., 25 U.S.C. 415(a) allows for a maximum term of 99 years for certain tribes), a different initial term, renewal term, or number of renewals.

(b) For tribal land, we will defer to the tribe's determination that the lease term, including any renewal, is reasonable. For individually owned Indian land, we will review the lease term, including any renewal, to ensure it is reasonable, given the:

(1) Purpose of the lease;

(2) Type of financing; and

(3) Level of investment.

(c) The lease may not be extended by holdover.

§ 162.412 What must the lease include if it contains an option to renew?

(a) If the lease provides for an option to renew, the lease must specify:

(1) The time and manner in which the option must be exercised or is automatically effective;

(2) That confirmation of the renewal will be submitted to us, unless the lease provides for automatic renewal;

(3) Whether Indian landowner consent to the renewal is required;

(4) That the lessee must provide notice of the renewal to the Indian landowners and any sureties and mortgagees;

(5) The additional consideration, if any, that will be due upon the exercise of the option to renew or the start of the renewal term; and

(6) Any other conditions for renewal (e.g., that the lessee not be in violation of the lease at the time of renewal).

(b) We will record any renewal of a lease in the LTRO.

§ 162.413 Are there mandatory provisions that a business lease must contain?

(a) All business leases must identify:

(1) The tract or parcel of land being leased;
(2) The purpose of the lease and authorized uses of the leased premises;
(3) The parties to the lease;
(4) The term of the lease;
(5) The ownership of permanent improvements and the responsibility for constructing, operating, maintaining, and managing permanent improvements under § 162.415;
(6) Payment requirements and late payment charges, including interest;
(7) Due diligence requirements under § 162.417 (unless the lease is for religious, educational, recreational, cultural, or other public purposes);
(8) Insurance requirements under § 162.437; and
(9) Bonding requirements under § 162.434. If a performance bond is required, the lease must state that the lessee must obtain the consent of the surety for any legal instrument that directly affects their obligations and liabilities.
(b) Where a representative executes a lease on behalf of an Indian landowner or lessee, the lease must identify the landowner or lessee being represented and the authority under which the action is taken.
(c) All business leases must include the following provisions:
(1) The obligations of the lessee and its sureties to the Indian landowners are also enforceable by the United States, so long as the land remains in trust or restricted status;
(2) There must not be any unlawful conduct, creation of a nuisance, illegal activity, or negligent use or waste of the leased premises;
(3) The lessee must comply with all applicable laws, ordinances, rules, regulations, and other legal requirements under § 162.014;
(4) If historic properties, archeological resources, human remains, or other cultural items not previously reported are encountered during the course of any activity associated with this lease, all activity in the immediate vicinity of the properties, resources, remains, or items will cease and the lessee will contact BIA and the tribe with jurisdiction over the land to determine how to proceed and appropriate disposition;
(5) BIA has the right, at any reasonable time during the term of the lease and upon reasonable notice, in accordance with § 162.464, to enter the leased premises for inspection and to ensure compliance; and
(6) BIA may, at its discretion, treat as a lease violation any failure by the lessee to cooperate with a BIA request to make appropriate records, reports, or information available for BIA inspection and duplication.
(d) Unless the lessee would be prohibited by law from doing so, the lease must also contain the following provisions:
(1) The lessee holds the United States and the Indian landowners harmless from any loss, liability, or damages resulting from the lessee's use or occupation of the leased premises; and
(2) The lessee indemnifies the United States and the Indian landowners against all liabilities or costs relating to the use, handling, treatment, removal, storage, transportation, or disposal of hazardous materials, or the release or discharge of any hazardous material from the leased premises that occurs during the lease term, regardless of fault, with the exception that the lessee is not required to indemnify the Indian landowners for liability or cost arising from the Indian landowners' negligence or willful misconduct.
(e) We may treat any provision of a lease document that violates Federal law as a violation of the lease.

§ 162.414 May permanent improvements be made under a business lease?

The lessee may construct permanent improvements under a business lease if the business lease specifies, or provides for the development of:
(a) A plan that describes the type and location of any permanent improvements to be constructed by the lessee; and
(b) A general schedule for construction of the permanent improvements, including dates for commencement and completion of construction.

§ 162.415 How must a business lease address ownership of permanent improvements?

(a) A business lease must specify who will own any permanent improvements the lessee constructs during the lease term and may specify under what conditions, if any, permanent improvements the lessee constructs may be conveyed to the Indian landowners during the lease term. In addition, the lease must indicate whether each specific permanent improvement the lessee constructs will:
(1) Remain on the leased premises, upon the expiration, cancellation, or termination of the lease, in a condition satisfactory to the Indian landowners, and become the property of the Indian landowners;
(2) Be removed within a time period specified in the lease, at the lessee's expense, with the leased premises to be restored as closely as possible to their condition before construction of the permanent improvements; or
(3) Be disposed of by other specified means.
(b) A lease that requires the lessee to remove the permanent improvements must also provide the Indian landowners with an option to take possession of and title to the permanent improvements if the improvements are not removed within the specified time period.

§ 162.416 How will BIA enforce removal requirements in a business lease?

(a) We may take appropriate enforcement action to ensure removal of the permanent improvements and restoration of the premises at the lessee's expense:
(1) In consultation with the tribe, for tribal land or, where feasible, with Indian landowners for individually owned Indian land; and
(2) Before or after expiration, termination, or cancellation of the lease.
(b) We may collect and hold the performance bond or alternative form of security until removal and restoration are completed.

§ 162.417 What requirements for due diligence must a business lease include?

(a) If permanent improvements are to be constructed, the business lease must include due diligence requirements that require the lessee to complete construction of any permanent improvements within the schedule specified in the lease or general schedule of construction, and a process for changing the schedule by mutual consent of the parties. If construction does not occur, or is not expected to be completed, within the time period specified in the lease, the lessee must provide the Indian landowners and BIA with an explanation of good cause as to the nature of any delay, the anticipated date of construction of facilities, and evidence of progress toward commencement of construction.
(b) Failure of the lessee to comply with the due diligence requirements of the lease is a violation of the lease and may lead to cancellation of the lease under § 162.467.
(c) BIA may waive the requirements in this section if such waiver is in the best interest of the Indian landowners.
(d) The requirements of this section do not apply to leases for religious, educational, recreational, cultural, or other public purposes.

§ 162.418 How must a business lease describe the land?

(a) A business lease must describe the leased premises by reference to an official or certified survey, if possible. If

the land cannot be so described, the lease must include one or more of the following:

(1) A legal description;

(2) A survey-grade global positioning system description; or

(3) Another description prepared by a registered land surveyor that is sufficient to identify the leased premises.

(b) If the tract is fractionated we will identify the undivided trust or restricted interests in the leased premises.

§ 162.419 May a business lease allow compatible uses?

A business lease may provide for the Indian landowners to use, or authorize others to use, the leased premises for other uses compatible with the purpose of the business lease and consistent with the terms of the business lease. Any such use or authorization by the Indian landowners will not reduce or offset the monetary compensation for the business lease.

Monetary Compensation Requirements

§ 162.420 How much monetary compensation must be paid under a business lease of tribal land?

(a) A business lease of tribal land may allow for any payment amount negotiated by the tribe, and we will defer to the tribe and not require a valuation if the tribe submits a tribal authorization expressly stating that it:

(1) Has negotiated compensation satisfactory to the tribe;

(2) Waives valuation; and

(3) Has determined that accepting such negotiated compensation and waiving valuation is in its best interest.

(b) The tribe may request, in writing, that we determine fair market rental, in which case we will use a valuation in accordance with § 162.422. After providing the tribe with the fair market rental, we will defer to a tribe's decision to allow for any payment amount negotiated by the tribe.

(c) If the conditions in paragraph (a) or (b) of this section are not met, we will require that the lease provide for fair market rental based on a valuation in accordance with § 162.422.

§ 162.421 How much monetary compensation must be paid under a business lease of individually owned Indian land?

(a) A business lease of individually owned Indian land must require payment of not less than fair market rental before any adjustments, based on a fixed amount, a percentage of the projected income, or some other method, unless paragraphs (b) or (c) of this section permit a lesser amount. The lease must establish how the fixed amount, percentage, or combination will be calculated and the frequency at which the payments will be made.

(b) We may approve a lease of individually owned Indian land that provides for the payment of nominal compensation, or less than a fair market rental, if:

(1) The Indian landowners execute a written waiver of the right to receive fair market rental; and

(2) We determine it is in the Indian landowners' best interest, based on factors including, but not limited to:

(i) The lessee is a member of the immediate family, as defined in § 162.003, of an individual Indian landowner;

(ii) The lessee is a co-owner in the leased tract;

(iii) A special relationship or circumstances exist that we believe warrant approval of the lease;

(iv) The lease is for religious, educational, recreational, cultural, or other public purposes;

(v) We have waived the requirement for a valuation under paragraph (e) of this section.

(c) We may approve a lease that provides for payment of less than a fair market rental during the pre-development or construction periods, if we determine it is in the Indian landowners' best interest. The lease must specify the amount of the compensation and the applicable periods.

(d) We will require a valuation in accordance with § 162.422, unless:

(1) 100 percent of the Indian landowners submit to us a written request to waive the valuation requirement; or

(2) We waive the requirement under paragraph (e) of this section.

(e) If the owners of the applicable percentage of interests under § 162.012 of this part execute a business lease on behalf of all of the Indian landowners of a fractionated tract, the lease must provide that the non-consenting Indian landowners, and those on whose behalf we have consented, receive a fair market rental, as determined by a valuation, unless we waive the requirement because the tribe or lessee will construct infrastructure improvements on, or serving, the leased premises, and we determine it is in the best interest of all the landowners.

§ 162.422 How will BIA determine fair market rental for a business lease?

(a) We will use a market analysis, appraisal, or other appropriate valuation method to determine the fair market rental before we approve a business lease of individually owned Indian land or, at the request of the tribe, for tribal land.

(b) We will either:

(1) Prepare, or have prepared, a market analysis, appraisal, or other appropriate valuation method; or

(2) Use an approved market analysis, appraisal, or other appropriate valuation method from the Indian landowners or lessee.

(c) We will use or approve use of a market analysis, appraisal, or other appropriate valuation method only if it:

(1) Has been prepared in accordance with USPAP or a valuation method developed by the Secretary under 25 U.S.C. 2214; and

(2) Complies with Departmental policies regarding appraisals, including third-party appraisals.

(d) Indian landowners may use competitive bidding as a valuation method.

§ 162.423 When are monetary compensation payments due under a business lease?

(a) A business lease must specify the dates on which all payments are due.

(b) Unless the lease provides otherwise, payments may not be made or accepted more than one year in advance of the due date.

(c) Payments are due at the time specified in the lease, regardless of whether the lessee receives an advance billing or other notice that a payment is due.

§ 162.424 Must a business lease specify who receives monetary compensation payments?

(a) A business lease must specify whether the lessee will make payments directly to the Indian landowners (direct pay) or to us on their behalf.

(b) The lessee may make payments directly to the Indian landowners if:

(1) The Indian landowners' trust accounts are unencumbered;

(2) There are 10 or fewer beneficial owners; and

(3) One hundred percent of the beneficial owners (including those on whose behalf we have consented) agree to receive payment directly from the lessee at the start of the lease.

(c) If the lease provides that the lessee will directly pay the Indian landowners, then:

(1) The lease must include provisions for proof of payment upon our request.

(2) When we consent on behalf of an Indian landowner, the lessee must make payment to us on behalf of that landowner.

(3) The lessee must send direct payments to the parties and addresses

specified in the lease, unless the lessee receives notice of a change of ownership or address.

(4) Unless the lease provides otherwise, compensation payments may not be made payable directly to anyone other than the Indian landowners.

(5) Direct payments must continue through the duration of the lease, except that:

(i) The lessee must make all Indian landowners' payments to us if 100 percent of the Indian landowners agree to suspend direct pay and provide us with documentation of their agreement; and

(ii) The lessee must make that individual Indian landowner's payment to us if any individual Indian landowner who dies, is declared non compos mentis, owes a debt resulting in a trust account encumbrance, or his or her whereabouts become unknown.

§ 162.425 What form of monetary compensation payment is acceptable under a business lease?

(a) When payments are made directly to Indian landowners, the form of payment must be acceptable to the Indian landowners.

(b) When payments are made to us, our preferred method of payment is electronic funds transfer payments. We will also accept:

(1) Money orders;

(2) Personal checks;

(3) Certified checks; or

(4) Cashier's checks.

(c) We will not accept cash or foreign currency.

(d) We will accept third-party checks only from financial institutions or Federal agencies.

§ 162.426 May the business lease provide for non-monetary or varying types of compensation?

(a) A lease may provide for the following, subject to the conditions in paragraphs (b) and (c) of this section:

(1) Alternative forms of compensation, including but not limited to, in-kind consideration and payments based on percentage of income; or

(2) Varying types of compensation at specific stages during the life of the lease, including but not limited to fixed annual payments during construction, payments based on income during an operational period, and bonuses.

(b) For tribal land, we will defer to the tribe's determination that the compensation under paragraph (a) of this section is in its best interest, if the tribe submits a signed certification or tribal authorization stating that it has determined the compensation under paragraph (a) of this section to be in its best interest.

(c) For individually owned land, we may approve a lease that provides for compensation under paragraph (a) of this section if we determine that it is in the best interest of the Indian landowners.

§ 162.427 Will BIA notify a lessee when a payment is due under a business lease?

Upon request of the Indian landowners, we may issue invoices to a lessee in advance of the dates on which payments are due under a business lease. The lessee's obligation to make these payments in a timely manner will not be excused if invoices are not issued, delivered, or received.

§ 162.428 Must a business lease provide for compensation reviews or adjustments?

(a) For a business lease of tribal land, unless the lease provides otherwise, no periodic review of the adequacy of compensation or adjustment is required if the tribe states in its tribal certification or authorization that it has determined that not having compensation reviews and/or adjustments is in its best interest.

(b) For a business lease of individually owned Indian land, unless the lease provides otherwise, no periodic review of the adequacy of compensation or adjustment is required if:

(1) If the term of the lease is 5 years or less;

(2) The lease provides for automatic adjustments; or

(3) We determine it is in the best interest of the Indian landowners not to require a review or automatic adjustment based on circumstances including, but not limited to, the following:

(i) The lease provides for payment of less than fair market rental;

(ii) The lease is for religious, educational, recreational, cultural, or other public purposes;

(iii) The lease provides for most or all of the compensation to be paid during the first 5 years of the lease term or before the date the review would be conducted; or

(iv) The lease provides for graduated rent or non-monetary or various types of compensation.

(c) If the conditions in paragraph (a) or (b) of this section are not met, a review of the adequacy of compensation must occur at least every fifth year, in the manner specified in the lease. The lease must specify:

(1) When adjustments take effect;

(2) Who can make adjustments;

(3) What the adjustments are based on; and

(4) How to resolve disputes arising from the adjustments.

(d) When a review results in the need for adjustment of compensation, the Indian landowners must consent to the adjustment in accordance with § 162.012, unless the lease provides otherwise.

§ 162.429 What other types of payments are required under a business lease?

(a) The lessee may be required to pay additional fees, taxes, and assessments associated with the use of the land, as determined by entities having jurisdiction, except as provided in § 162.017. The lessee must pay these amounts to the appropriate office.

(b) If the leased premises are within an Indian irrigation project or drainage district, except as otherwise provided in part 171 of this chapter, the lessee must pay all operation and maintenance charges that accrue during the lease term. The lessee must pay these amounts to the appropriate office in charge of the irrigation project or drainage district. We will treat failure to make these payments as a violation of the lease.

(c) Where the property is subject to at least one other lease for another compatible use, the lessees may agree among themselves how to allocate payment of the Indian irrigation operation and maintenance charges.

Bonding and Insurance

§ 162.434 Must a lessee provide a performance bond for a business lease?

The lessee must provide a performance bond or alternative form of security, except as provided in paragraph (f) of this section.

(a) The performance bond or alternative form of security must be in an amount sufficient to secure the contractual obligations including:

(1) No less than:

(i) The highest annual rental specified in the lease, if compensation is paid annually; or

(ii) If the compensation is not paid annually, another amount established by BIA in consultation with the tribe for tribal land or, where feasible, with Indian landowners for individually owned Indian land;

(2) The construction of any required permanent improvements;

(3) The operation and maintenance charges for any land located within an irrigation project; and

(4) The restoration and reclamation of the leased premises, to their condition at the start of the lease term or some other specified condition.

(b) The performance bond or other security:

(1) Must be deposited with us and made payable only to us, and may not

be modified without our approval, except as provided in paragraph (b)(2) of this section; and

(2) For tribal land, if the lease so provides, may be deposited with the tribe and made payable to the tribe, and may not be modified without the approval of the tribe.

(c) The lease must specify the conditions under which we may adjust security or performance bond requirements to reflect changing conditions, including consultation with the tribal landowner for tribal land before the adjustment.

(d) We may require that the surety provide any supporting documents needed to show that the performance bond or alternative forms of security will be enforceable, and that the surety will be able to perform the guaranteed obligations.

(e) The performance bond or other security instrument must require the surety to provide notice to us at least 60 days before canceling a performance bond or other security. This will allow us to notify the lessee of its obligation to provide a substitute performance bond or other security and require collection of the bond or security before the cancellation date. Failure to provide a substitute performance bond or security is a violation of the lease.

(f) We may waive the requirement for a performance bond or alternative form of security if either:

(1) The lease is for religious, educational, recreational, cultural, or other public purposes; or

(2) The Indian landowners request it and we determine a waiver is in the Indian landowners' best interest.

(g) For tribal land, we will defer, to the maximum extent possible, to the tribe's determination that a waiver of a performance bond or alternative form of security is in its best interest.

§ 162.435 What forms of security are acceptable under a business lease?

(a) We will accept a performance bond only in one of the following forms:

(1) Certificates of deposit issued by a federally insured financial institution authorized to do business in the United States;

(2) Irrevocable letters of credit issued by a federally insured financial institution authorized to do business in the United States;

(3) Negotiable Treasury securities; or

(4) Surety bonds issued by a company approved by the U.S. Department of the Treasury.

(b) We may accept an alternative form of security approved by us that provides adequate protection for the Indian landowners and us, including but not limited to an escrow agreement and assigned savings account.

(c) All forms of performance bonds or alternative security must, if applicable:

(1) Indicate on their face that BIA approval is required for redemption;

(2) Be accompanied by a statement granting full authority to BIA to make an immediate claim upon or sell them if the lessee violates the lease;

(3) Be irrevocable during the term of the performance bond or alternative security; and

(4) Be automatically renewable during the term of the lease.

(d) We will not accept cash bonds.

§ 162.436 What is the release process for a performance bond or alternative form of security under a business lease?

(a) Upon expiration, termination, or cancellation of the lease, the lessee may ask BIA in writing to release the performance bond or alternative form of security.

(b) Upon receiving a request under paragraph (a) of this section, BIA will:

(1) Confirm with the tribe, for tribal land or, where feasible, with the Indian landowners for individually owned Indian land, that the lessee has complied with all lease obligations; and

(2) Release the performance bond or alternative form of security to the lessee, unless we determine that the bond or security must be redeemed to fulfill the contractual obligations.

§ 162.437 Must a lessee provide insurance for a business lease?

Except as provided in paragraph (c) of this section, a lessee must provide insurance necessary to protect the interests of the Indian landowners and in the amount sufficient to protect all insurable permanent improvements on the premises.

(a) The insurance may include property, crop, liability, and casualty insurance, depending on the Indian landowners' interests to be protected.

(b) Both the Indian landowners and the United States must be identified as additional insured parties.

(c) We may waive the requirement for insurance upon the request of the Indian landowner, if a waiver is in the best interest of the Indian landowner, including if the lease is for less than fair market rental or nominal compensation. For tribal land, we will defer, to the maximum extent possible, to the tribe's determination that a waiver is in its best interest.

Approval

§ 162.438 What documents are required for BIA approval of a business lease?

A lessee or the Indian landowners must submit the following documents to us to obtain BIA approval of a business lease:

(a) A lease executed by the Indian landowners and the lessee that meets the requirements of this part;

(b) For tribal land, a tribal authorization for the lease and, if applicable, meeting the requirements of §§ 162.420(a), 162.426(b), and 162.428(a), or a separate signed certification meeting the requirements of §§ 162.426(b) and 162.428(a));

(c) A valuation, if required under § 162.420 or § 162.421;

(d) Proof of insurance, if required under § 162.437;

(e) A performance bond or other security, if required under § 162.434;

(f) Statement from the appropriate tribal authority that the proposed use is in conformance with applicable tribal law, if required by the tribe;

(g) Environmental and archeological reports, surveys, and site assessments as needed to facilitate compliance with applicable Federal and tribal environmental and land use requirements, including any documentation prepared under § 162.027(b);

(h) A restoration and reclamation plan (and any subsequent modifications to the plan), if appropriate;

(i) Where the lessee is not an entity owned and operated by the tribe, documents that demonstrate the technical capability of the lessee or lessee's agent to construct, operate, maintain, and terminate the proposed project and the lessee's ability to successfully design, construct, or obtain the funding for a project similar to the proposed project, if appropriate;

(j) A preliminary plan of development that describes the type and location of any permanent improvements the lessee plans to construct and a schedule showing the tentative commencement and completion dates for those improvements, if appropriate;

(k) A legal description of the land under § 162.418;

(l) If the lease is being approved under 25 U.S.C. 415, information to assist us in our evaluation of the factors in 25 U.S.C. 415(a); and

(m) If the lessee is a corporation, limited liability company, partnership, joint venture, or other legal entity, except a tribal entity, information such as organizational documents, certificates, filing records, and resolutions, that demonstrates that:

(1) The representative has authority to execute a lease;

(2) The lease will be enforceable against the lessee; and

(3) The legal entity is in good standing and authorized to conduct business in

the jurisdiction where the land is located.

§ 162.439 Will BIA review a proposed business lease before or during preparation of the NEPA review documentation?

Upon request of the Indian landowners, we will review the proposed business lease after negotiation by the parties, before or during preparation of the NEPA review documentation and any valuation. Within 60 days of receiving the proposed lease, we will provide an acknowledgement of the terms of the lease and identify any provisions that, based on this acknowledgment review, would justify disapproval of the lease, pending results of the NEPA review and any valuation.

§ 162.440 What is the approval process for a business lease?

(a) Before we approve a business lease, we must determine that the lease is in the best interest of the Indian landowners. In making that determination, we will:

(1) Review the lease and supporting documents;

(2) Identify potential environmental impacts and ensure compliance with all applicable environmental laws, land use laws, and ordinances;

(3) If the lease is being approved under 25 U.S.C. 415, assure ourselves that adequate consideration has been given to the factors in 25 U.S.C. 415(a); and

(4) Require any lease modifications or mitigation measures necessary to satisfy any requirements including any other Federal or tribal land use requirements.

(b) Upon receiving a business lease package, we will promptly notify the parties whether the package is or is not complete. A complete package includes all the information and supporting documents required under this subpart, including but not limited to, NEPA review documentation and valuation documentation, where applicable.

(1) If the business lease package is not complete, our letter will identify the missing information or documents required for a complete package. If we do not respond to the submission of a business lease package, the parties may take action under § 162.463.

(2) If the business lease package is complete, we will notify the parties of the date of our receipt. Within 60 days of the receipt date, we will approve or disapprove the lease, return the package for revision, or inform the parties in writing that we need additional review time. If we inform the parties in writing that we need additional time, then:

(i) Our letter informing the parties that we need additional review time must identify our initial concerns and invite the parties to respond within 15 days of the date of the letter; and

(ii) We have 30 days from sending the letter informing the parties that we need additional time to approve or disapprove the lease.

(c) If we do not meet the deadlines in this section, then the parties may take appropriate action under § 162.463.

(d) We will provide any lease approval or disapproval and the basis for the determination, along with notification of any appeal rights under part 2 of this chapter, in writing to the parties to the lease.

(e) We will provide approved business leases on tribal land to the lessee and provide a copy to the tribe. We will provide approved business leases on individually owned Indian land to the lessee, and make copies available to the Indian landowners upon written request.

§ 162.441 How will BIA decide whether to approve a business lease?

(a) We will approve a business lease unless:

(1) The required consents have not been obtained from the parties to the lease;

(2) The requirements of this subpart have not been met; or

(3) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) We will defer, to the maximum extent possible, to the Indian landowners' determination that the lease is in their best interest.

(c) We may not unreasonably withhold approval of a lease.

§ 162.442 When will a business lease be effective?

(a) A business lease will be effective on the date that we approve the lease, even if an appeal is filed under part 2 of this chapter.

(b) The lease may specify a date on which the obligations between the parties to the business lease are triggered. Such date may be before or after the approval date under paragraph (a) of this section.

§ 162.443 Must a business lease document be recorded?

(a) Any business lease document must be recorded in our LTRO with jurisdiction over the leased land.

(1) We will record the lease document immediately following our approval.

(2) If our approval of an assignment or sublease is not required, the parties must record the assignment or sublease in the LTRO with jurisdiction over the leased land.

(b) The tribe must record lease documents for the following types of leases in the LTRO with jurisdiction over the leased lands, even though BIA approval is not required:

(1) Leases of tribal land a corporate entity leases to a third party under 25 U.S.C. 477; and

(2) Leases of tribal land under a special act of Congress authorizing leases without our approval under certain conditions.

§ 162.444 Will BIA require an appeal bond for an appeal of a decision on a business lease document?

(a) If a party appeals our decision on a lease, assignment, amendment, or sublease, then the official to whom the appeal is made may require the appellant to post an appeal bond in accordance with part 2 of this chapter. We will not require an appeal bond:

(1) For an appeal of a decision on a leasehold mortgage; or

(2) If the tribe is a party to the appeal and requests a waiver of the appeal bond.

(b) The appellant may not appeal the appeal bond decision. The appellant may, however, request that the official to whom the appeal is made reconsider the bond decision, based on extraordinary circumstances. Any reconsideration decision is final for the Department.

Amendments

§ 162.445 May the parties amend a business lease?

The parties may amend a business lease by obtaining:

(a) The lessee's signature;

(b) The Indian landowners' consent under the requirements in § 162.446; and

(c) BIA approval of the amendment under §§ 162.447 and 162.448.

§ 162.446 What are the consent requirements for an amendment to a business lease?

(a) Unless the lease provides otherwise, the lessee must notify all Indian landowners of the proposed amendment.

(b) The Indian landowners, or their representatives under § 162.013, must consent to an amendment of a business lease in the same percentages and manner as a new business lease under § 162.012, unless the lease:

(1) Provides that individual Indian landowners are deemed to have consented where they do not object in writing to the amendment within a specified period of time following the landowners' receipt of the amendment and the lease meets the requirements of paragraph (c) of this section;

(2) Authorizes one or more representatives to consent to an amendment on behalf of all Indian landowners; or

(3) Designates us as the Indian landowners' representative for the purposes of consenting to an amendment.

(c) If the lease provides for deemed consent under paragraph (b)(1) of this section, it must require the parties to submit to us:

(1) A copy of the executed amendment or other documentation of any Indian landowners' actual consent;

(2) Proof of mailing of the amendment to any Indian landowners who are deemed to have consented; and

(3) Any other pertinent information for us to review.

(d) Unless specifically authorized in the lease, a written power of attorney, or a court document, Indian landowners may not be deemed to have consented to, and an Indian landowner's designated representative may not negotiate or consent to, an amendment that would:

(1) Reduce the payment obligations to the Indian landowners;

(2) Increase or decrease the lease area;

(3) Terminate or change the term of the lease; or

(4) Modify the dispute resolution procedures.

§ 162.447 What is the approval process for an amendment to a business lease?

(a) When we receive an amendment that meets the requirements of this subpart, we will notify the parties of the date we receive it. We have 30 days from receipt of the executed amendment, proof of required consents, and required documentation to approve or disapprove the amendment or inform the parties in writing that we need additional review time. Our determination whether to approve the amendment will be in writing and will state the basis for our approval or disapproval.

(b) Our letter informing the parties that we need additional review time must identify our initial concerns and invite the parties to respond within 15 days of the date of the letter. We have 30 days from sending the letter informing the parties that we need additional time to approve or disapprove the amendment.

(c) If we do not meet the deadline in paragraph (a) or this section, or paragraph (b) of this section if applicable, the amendment is deemed approved to the extent consistent with Federal law. Unless the lease provides otherwise, provisions of the amendment that are inconsistent with Federal law will be severed and unenforceable; all other provisions of the amendment will remain in force.

§ 162.448 How will BIA decide whether to approve an amendment to a business lease?

(a) We may disapprove a business lease amendment only if at least one of the following is true:

(1) The Indian landowners have not consented and their consent is required;

(2) The lessee's mortgagees or sureties have not consented;

(3) The lessee is in violation of the lease;

(4) The requirements of this subpart have not been met; or

(5) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) We will defer, to the maximum extent possible to the Indian landowners' determination that the amendment is in their best interest.

(c) We may not unreasonably withhold approval of an amendment.

Assignments

§ 162.449 May a lessee assign a business lease?

(a) A lessee may assign a business lease by meeting the consent requirements in § 162.450 and obtaining our approval of the assignment under §§ 162.451 and 162.452, or by meeting the conditions in paragraphs (b) or (c) of this section.

(b) Where provided in the lease, the lessee may assign the lease to the following without meeting consent requirements or obtaining BIA approval of the assignment, as long as the lessee notifies BIA of the assignment within 30 days after it is executed:

(1) Not more than three distinct legal entities specified in the lease; or

(2) The lessee's wholly owned subsidiaries.

(c) The lessee may assign the lease without our approval or meeting consent requirements if:

(1) The assignee is a leasehold mortgagee or its designee, acquiring the lease either through foreclosure or by conveyance;

(2) The assignee agrees in writing to assume all of the obligations and conditions of the lease; and

(3) The assignee agrees in writing that any transfer of the lease will be in accordance with applicable law under § 162.014.

§ 162.450 What are the consent requirements for an assignment of a business lease?

(a) Unless the lease provides otherwise, the lessee must notify all Indian landowners of the proposed assignment.

(b) The Indian landowners, or their representatives under § 162.013, must consent to an amendment of a business lease in the same percentages and manner as a new business lease under § 162.012, unless the lease:

(1) Provides that individual Indian landowners are deemed to have consented where they do not object in writing to the amendment within a specified period of time following the landowners' receipt of the amendment and the lease meets the requirements of paragraph (c) of this section;

(2) Authorizes one or more representatives to consent to an amendment on behalf of all Indian landowners; or

(3) Designates us as the Indian landowners' representative for the purposes of consenting to an amendment.

(c) If the lease provides for deemed consent under paragraph (b)(1) of this section, it must require the parties to submit to us:

(1) A copy of the executed amendment or other documentation of any Indian landowners' actual consent;

(2) Proof of mailing of the amendment to any Indian landowners who are deemed to have consented; and

(3) Any other pertinent information for us to review.

(d) The lessee must obtain the consent of the holders of any bonds or mortgages.

§ 162.451 What is the approval process for an assignment of a business lease?

(a) When we receive an assignment that meets the requirements of this subpart, we will notify the parties of the date we receive it. If our approval is required, we have 30 days from receipt of the executed assignment, proof of required consents, and required documentation to approve or disapprove the assignment. Our determination whether to approve the assignment will be in writing and will state the basis for our approval or disapproval.

(b) If we do not meet the deadline in this section, the lessee or Indian landowners may take appropriate action under § 162.463.

§ 162.452 How will BIA decide whether to approve an assignment of a business lease?

(a) We may disapprove an assignment of a business lease only if at least one of the following is true:

(1) The Indian landowners have not consented and their consent is required;

(2) The lessee's mortgagees or sureties have not consented;

(3) The lessee is in violation of the lease;

(4) The assignee does not agree to be bound by the terms of the lease;

(5) The requirements of this subpart have not been met; or

(6) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) In making the finding required by paragraph (a)(6) of this section, we may consider whether:

(1) The value of any part of the leased premises not covered by the assignment would be adversely affected; and

(2) If a performance bond is required, the assignee has posted the bond or security and provided supporting documents that demonstrate that:

(i) The lease will be enforceable against the assignee; and

(ii) The assignee will be able to perform its obligations under the lease or assignment.

(c) We will defer, to the maximum extent possible, to the Indian landowners' determination that the assignment is in their best interest.

(d) We may not unreasonably withhold approval of an assignment.

Subleases

§ 162.453 May a lessee sublease a business lease?

(a) A lessee may sublease a business lease by meeting the consent requirements in § 162.454 and obtaining our approval of the sublease under §§ 162.455 and 162.456, or by meeting the conditions in paragraph (b) of this section.

(b) Where the sublease is part of a commercial development or residential development, the lessee may sublease without meeting consent requirements or obtaining BIA approval of the sublease, if:

(1) The lease provides for subleasing without meeting consent requirements or obtaining BIA approval;

(2) The sublease does not relieve the lessee/sublessor of any liability; and

(3) The parties provide BIA with a copy of the sublease within 30 days after it is executed.

§ 162.454 What are the consent requirements for a sublease of a business lease?

(a) Unless the lease provides otherwise, the lessee must notify all Indian landowners of the proposed sublease.

(b) The Indian landowners must consent to a sublease of a business lease in the same percentages and manner as a new business lease under § 162.012, unless the lease:

(1) Provides that individual Indian landowners are deemed to have consented where they do not object in writing to the sublease within a specified period of time following the landowners' receipt of the sublease and the lease meets the requirements of paragraph (c) of this section;

(2) Authorizes one or more representatives to consent to a sublease on behalf of all Indian landowners; or

(3) Designates us as the Indian landowners' representative for the purposes of consenting to a sublease.

(c) If the lease provides for deemed consent under paragraph (b)(1) of this section, it must require the parties to submit to us:

(1) A copy of the executed sublease or other documentation of any Indian landowners' actual consent;

(2) Proof of mailing of the sublease to any Indian landowners who are deemed to have consented; and

(3) Any other pertinent information for us to review.

§ 162.455 What is the approval process for a sublease of a business lease?

(a) When we receive a sublease that meets the requirements of this subpart, we will notify the parties of the date we receive it. If our approval is required, we have 30 days from receipt of the executed sublease, proof of required consents, and required documentation to approve or disapprove the sublease or inform the parties in writing that we need additional review time. Our determination whether to approve the sublease will be in writing and will state the basis for our approval or disapproval.

(b) Our letter informing the parties that we need additional review time must identify our initial concerns and invite the parties to respond within 15 days of the date of the letter. We have 30 days from sending the letter informing the parties that we need additional time to approve or disapprove the sublease.

(c) If we do not meet the deadline in paragraph (a) of this section, or paragraph (b) of this section if applicable, the sublease is deemed approved to the extent consistent with Federal law. Unless the lease provides otherwise, provisions of the sublease that are inconsistent with Federal law will be severed and unenforceable; all other provisions of the sublease will remain in force.

§ 162.456 How will BIA decide whether to approve a sublease of a business lease?

(a) We may disapprove a sublease of a business lease only if at least one of the following is true:

(1) The Indian landowners have not consented and their consent is required;

(2) The lessee's mortgagees or sureties have not consented;

(3) The lessee is in violation of the lease;

(4) The lessee will not remain liable under the lease;

(5) The requirements of this subpart have not been met; or

(6) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) In making the finding required by paragraph (a)(6) of this section, we may consider whether the value of any part of the leased premises not covered by the sublease would be adversely affected.

(c) We will defer, to the maximum extent possible, to the Indian landowners' determination that the sublease is in their best interest.

(d) We may not unreasonably withhold approval of a sublease.

Leasehold Mortgages

§ 162.457 May a lessee mortgage a business lease?

(a) A lessee may mortgage a business lease by meeting the consent requirements in § 162.458 and obtaining our approval of the leasehold mortgage under §§ 162.459 and 162.460.

(b) Refer to § 162.449(c) for information on what happens if a sale or foreclosure under an approved mortgage of the leasehold interest occurs.

§ 162.458 What are the consent requirements for a leasehold mortgage of a business lease?

(a) Unless the lease provides otherwise, the lessee must notify all Indian landowners of the proposed leasehold mortgage.

(b) The Indian landowners, or their representatives under § 162.013, must consent to a leasehold mortgage of a business lease in the same percentages and manner as a new business lease under § 162.012, unless the lease:

(1) States that landowner consent is not required for a leasehold mortgage and identifies what law would apply in case of foreclosure;

(2) Provides that individual Indian landowners are deemed to have consented where they do not object in writing to the leasehold mortgage within a specified period of time following the landowners' receipt of the leasehold mortgage and the lease meets the requirements of paragraph (c) of this section;

(3) Authorizes one or more representatives to consent to a leasehold

mortgage on behalf of all Indian landowners; or

(4) Designates us as the Indian landowners' representative for the purposes of consenting to a leasehold mortgage.

(c) If the lease provides for deemed consent under paragraph (b)(2) of this section, it must require the parties to submit to us:

(1) A copy of the executed leasehold mortgage or other documentation of any Indian landowners' actual consent;

(2) Proof of mailing of the leasehold mortgage to any Indian landowners who are deemed to have consented; and

(3) Any other pertinent information for us to review.

§ 162.459 What is the approval process for a leasehold mortgage of a business lease?

(a) When we receive a leasehold mortgage that meets the requirements of this subpart, we will notify the parties of the date we receive it. We have 20 days from receipt of the executed leasehold mortgage, proof of required consents, and required documentation to approve or disapprove the leasehold mortgage. Our determination whether to approve the leasehold mortgage will be in writing and will state the basis for our approval or disapproval.

(b) If we do not meet the deadline in this section, the lessee may take appropriate action under § 162.463.

§ 162.460 How will BIA decide whether to approve a leasehold mortgage of a business lease?

(a) We may disapprove a leasehold mortgage of a business lease only if at least one of the following is true:

(1) The Indian landowners have not consented and their consent is required;

(2) The lessee's mortgagees or sureties have not consented;

(3) The requirements of this subpart have not been met; or

(4) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) In making the finding required by paragraph (a)(4) of this section, we may consider whether:

(1) The leasehold mortgage proceeds would be used for purposes unrelated to the leased premises; and

(2) The leasehold mortgage is limited to the leasehold.

(c) We will defer, to the maximum extent possible, to the Indian landowners' determination that the leasehold mortgage is in their best interest.

(d) We may not unreasonably withhold approval of a leasehold mortgage.

Effectiveness, Compliance, and Enforcement

§ 162.461 When will an amendment, assignment, sublease, or leasehold mortgage of a business lease be effective?

(a) An amendment, assignment, sublease, or leasehold mortgage of a business lease will be effective when approved, even if an appeal is filed under part 2 of this chapter, except:

(1) If the amendment or sublease was deemed approved under § 162.447(c) or § 162.455(c), the amendment or sublease becomes effective 45 days from the date the parties mailed or delivered the document to us for our review or, if we sent a letter informing the parties that we need additional time to approve or disapprove the lease, the amendment or sublease becomes effective 45 days from the date of the letter informing the parties that we need additional time to approve or disapprove the lease; and

(2) An assignment that does not require our approval under § 162.449(b) or § 162.449(c) or a sublease that does not require our approval under § 152.453(b) becomes effective on the effective date specified in the assignment or sublease. If the assignment or sublease does not specify the effective date, it becomes effective upon execution by the parties.

(b) We will provide copies of approved documents to the party requesting approval, to the tribe for tribal land, and upon request, to other parties to the lease document.

§ 162.462 What happens if BIA disapproves an amendment, assignment, sublease, or leasehold mortgage of a business lease?

If we disapprove an amendment, assignment, sublease, or leasehold mortgage of a business lease, we will notify the parties immediately and advise the landowners of their right to appeal the decision under part 2 of this chapter.

§ 162.463 What happens if BIA does not meet a deadline for issuing a decision on a lease document?

(a) If a Superintendent does not meet a deadline for issuing a decision on a lease, assignment, or leasehold mortgage, the parties may file a written notice to compel action with the appropriate Regional Director.

(b) The Regional Director has 15 days from receiving the notice to:

(1) Issue a decision; or

(2) Order the Superintendent to issue a decision within the time set out in the order.

(c) The parties may file a written notice to compel action with the BIA Director if:

(1) The Regional Director does not meet the deadline in paragraph (b) of this section;

(2) The Superintendent does not issue a decision within the time set by the Regional Director under paragraph (b)(2) of this section; or

(3) The initial decision on the lease, assignment, or leasehold mortgage is with the Regional Director, and he or she does not meet the deadline for such decision.

(d) The BIA Director has 15 days from receiving the notice to:

(1) Issue a decision; or

(2) Order the Regional Director or Superintendent to issue a decision within the time set out in the order.

(e) If the Regional Director or Superintendent does not issue a decision within the time set out in the order under paragraph (d)(2), then the BIA Director must issue a decision within 15 days from the expiration of the time set out in the order.

(f) The parties may file an appeal from our inaction to the Interior Board of Indian Appeals if the Director does not meet the deadline in paragraph (d) or (e) of this section.

(g) The provisions of 25 CFR 2.8 do not apply to the inaction of BIA officials with respect to a decision on a lease, amendment, assignment, sublease, or leasehold mortgage under this subpart.

§ 162.464 May BIA investigate compliance with a business lease?

(a) We may enter the leased premises at any reasonable time, upon reasonable notice, and consistent with any notice requirements under applicable tribal law and applicable lease documents, to protect the interests of the Indian landowners and to determine if the lessee is in compliance with the requirements of the lease.

(b) If an Indian landowner notifies us that a specific lease violation has occurred, we will promptly initiate an appropriate investigation.

§ 162.465 May a business lease provide for negotiated remedies if there is a violation?

(a) A business lease of tribal land may provide either or both parties with negotiated remedies in the event of a lease violation, including, but not limited to, the power to terminate the lease. If the lease provides one or both parties with the power to terminate the lease:

(1) BIA approval of the termination is not required;

(2) The termination is effective without BIA cancellation; and

(3) The Indian landowners must notify us of the termination so that we may record it in the LTRO.

(b) A business lease of individually owned Indian land may provide either or both parties with negotiated remedies, so long as the lease also specifies the manner in which those remedies may be exercised by or on behalf of the Indian landowners of the applicable percentage of interests under § 162.012 of this part. If the lease provides one or both parties with the power to terminate the lease:

(1) BIA concurrence with the termination is required to ensure that the Indian landowners of the applicable percentage of interests have consented; and

(2) BIA will record the termination in the LTRO.

(c) The parties must notify any surety or mortgagee of any violation that may result in termination and the termination of a business lease.

(d) Negotiated remedies may apply in addition to, or instead of, the cancellation remedy available to us, as specified in the lease. The landowners may request our assistance in enforcing negotiated remedies.

(e) A business lease may provide that lease violations will be addressed by a tribe, and that lease disputes will be resolved by a tribal court, any other court of competent jurisdiction, or by a tribal governing body in the absence of a tribal court, or through an alternative dispute resolution method. We may not be bound by decisions made in such forums, but we will defer to ongoing actions or proceedings, as appropriate, in deciding whether to exercise any of the remedies available to us.

§ 162.466 What will BIA do about a violation of a business lease?

(a) In the absence of actions or proceedings described in § 162.465(e), or if it is not appropriate for us to defer to the actions or proceedings, we will follow the procedures in paragraphs (b) and (c) of this section.

(b) If we determine there has been a violation of the conditions of a business lease, other than a violation of payment provisions covered by paragraph (c) of this section, we will promptly send the lessee and any surety and mortgagee a notice of violation by certified mail, return receipt requested.

(1) We will send a copy of the notice of violation to the tribe for tribal land, or provide constructive notice to Indian landowners for individually owned Indian land.

(2) The notice of violation will advise the lessee that, within 10 business days of the receipt of a notice of violation, the lessee must:

(i) Cure the violation and notify us, and the tribe for tribal land, in writing that the violation has been cured;

(ii) Dispute our determination that a violation has occurred; or

(iii) Request additional time to cure the violation.

(3) The notice of violation may order the lessee to cease operations under the lease.

(c) A lessee's failure to pay compensation in the time and manner required by a business lease is a violation of the lease, and we will issue a notice of violation in accordance with this paragraph.

(1) We will send the lessees and any surety and mortgagee a notice of violation by certified mail, return receipt requested:

(i) Promptly following the date on which the payment was due, if the lease requires that payments be made to us; or

(ii) Promptly following the date on which we receive actual notice of non-payment from the Indian landowners, if the lease provides for payment directly to the Indian landowners.

(2) We will send a copy of the notice of violation to the tribe for tribal land, or provide constructive notice to the Indian landowners for individually owned Indian land.

(3) The notice of violation will require the lessee to provide adequate proof of payment.

(d) The lessee and its sureties will continue to be responsible for the obligations in the lease until the lease expires, or is terminated or cancelled.

§ 162.467 What will BIA do if the lessee does not cure a violation of a business lease on time?

(a) If the lessee does not cure a violation of a business lease within the required time period, or provide adequate proof of payment as required in the notice of violation, we will consult with the tribe for tribal land or, where feasible, with Indian landowners for individually owned Indian land, and determine whether:

(1) We should cancel the lease;

(2) The Indian landowners wish to invoke any remedies available to them under the lease;

(3) We should invoke other remedies available under the lease or applicable law, including collection on any available performance bond or, for failure to pay compensation, referral of the debt to the Department of the Treasury for collection; or

(4) The lessee should be granted additional time in which to cure the violation.

(b) Following consultation with the tribe for tribal land or, where feasible, with Indian landowners for individually owned Indian land, we may take action to recover unpaid compensation and any associated late payment charges.

(1) We do not have to cancel the lease or give any further notice to the lessee before taking action to recover unpaid compensation.

(2) We may still take action to recover any unpaid compensation if we cancel the lease.

(c) If we decide to cancel the lease, we will send the lessee and any surety and mortgagee a cancellation letter by certified mail, return receipt requested, within 5 business days of our decision. We will send a copy of the cancellation letter to the tribe for tribal land, and will provide Indian landowners for individually owned Indian land with actual or constructive notice of the cancellation. The cancellation letter will:

(1) Explain the grounds for cancellation;

(2) If applicable, notify the lessee of the amount of any unpaid compensation or late payment charges due under the lease;

(3) Notify the lessee of the lessee's right to appeal under part 2 of this chapter, including the possibility that the official to whom the appeal is made may require the lessee to post an appeal bond;

(4) Order the lessee to vacate the property within 31 days of the date of receipt of the cancellation letter, if an appeal is not filed by that time; and

(5) Order the lessee to take any other action BIA deems necessary to protect the Indian landowners.

(d) We may invoke any other remedies available to us under the lease, including collecting on any available performance bond, and the Indian landowners may pursue any available remedies under tribal law.

§ 162.468 Will late payment charges or special fees apply to delinquent payments due under a business lease?

(a) Late payment charges will apply as specified in the lease. The failure to pay these amounts will be treated as a lease violation.

(b) We may assess the following special fees to cover administrative costs incurred by the United States in the collection of the debt, if compensation is not paid in the time and manner required, in addition to the late payment charges that must be paid to the Indian landowners under the lease:

The lessee will pay . . .	For . . .
(1) $50.00	Any dishonored check.
(2) $15.00	Processing of each notice or demand letter.
(3) 18 percent of balance due	Treasury processing following referral for collection of delinquent debt.

§ 162.469 How will payment rights relating to a business lease be allocated?

The business lease may allocate rights to payment for insurance proceeds, trespass damages, condemnation awards, settlement funds, and other payments between the Indian landowners and the lessee. If not specified in the lease, insurance policy, order, award, judgment, or other document, the Indian landowners or lessees will be entitled to receive these payments.

§ 162.470 When will a cancellation of a business lease be effective?

(a) A cancellation involving a business lease will not be effective until 31 days after the lessee receives a cancellation letter from us, or 41 days from the date we mailed the letter, whichever is earlier.

(b) The cancellation decision will not be effective if an appeal is filed unless the cancellation is made immediately effective under part 2 of this chapter. While a cancellation decision is ineffective, the lessee must continue to pay compensation and comply with the other terms of the lease.

§ 162.471 What will BIA do if a lessee remains in possession after a business lease expires or is terminated or cancelled?

If a lessee remains in possession after the expiration, termination, or cancellation of a business lease, we may treat the unauthorized possession as a trespass under applicable law in consultation with the Indian landowners. Unless the Indian landowners of the applicable percentage of interests under § 162.012 have notified us in writing that they are engaged in good faith negotiations with the holdover lessee to obtain a new lease, we may take action to recover possession on behalf of the Indian landowners, and pursue any additional remedies available under applicable law, such as a forcible entry and detainer action.

§ 162.472 Will BIA appeal bond regulations apply to cancellation decisions involving business leases?

(a) Except as provided in paragraph (b) of this section, the appeal bond provisions in part 2 of this chapter will apply to appeals from lease cancellation decisions

(b) The lessee may not appeal the appeal bond decision. The lessee may, however, request that the official to whom the appeal is made reconsider the appeal bond decision, based on extraordinary circumstances. Any reconsideration decision is final for the Department.

§ 162.473 When will BIA issue a decision on an appeal from a business leasing decision?

BIA will issue a decision on an appeal from a business leasing decision within 60 days of receipt of all pleadings.

§ 162.474 What happens if the lessee abandons the leased premises?

If a lessee abandons the leased premises, we will treat the abandonment as a violation of the lease. The lease may specify a period of non-use after which the lease premises will be considered abandoned.

Subpart F—[Removed]

■ 14a. Remove subpart F, consisting of §§ 162.600 through 162.623.

Subpart E [Redesignated as Subpart F]

■ 14b. Redesignate subpart E, consisting of §§ 162.500 through 162.503, as new subpart F under the following heading:

Subpart F—Special Requirements for Certain Reservations

■ 15. Add a new subpart E to read as follows:

Subpart E—Wind and Solar Resource Leases

General Provisions Applicable to WEELs and WSR Leases

Sec.

WEELs

WEEL Monetary Compensation Requirements

WEEL Bonding and Insurance

WEEL Approval

WEEL Administration

WEEL Compliance and Enforcement

WSR Leases

Subpart E—Wind and Solar Resource Leases

General Provisions Applicable to WEELs and WSR Leases

§ 162.501 What types of leases does this subpart cover?

(a) This subpart covers:

(1) Wind energy evaluation leases (WEELs), which are short-term leases that authorize possession of Indian land for the purpose of installing, operating, and maintaining instrumentation, and associated infrastructure, such as meteorological towers, to evaluate wind resources for electricity generation; and

(2) Wind and solar resource (WSR) leases, which are leases that authorize possession of Indian land for the purpose of installing, operating, and maintaining instrumentation, facilities, and associated infrastructure, such as wind turbines and solar panels, to harness wind and/or solar energy to generate and supply electricity:

(i) For resale on a for-profit or non-profit basis;

(ii) To a utility grid serving the public generally; or

(iii) To users within the local community (e.g., on and adjacent to a reservation).

(b) If the generation of electricity is solely to support a use approved under subpart B, Agricultural Leases; subpart C, Residential Leases; or subpart D Business Leases (including religious, educational, recreational, cultural, or other public purposes), for the same parcel of land, then the installation, operation, and maintenance of instrumentation, facilities, and associated infrastructure are governed by subpart B, C, or D, as appropriate.

§ 162.502 Who must obtain a WEEL or WSR lease?

(a) Anyone seeking to possess Indian land to conduct activities associated with the evaluation of wind resources must obtain a WEEL, except that a WEEL is not required if use or possession of the Indian land to conduct wind energy evaluation activities is authorized:

(1) Under § 162.005(b);

(2) By a permit from the Indian landowners under § 162.007; or

(3) By a tribe on its land under 25 U.S.C. 81.

(b) Except as provided in §§ 162.005(b), 162.501, and paragraph (c) of this section, anyone seeking to possess Indian land to conduct activities associated with the development of wind and/or solar resources must obtain a WSR lease.

(c) A tribe that conducts wind and solar resource activities on its tribal land does not need a WEEL or WSR under this subpart.

§ 162.503 Is there a model WEEL or WSR lease?

There is no model WEEL or WSR lease because of the need for flexibility in negotiating and writing WEELs and WSR leases; however, we may:

(a) Provide other guidance, such as checklists and sample lease provisions,

to assist in the lease negotiation process; and

(b) Assist the Indian landowners, upon their request, in developing appropriate lease provisions or in using tribal lease forms that conform to the requirements of this part.

WEELs

§ 162.511 What is the purpose of a WEEL?

A WEEL is a short-term lease that allows the lessee to possess trust or restricted lands for the purpose of evaluating wind resources. The lessee may use information collected under the WEEL to assess the potential for wind energy development, and determine future placement and type of wind energy technology to use in developing the energy resource potential of the leased area.

§ 162.512 How long may the term of a WEEL run?

(a) A WEEL must provide for a definite term, state if there is an option to renew and if so, provide for a definite term for the renewal period. WEELs are for project evaluation purposes, and therefore may have:

(1) An initial term that is no longer than 3 years; and

(2) One renewal period not to exceed 3 years.

(b) The exercise of the option to renew must be in writing and the WEEL must specify:

(1) The time and manner in which the option must be exercised or is automatically effective;

(2) That confirmation of the renewal will be submitted to us, unless the WEEL provides for automatic renewal; and

(3) Additional consideration, if any, that will be due upon the exercise of the option to renew or the start of the renewal term.

§ 162.513 Are there mandatory provisions a WEEL must contain?

(a) All WEELs must identify:

(1) The tract or parcel of land being leased;

(2) The purpose of the WEEL and authorized uses of the leased premises;

(3) The parties to the WEEL;

(4) The term of the WEEL;

(5) The ownership of permanent improvements and the responsibility for constructing, operating, maintaining, and managing permanent improvements, under § 162.515;

(6) Payment requirements and late payment charges, including interest; and

(7) Due diligence requirements, under § 162.517.

(b) Where a representative executes a lease on behalf of an Indian landowner or lessee, the lease must identify the landowner or lessee being represented and the authority under which the action is taken.

(c) All WEELs must include the following provisions:

(1) The obligations of the lessee and its sureties to the Indian landowners are also enforceable by the United States, so long as the land remains in trust or restricted status;

(2) There must not be any unlawful conduct, creation of a nuisance, illegal activity, or negligent use or waste of leased premises;

(3) The lessee must comply with all applicable laws, ordinances, rules, regulations, and other legal requirements under § 162.014;

(4) If historic properties, archeological resources, human remains, or other cultural items, not previously reported are encountered during the course of any activity associated with this lease, all activity in the immediate vicinity of the properties, resources, remains, or items will cease, and the lessee will contact BIA and the tribe with jurisdiction to determine how to proceed and appropriate disposition;

(5) BIA has the right, at any reasonable time during the term of the lease, and upon reasonable notice, in accordance with § 162.589, to enter the leased premises for inspection; and

(6) BIA may, at its discretion. treat as a lease violation any failure by the lessee to cooperate with a BIA request to make appropriate records, reports, or information available for BIA inspection and duplication.

(d) Unless the lessee would be prohibited by law from doing so, the lease must also contain the following provisions:

(1) The lessee holds the United States and the Indian landowners harmless from any loss, liability, or damages resulting from the lessee's use or occupation of the leased premises;

(2) The lessee indemnifies the United States and the Indian landowners against all liabilities or costs relating to the use, handling, treatment, removal, storage, transportation, or disposal of hazardous materials, or the release or discharge of any hazardous material from the leased premises that occurs during the lease term, regardless of fault, with the exception that the lessee is not required to indemnify the Indian landowners for liability or cost arising from the Indian landowners' negligence or willful misconduct.

§ 162.514 May permanent improvements be made under a WEEL?

(a) A WEEL anticipates the installation of facilities and associated infrastructure of a size and magnitude necessary for evaluation of wind resource capacity and potential effects of development. These facilities and associated infrastructure are considered permanent improvements. An equipment installation plan must be submitted with the lease under § 162.528(g).

(b) If any of the following changes are made to the equipment installation plan, the Indian landowners must approve the revised plan and the lessee must provide a copy of the revised plan to BIA:

(1) Location of permanent improvements;

(2) Type of permanent improvements; or

(3) Delay of 90 days or more in any phase of development.

§ 162.515 How must a WEEL address ownership of permanent improvements?

(a) A WEEL must specify who will own any permanent improvements the lessee installs during the lease term. In addition, the WEEL must indicate whether any permanent improvements the lessee installs:

(1) Will remain on the premises upon expiration, termination, or cancellation of the lease whether or not the WEEL is followed by a WSR lease, in a condition satisfactory to the Indian landowners;

(2) May be conveyed to the Indian landowners during the WEEL term and under what conditions the permanent improvements may be conveyed;

(3) Will be removed within a time period specified in the WEEL, at the lessee's expense, with the leased premises to be restored as closely as possible to their condition before installation of the permanent improvements; or

(4) Will be disposed of by other specified means.

(b) A WEEL that requires the lessee to remove the permanent improvements must also provide the Indian landowners with an option to take possession and title to the permanent improvements if the improvements are not removed within the specified time period.

§ 162.516 How will BIA enforce removal requirements in a WEEL?

We may take appropriate enforcement action to ensure removal of the permanent improvements and restoration of the premises at the lessee's expense:

(a) In consultation with the tribe, for tribal land or, where feasible, with Indian landowners for individually owned Indian land; and

(b) After termination, cancellation, or expiration of the WEEL.

§ 162.517 What requirements for due diligence must a WEEL include?

(a) A WEEL must include due diligence requirements that require the lessee to:

(1) Install testing and monitoring facilities within 12 months after the effective date of the WEEL or other period designated in the WEEL and consistent with the plan of development; and

(2) If installation does not occur, or is not expected to be completed, within the time period specified in paragraph (a)(1) of this section, provide the Indian landowners and BIA with an explanation of good cause for any delay, the anticipated date of installation of facilities, and evidence of progress toward installing or completing testing and monitoring facilities.

(b) Failure of the lessee to comply with the due diligence requirements of the WEEL is a violation of the WEEL and may lead to:

(1) Cancellation of the WEEL under § 162.592; and

(2) Application of the requirement that the lessee transfer ownership of energy resource information collected under the WEEL to the Indian landowners under § 162.520.

§ 162.518 How must a WEEL describe the land?

(a) A WEEL must describe the leased premises by reference to a public or private survey, if possible. If the land cannot be so described, the lease must include one or more of the following:

(1) A legal description;

(2) A survey-grade global positioning system description; or

(3) Another description prepared by a registered land surveyor that is sufficient to identify the leased premises.

(b) If the tract is fractionated, we will identify the undivided trust or restricted interests in the leased premises.

§ 162.519 May a WEEL allow for compatible uses by the Indian landowner?

The WEEL may provide for the Indian landowners to use, or authorize others to use, the leased premises for other noncompeting uses compatible with the purpose of the WEEL. This may include the right to lease the premises for other compatible purposes. Any such use by the Indian landowners will not reduce or offset the monetary compensation for the WEEL.

§ 162.520 Who owns the energy resource information obtained under the WEEL?

(a) The WEEL must specify the ownership of any energy resource information the lessee obtains during the WEEL term.

(b) Unless otherwise specified in the WEEL, the energy resource information the lessee obtains through the leased activity becomes the property of Indian landowners at the expiration, termination, or cancellation of the WEEL or upon failure by the lessee to diligently install testing and monitoring facilities on the leased premises in accordance with § 162.517.

(c) BIA will keep confidential any information it is provided that is marked confidential or proprietary and that is exempt from public release, to the extent allowed by law.

§ 162.521 May a lessee incorporate its WEEL analyses into its WSR lease analyses?

Any analyses a lessee uses to bring a WEEL activity into compliance with applicable laws, ordinances, rules, regulations under § 162.014 and any other legal requirements may be incorporated by reference, as appropriate, into the analyses of a proposed WSR lease.

§ 162.522 May a WEEL contain an option for the lessee to enter into a WSR lease?

(a) A WEEL may provide for an option period following the expiration of the WEEL term during which the lessee and the Indian landowners may enter into a WSR lease.

(b) Our approval of a WEEL that contains an option to enter into a WSR lease does not guarantee or imply our approval of any WSR lease.

WEEL Monetary Compensation Requirements

§ 162.523 How much compensation must be paid under a WEEL?

(a) The WEEL must state how much compensation will be paid.

(b) A WEEL must specify the date on which compensation will be due.

(c) Failure to make timely payments is a violation of the WEEL and may lead to cancellation of the WEEL.

(d) The lease compensation requirements of §§ 162.552 through 162.558 also apply to WEELs.

§ 162.524 Will BIA require a valuation for a WEEL?

We will not require a valuation for a WEEL.

WEEL Bonding and Insurance

§ 162.525 Must a lessee provide a performance bond for a WEEL?

We will not require the lessee to provide a performance bond or alternative form of security for a WEEL.

§ 162.526 [Reserved]

§ 162.527 Must a lessee provide insurance for a WEEL?

Except as provided in paragraph (d) of this section, a lessee must provide insurance necessary to protect the interests of Indian landowners and in the amount sufficient to protect all insurable permanent improvements on the leased premises.

(a) The insurance may include property, crop, liability, and casualty insurance, depending on the Indian landowners' interests to be protected.

(b) Both the Indian landowners and the United States must be identified as additional insured parties.

(c) Lease insurance may be increased and extended for use as the required WSR lease insurance.

(d) We may waive the requirement for insurance upon the request of the Indian landowner, if a waiver is in the best interest of the Indian landowner, including if the lease is for less than fair market rental or nominal compensation. For tribal land, we will defer, to the maximum extent possible, to the tribe's determination that a waiver is in its best interest.

WEEL Approval

§ 162.528 What documents are required for BIA approval of a WEEL?

A lessee or the Indian landowners must submit the following documents to us to obtain BIA approval of a WEEL:

(a) A WEEL executed by the Indian landowners and the lessee that meets the requirements of this part;

(b) For tribal land, a tribal authorization for the WEEL;

(c) Proof of insurance, as required by § 162.527;

(d) Statement from the appropriate tribal authority that the proposed use is in conformance with applicable tribal law, if required by the tribe;

(e) Environmental and archeological reports, surveys, and site assessments as needed to facilitate compliance with applicable Federal and tribal environmental and land use requirements, including any documentation prepared under § 162.027(b);

(f) An equipment installation plan;

(g) A restoration and reclamation plan (and any subsequent modifications to the plan);

(h) Where the lessee is not an entity owned and operated by the tribe, documents that demonstrate the technical capability of the lessee or lessee's agent to construct, operate, maintain, and terminate the proposed project and the lessee's ability to successfully design, construct, or obtain

the funding for a project similar to the proposed project, if appropriate;

(i) A legal description of the land under § 162.518;

(j) If the lease is being approved under 25 U.S.C. 415, information to assist us in our evaluation of the factors in 25 U.S.C. 415(a); and

(k) If the lessee is a corporation, limited liability company, partnership, joint venture, or other legal entity, except a tribal entity, information such as organizational documents, certificates, filing records, and resolutions, that demonstrates that:

(1) The representative has authority to execute a lease;

(2) The lease will be enforceable against the lessee; and

(3) The legal entity is in good standing and authorized to conduct business in the jurisdiction where the land is located.

§ 162.529 Will BIA review a proposed WEEL before or during preparation of the NEPA review documentation?

Upon request of the Indian landowners, we will review the proposed WEEL after negotiation by the parties, before or during preparation of the NEPA review documentation. Within 10 days of receiving the proposed WEEL, we will provide an acknowledgement of the terms of the lease and identify any provisions that, based on this acknowledgment review, would justify disapproval of the lease, pending results of the NEPA review.

§ 162.530 What is the approval process for a WEEL?

(a) Before we approve a WEEL, we must determine that the WEEL is in the best interest of the Indian landowners. In making that determination, we will:

(1) Review the WEEL and supporting documents;

(2) Identify potential environmental impacts and ensure compliance with all applicable environmental laws, land use laws, and ordinances;

(3) If the lease is being approved under 25 U.S.C. 415, assure ourselves that adequate consideration has been given to the factors in 25 U.S.C. 415(a); and

(4) Require any lease modifications or mitigation measures necessary to satisfy any requirements including any other Federal or tribal land use requirements.

(b) Upon receiving the WEEL package, we will promptly notify the parties whether the package is or is not complete. A complete package includes all the information and supporting documents required for a WEEL, including but not limited to, NEPA review documentation, where applicable.

(1) If the WEEL package is not complete, our letter will identify the missing information or documents required for a complete package. If we do not respond to the submission of a WEEL package, the parties may take action under § 162.588.

(2) If the WEEL package is complete, we will notify the parties of the date we receive the complete package, and, within 20 days of the date of receipt of the package at the appropriate BIA office, approve or disapprove the WEEL or return the package for revision.

(c) If we do not meet the deadline in this section, then the parties may take appropriate action under § 162.588.

(d) We will provide any WEEL approval determination and the basis for the determination, along with notification of appeal rights under part 2 of this chapter, in writing to the parties to the WEEL.

(e) We will provide any WEEL disapproval determination and the basis for the determination, along with notification of rights to an informal conference, in writing to the parties. Within 30 days of receipt of the disapproval determination, the parties may request an informal conference with the official who issued the determination. Within 30 days of receiving this request, the official must hold the informal conference with the parties. Within 10 days of the informal conference, the official must issue a decision and the basis for the decision, along with a notification of appeal rights under part 2 of this chapter, in writing to the parties to the WEEL.

(f) We will provide the approved WEEL on tribal land to the lessee and provide a copy to the tribe. We will provide the approved WEEL on individually owned Indian land to the lessee, and make copies available to the Indian landowners upon written request.

§ 162.531 How will BIA decide whether to approve a WEEL?

(a) We will approve a WEEL unless:

(1) The required consents have not been obtained from the parties to the WEEL;

(2) The requirements applicable to WEELs have not been met; or

(3) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) We will defer, to the maximum extent possible, to the Indian landowners' determination that the WEEL is in their best interest.

(c) We may not unreasonably withhold approval of a WEEL.

§ 162.532 When will a WEEL be effective?

(a) A WEEL will be effective on the date on which we approve the WEEL, even if an appeal is filed under part 2 of this chapter.

(b) The WEEL may specify a date on which the obligations between the parties to a WEEL are triggered. Such date may be before or after the approval date under paragraph (a) of this section.

(c) WEEL lease documents not requiring our approval are effective upon execution by the parties, or on the effective date specified in the lease document. If the WEEL lease document does not specify an effective date, it becomes effective upon execution by the parties.

§ 162.533 Must a WEEL lease document be recorded?

(a) Any WEEL lease document must be recorded in our LTRO with jurisdiction over the leased land.

(1) We will record the lease document immediately following our approval.

(2) If our approval of an assignment or sublease is not required, the parties must record the assignment or sublease in the LTRO with jurisdiction over the leased land.

(b) The tribe must record lease documents for the following types of leases in the LTRO with jurisdiction over the tribal lands, even though BIA approval is not required:

(1) Leases of tribal land that a corporate entity leases to a third party under 25 U.S.C. 477; and

(2) Leases of tribal land under a special act of Congress authorizing leases without our approval.

WEEL Administration

§ 162.534 May the parties amend, assign, sublease, or mortgage a WEEL?

The parties may amend, assign, sublease, or mortgage a WEEL by following the procedures and requirements for amending, assigning, subleasing, or mortgaging a WSR lease.

WEEL Compliance and Enforcement

§ 162.535 What effectiveness, compliance, and enforcement provisions apply to WEELs?

(a) The provisions at § 162.586 apply to WEEL lease documents.

(b) The provisions at §§ 162.587 through 162.589 and 162.591 through 162.599 apply to WEELs, except that any references to § 162.590 will apply instead to § 162.536.

§ 162.536 Under what circumstances may a WEEL be terminated?

A WEEL must state whether, and under what conditions, the Indian landowners may terminate the WEEL.

§ 162.537 [Reserved]

WSR Leases

§ 162.538 What is the purpose of a WSR lease?

A WSR lease authorizes a lessee to possess Indian land to conduct activities related to the installation, operation, and maintenance of wind and/or solar energy resource development projects. Activities include installing instrumentation facilities and infrastructure associated with the generation, transmission, and storage of electricity and other related activities. Leases for biomass or waste-to-energy purposes are governed by subpart D of this part.

§ 162.539 Must I obtain a WEEL before obtaining a WSR lease?

You may enter into a WSR lease without a WEEL. While you may enter into a lease as a direct result of energy resource information gathered from a WEEL activity, obtaining a WEEL is not a precondition to entering into a WSR lease.

§ 162.540 How long may the term of a WSR lease run?

(a) A WSR lease must provide for a definite lease term, state if there is an option to renew, and if so, provide for a definite term for the renewal period. The maximum term of a lease approved under 25 U.S.C. 415(a) may not exceed 50 years (consisting of an initial term not to exceed 25 years and one renewal not to exceed 25 years), unless a Federal statute provides for a longer maximum term (e.g., 25 U.S.C. 415(a) allows for a maximum term of 99 years for certain tribes), a different initial term, renewal term, or number of renewals.

(b) For tribal land, we will defer to the tribe's determination that the lease term, including any renewal, is reasonable. For individually owned Indian land, we will review the lease term, including any renewal, to ensure it is reasonable, given the:

(1) Purpose of the lease;

(2) Type of financing; and

(3) Level of investment.

(c) The lease may not be extended by holdover.

§ 162.541 What must the lease include if it contains an option to renew?

(a) If the lease provides for an option to renew, the lease must specify:

(1) The time and manner in which the option must be exercised or is automatically effective;

(2) That confirmation of the renewal will be submitted to us, unless the lease provides for automatic renewal;

(3) Whether Indian landowner consent to the renewal is required;

(4) That the lessee must provide notice of the renewal to the Indian landowners and any sureties and mortgagees;

(5) The additional consideration, if any, that will be due upon the exercise of the option to renew or the start of the renewal term; and

(6) Any other conditions for renewal (e.g., that the lessee not be in violation of the lease at the time of renewal).

(b) We will record any renewal of a lease in the LTRO.

§ 162.542 Are there mandatory provisions a WSR lease must contain?

(a) All WSR leases must identify:

(1) The tract or parcel of land being leased;

(2) The purpose of the lease and authorized uses of the leased premises;

(3) The parties to the lease;

(4) The term of the lease;

(5) The ownership of permanent improvements and the responsibility for constructing, operating, maintaining, and managing, WSR equipment, roads, transmission lines and related facilities under § 162.543;

(6) Who is responsible for evaluating the leased premises for suitability; purchasing, installing, operating, and maintaining WSR equipment; negotiating power purchase agreements; and transmission;

(7) Payment requirements and late payment charges, including interest;

(8) Due diligence requirements, under § 162.546;

(9) Insurance requirements, under § 162.562; and

(10) Bonding requirements under § 162.559. If a performance bond is required, the lease must state that the lessee must obtain the consent of the surety for any legal instrument that directly affects their obligations and liabilities.

(b) Where a representative executes a lease on behalf of an Indian landowner or lessee, the lease must identify the landowner or lessee being represented and the authority under which such action is taken.

(c) All WSR leases must include the following provisions:

(1) The obligations of the lessee and its sureties to the Indian landowners are also enforceable by the United States, so long as the land remains in trust or restricted status;

(2) There must not be any unlawful conduct, creation of a nuisance, illegal activity, or negligent use or waste of the leased premises;

(3) The lessee must comply with all applicable laws, ordinances, rules, regulations, and other legal requirements under § 162.014;

(4) If historic properties, archeological resources, human remains, or other cultural items not previously reported are encountered during the course of any activity associated with the lease, all activity in the immediate vicinity of the properties, resources, remains, or items will cease and the lessee will contact BIA and the tribe with jurisdiction to determine how to proceed and appropriate disposition;

(5) BIA has the right, at any reasonable time during the term of the lease and upon reasonable notice, in accordance with § 162.589, to enter the leased premises for inspection and to ensure compliance; and

(6) BIA may, at its discretion, treat as a lease violation any failure by the lessee to cooperate with a BIA request to make appropriate records, reports, or information available for BIA inspection and duplication.

(d) Unless the lessee would be prohibited by law from doing so, the lease must also contain the following provisions:

(1) The lessee holds the United States and the Indian landowners harmless from any loss, liability, or damages resulting from the lessee's use or occupation of the leased premises; and

(2) The lessee indemnifies the United States and the Indian landowners against all liabilities or costs relating to the use, handling, treatment, removal, storage, transportation, or disposal of hazardous materials, or the release or discharge of any hazardous material from the leased premises that occurs during the lease term, regardless of fault, with the exception that the lessee is not required to indemnify the Indian landowners for liability or cost arising from the Indian landowners' negligence or willful misconduct.

(e) We may treat any provision of a lease document that violates Federal law as a violation of the lease.

§ 162.543 May permanent improvements be made under a WSR lease?

(a) A WSR lease must provide for the installation of a facility and associated infrastructure of a size and magnitude necessary for the generation and delivery of electricity, in accordance with § 162.019. These facilities and associated infrastructure are considered permanent improvements. A resource development plan must be submitted for approval with the lease under § 162.563(h).

(b) If the parties agree to any of the following changes to the resource development plan after lease approval, they must submit the revised plan to BIA for the file:

(1) Location of permanent improvements;

(2) Type of permanent improvements; or

(3) Delay of 90 days or more in any phase of development.

§ 162.544 How must a WSR lease address ownership of permanent improvements?

(a) A WSR lease must specify who will own any permanent improvements the lessee installs during the lease term and may specify under what conditions, if any, permanent improvements the lessee constructs may be conveyed to the Indian landowners during the lease term. In addition, the lease must indicate whether each specific permanent improvement the lessee installs will:

(1) Remain on the leased premises upon the expiration, termination, or cancellation of the lease, in a condition satisfactory to the Indian landowners and become the property of the Indian landowners;

(2) Be removed within a time period specified in the lease, at the lessee's expense, with the leased premises to be restored as closely as possible to their condition before installation of the permanent improvements; or

(3) Be disposed of by other specified means.

(b) A lease that requires the lessee to remove the permanent improvements must also provide the Indian landowners with an option to take possession of and title to the permanent improvements if the improvements are not removed within the specified time period.

§ 162.545 How will BIA enforce removal requirements in a WSR lease?

(a) We may take appropriate enforcement action to ensure removal of the permanent improvements and restoration of the premises at the lessee's expense:

(1) In consultation with the tribe, for tribal land or, where feasible, with Indian landowners for individually owned Indian land; and

(2) Before or after expiration, termination, or cancellation of the lease.

(b) We may collect and hold the performance bond until removal and restoration are completed.

§ 162.546 What requirements for due diligence must a WSR lease include?

(a) A WSR lease must include due diligence requirements that require the lessee to:

(1) Commence installation of energy facilities within 2 years after the effective date of the lease or consistent with a timeframe in the resource development plan;

(2) If installation does not occur, or is not expected to be completed, within the time period specified in paragraph (a)(1) of this section, provide the Indian landowners and BIA with an explanation of good cause as to the nature of any delay, the anticipated date of installation of facilities, and evidence of progress toward commencement of installation;

(3) Maintain all on-site electrical generation equipment and facilities and related infrastructure in accordance with the design standards in the resource development plan; and

(4) Repair, place into service, or remove from the site within a time period specified in the lease any idle, improperly functioning, or abandoned equipment or facilities that have been inoperative for a continuous period specified in the lease (unless the equipment or facilities were idle as a result of planned suspension of operations, for example, for grid operations or during bird migration season).

(b) Failure of the lessee to comply with the due diligence requirements of the lease is a violation of the lease and may lead to cancellation of the lease under § 162.592.

§ 162.547 How must a WSR lease describe the land?

(a) A WSR lease must describe the leased premises by reference to a private or public survey, if possible. If the land cannot be so described, the lease must include one or more of the following:

(1) A legal description;

(2) A survey-grade global positioning system description; or

(3) Another description prepared by a registered land surveyor that is sufficient to identify the leased premises.

(b) If the tract is fractionated, we will identify the undivided trust or restricted interests in the leased premises.

§ 162.548 May a WSR lease allow compatible uses?

The lease may provide for the Indian landowners to use, or authorize others to use, the leased premises for other uses compatible with the purpose of the WSR lease and consistent with the terms of the WSR lease. This may include the right to lease the premises for other compatible purposes. Any such use or authorization by the Indian landowners will not reduce or offset the monetary compensation for the WSR lease.

WSR Lease Monetary Compensation Requirements

§ 162.549 How much monetary compensation must be paid under a WSR lease of tribal land?

(a) A WSR lease of tribal land may allow for any payment negotiated by the tribe, and we will defer to the tribe and not require a valuation if the tribe submits a tribal authorization expressly stating that it:

(1) Has negotiated compensation satisfactory to the tribe;

(2) Waives valuation; and

(3) Has determined that accepting such negotiated compensation and waiving valuation is in its best interest.

(b) The tribe may request, in writing, that we determine fair market rental, in which case we will use a valuation in accordance with § 162.551. After providing the tribe with the fair market rental, we will defer to a tribe's decision to allow for any payment amount negotiated by the tribe.

(c) If the conditions in paragraph (a) or (b) of this section are not met, we will require that the lease provide for fair market rental based on a valuation in accordance with § 162.551.

§ 162.550 How much monetary compensation must be paid under a WSR lease of individually owned Indian land?

(a) A WSR lease of individually owned Indian land must require payment of not less than fair market rental before any adjustments, based on a fixed amount, a percentage of the projected gross income, megawatt capacity fee, or some other method, unless paragraphs (b) or (c) of this section permit a lesser amount. The lease must establish how the fixed amount, percentage or combination will be calculated and the frequency at which the payments will be made.

(b) We may approve a lease of individually owned Indian land that provides for the payment of nominal compensation, or less than a fair market rental, if:

(1) The Indian landowners execute a written waiver of the right to receive fair market rental; and

(2) We determine it is in the Indian landowners' best interest, based on factors including, but not limited to:

(i) The lessee is a member of the immediate family, as defined in § 162.003, of an Indian landowner;

(ii) The lessee is a co-owner of the leased tract;

(iii) A special relationship or circumstances exist that we believe warrant approval of the lease;

(iv) The lease is for public purposes; or

(v) We have waived the requirement for a valuation under paragraph (e) of this section.

(c) We may approve a lease that provides for the payment of less than a fair market rental during the periods before the generation and transmission of electricity begins, if we determine it is in the Indian landowners' best interest. The lease must specify the amount of the compensation and the applicable periods.

(d) We will require a valuation in accordance with § 162.422, unless:

(1) 100 percent of the landowners submit to us a written request to waive the valuation requirement; or

(2) We waive the requirement under paragraph (e) of this section; or

(3) We determine it is in the best interest of the Indian landowners to accept an economic analysis in lieu of an appraisal and:

(i) The Indian landowners submit an economic analysis that is approved by the Office of Indian Energy & Economic Development (IEED); or

(ii) IEED prepares an economic analysis at the request of the Indian landowners.

(e) If the owners of the applicable percentage of interests under § 162.011 of this part grant a WSR lease on behalf of all of the Indian landowners of a fractionated tract, the lease must provide that the non-consenting Indian landowners, and those on whose behalf we have consented, receive a fair market rental, as determined by a valuation, unless we waive the requirement because the tribe or lessee will construct infrastructure improvements on, or serving, the leased premises, and we determine it is in the best interest of all the landowners.

§ 162.551 How will BIA determine fair market rental for a WSR lease?

(a) We will use a market analysis, appraisal, or other appropriate valuation method to determine the fair market rental before we approve a WSR lease of individually owned Indian land or, at the request of the tribe, for tribal land.

(b) We will either:

(1) Prepare, or have prepared, a market analysis, appraisal, or other appropriate valuation method; or

(2) Use an approved market analysis, appraisal, or other appropriate valuation method from the Indian landowners or lessee.

(c) We will use or approve use of a market analysis, appraisal, or other appropriate valuation method only if it:

(1) Has been prepared in accordance with USPAP or a valuation method developed by the Secretary under 25 U.S.C. 2214; and

(2) Complies with Department policies regarding appraisals, including third-party appraisals.

(d) Indian landowners may use competitive bidding as a valuation method.

§ 162.552 When are monetary compensation payments due under a WSR lease?

(a) A WSR lease must specify the dates on which all payments are due.

(b) Unless the lease provides otherwise, payments may not be made or accepted more than one year in advance of the due date.

(c) Payments are due at the time specified in the lease, regardless of whether the lessee receives an advance billing or other notice that a payment is due.

§ 162.553 Must a WSR lease specify who receives monetary compensation payments?

(a) A WSR lease must specify whether the lessee will make payments directly to the Indian landowners (direct pay) or to us on their behalf.

(b) The lessee may make payments directly to the Indian landowners if:

(1) The Indian landowners' trust accounts are unencumbered;

(2) There are 10 or fewer beneficial owners; and

(3) One hundred percent of the beneficial owners (including those on whose behalf we have consented) agree to receive payment directly from the lessee at the start of the lease.

(c) If the lease provides that the lessee will directly pay the Indian landowners, then:

(1) The lease must include provisions for proof of payment upon our request.

(2) When we consent on behalf of an Indian landowner, the lessee must make payment to us on behalf of that landowner.

(3) The lessee must send direct payments to the parties and addresses specified in the lease, unless the lessee receives notice of a change of ownership or address.

(4) Unless the lease provides otherwise, payments may not be made payable directly to anyone other than the Indian landowners.

(5) Direct payments must continue through the duration of the lease, except that:

(i) The lessee must make all Indian landowners' payments to us if 100 percent of the Indian landowners agree to suspend direct pay and provide us with documentation of their agreement; and

(ii) The lessee must make that individual Indian landowner's payment to us if any individual Indian landowner who dies, is declared non compos mentis, owes a debt resulting in a trust account encumbrance, or his or her whereabouts become unknown.

§ 162.554 What form of monetary compensation payment is acceptable under a WSR lease?

(a) When payments are made directly to Indian landowners, the form of payment must be acceptable to the Indian landowners.

(b) When payments are made to us, our preferred method of payment is electronic funds transfer payments. We will also accept:

(1) Money orders;

(2) Personal checks;

(3) Certified checks; or

(4) Cashier's checks.

(c) We will not accept cash or foreign currency.

(d) We will accept third-party checks only from financial institutions or Federal agencies.

§ 162.555 May a WSR lease provide for non-monetary or varying types of compensation?

(a) A WSR lease may provide for the following, subject to the conditions in paragraphs (b) and (c) of this section:

(1) Alternative forms of compensation, including but not limited to, in-kind consideration and payments based on percentage of income; or

(2) Varying types of consideration at specific stages during the life of the lease, including but not limited to fixed annual payments during installation, payments based on income during an operational period, and bonuses.

(b) For tribal land, we will defer to the tribe's determination that the compensation in paragraph (a) of this section is in its best interest, if the tribe submits a signed certification or tribal authorization stating that it has determined the compensation in paragraph (a) of this section to be in its best interest.

(c) For individually owned land, we may approve a lease that provides for compensation under paragraph (a) of this section if we determine that it is in the best interest of the Indian landowners.

§ 162.556 Will BIA notify a lessee when a payment is due under a WSR lease?

Upon request of the Indian landowners, we may issue invoices to a lessee in advance of the dates on which payments are due under a WSR lease. The lessee's obligation to make these payments in a timely manner will not be excused if invoices are not delivered or received.

§ 162.557 Must a WSR lease provide for compensation reviews or adjustments?

(a) For a WSR lease of tribal land, unless the lease provides otherwise, no periodic review of the adequacy of compensation or adjustment is required if the tribe states in its tribal certification or authorization that it has determined that not having reviews and/or adjustments is in its best interest.

(b) For a WSR lease of individually owned Indian land, unless the lease provides otherwise, no periodic review of the adequacy of compensation or adjustment is required if:

(1) If the term of the lease is 5 years or less;

(2) The lease provides for automatic adjustments; or

(3) We determine it is in the best interest of the Indian landowners not to require a review or automatic adjustment based on circumstances including, but not limited to, the following:

(i) The lease provides for payment of less than fair market rental;

(ii) The lease is for public purposes;

(iii) The lease provides for most or all of the compensation to be paid during the first 5 years of the lease term or before the date the review would be conducted; or

(iv) The lease provides for graduated rent or non-monetary or various types of compensation.

(c) If the conditions in paragraph (a) or (b) of this section are not met, a review of the adequacy of compensation must occur at least every fifth year, in the manner specified in the lease. The lease must specify:

(1) When adjustments take effect;

(2) Who can make adjustments;

(3) What the adjustments are based on; and

(4) How to resolve disputes arising from the adjustments.

(d) When a review results in the need for adjustment of compensation, the Indian landowners must consent to the adjustment in accordance with § 162.012, unless the lease provides otherwise.

§ 162.558 What other types of payments are required under a WSR lease?

(a) The lessee may be required to pay additional fees, taxes, and assessments associated with the use of the land, as determined by entities having jurisdiction, except as provided in § 162.017. The lessee must pay these amounts to the appropriate office.

(b) If the leased premises are within an Indian irrigation project or drainage district, except as otherwise provided in part 171 of this chapter, the lessee must pay all operation and maintenance charges that accrue during the lease term. The lessee must pay these amounts to the appropriate office in charge of the irrigation project or drainage district. We will treat failure to make these payments as a violation of the lease.

(c) Where the property is subject to at least one other lease for another compatible use, such as grazing, the lessees may agree among themselves how to allocate payment of the operation and maintenance charges.

WSR Lease Bonding and Insurance

§ 162.559 Must a lessee provide a performance bond for a WSR lease?

The lessee must provide a performance bond or alternative form of security, except as provided in paragraph (f) of this section.

(a) The performance bond or alternative form of security must be in an amount sufficient to secure the contractual obligations including:

(1) No less than:

(i) The highest annual rental specified in the lease, if the compensation is paid annually; or

(ii) If the compensation is not paid annually, another amount established by BIA in consultation with the tribe for tribal land or, where feasible, with Indian landowners for individually owned Indian land;

(2) The installation of any required permanent improvements;

(3) The operation and maintenance charges for any land located within an irrigation project; and

(4) The restoration and reclamation of the leased premises, to their condition at the start of the lease term or some other specified condition.

(b) The performance bond or other security:

(1) Must be deposited with us and made payable only to us, and may not be modified without our approval, except as provided in paragraph (b)(2) of this section; and

(2) For tribal land, if the lease so provides, may be deposited with the tribe and made payable to the tribe, and may not be modified without the approval of the tribe.

(c) The lease must specify the conditions under which we may adjust security or performance bond requirements to reflect changing conditions, including consultation with the tribal landowner for tribal land before adjustment.

(d) We may require that the surety provide any supporting documents needed to show that the performance bond or alternative forms of security will be enforceable, and that the surety will be able to perform the guaranteed obligations.

(e) The performance bond or other security instrument must require the surety to provide notice to us at least 60 days before canceling a performance bond or other security. This will allow us to notify the lessee of its obligation to provide a substitute performance bond or other security and require collection of the bond or security before the cancellation date. Failure to provide a substitute performance bond or security is a violation of the lease.

(f) We may waive the requirement for a performance bond or alternative forms of security if:

(1) The lease is for public purposes; or

(2) The Indian landowners request it and we determine a waiver is in the Indian landowners' best interest.

(g) For tribal land, we will defer to the tribe's determination that a waiver of the performance bond or alternative form of security is in its best interest, to the maximum extent possible.

§ 162.560 What forms of security are acceptable under a WSR lease?

(a) We will accept a performance bond only in one of the following forms:

(1) Certificates of deposit issued by a federally insured financial institution authorized to do business in the United States;

(2) Irrevocable letters of credit issued by a federally insured financial institution authorized to do business in the United States;

(3) Negotiable Treasury securities; or

(4) Surety bonds issued by a company approved by the U.S. Department of the Treasury.

(b) We may accept an alternative form of security approved by us that provides adequate protection for the Indian landowners and us, including but not limited to an escrow agreement and assigned savings account.

(c) All forms of performance bonds or alternative security must, if applicable:

(1) Indicate on their face that BIA approval is required for redemption;

(2) Be accompanied by a statement granting full authority to BIA to make an immediate claim upon or sell them if the lessee violates the terms of the lease;

(3) Be irrevocable during the term of the performance bond or alternative security; and

(4) Be automatically renewable during the term of the lease.

(d) We will not accept cash bonds.

§ 162.561 What is the release process for a performance bond or alternative form of security under a WSR lease?

(a) Upon expiration, termination, or cancellation of the lease, the lessee must

ask BIA in writing to release the performance bond or alternative form of security.

(b) Upon receiving the request under paragraph (a) of this section, BIA will:

(1) Confirm with the tribe, for tribal land or, where feasible, with the Indian landowners for individually owned Indian land, that the lessee has complied with all lease obligations; and

(2) Release the performance bond or alternative form of security to the lessee unless we determine that the bond or security must be redeemed to fulfill the contractual obligations.

§ 162.562 Must a lessee provide insurance for a WSR lease?

Except as provided in paragraph (c) of this section, a lessee must provide insurance when necessary to protect the interests of Indian landowners and in the amount sufficient to protect all insurable permanent improvements on the leased premises.

(a) The insurance may include property, liability, and casualty insurance, depending on the Indian landowners' interests to be protected.

(b) Both the Indian landowners and the United States must be identified as additional insured parties.

(c) We may waive the requirement for insurance upon the request of the Indian landowner, if a waiver is in the best interest of the Indian landowner, including if the lease is for less than fair market rental or nominal compensation. For tribal land, we will defer, to the maximum extent possible, to the tribe's determination that a waiver is in its best interest.

WSR Lease Approval

§ 162.563 What documents are required for BIA approval of a WSR lease?

A lessee or the Indian landowners must submit the following documents to us to obtain BIA approval of a WSR lease:

(a) A lease executed by the Indian landowners and the lessee that meets the requirements of this part;

(b) For tribal land, a tribal authorization for the lease and, if applicable, meeting the requirements of §§ 162.549(a), 162.555(b), and 162.557(a), or a separate signed certification meeting the requirements of §§ 162.555(b) and 162.557(a));

(c) A valuation, if required under § 162.549 or § 162.550;

(d) Proof of insurance, if required under § 162.562;

(e) A performance bond or other security, if required under § 162.559;

(f) Statement from the appropriate tribal authority that the proposed use is in conformance with applicable tribal law, if required by the tribe;

(g) Environmental and archeological reports, surveys, and site assessments as needed to facilitate compliance with applicable Federal and tribal environmental and land use requirements, including any documentation prepared under § 162.027(b);

(h) A resource development plan that describes the type and location of any permanent improvements the lessee plans to install and a schedule showing the tentative commencement and completion dates for those improvements;

(i) A restoration and reclamation plan (and any subsequent modifications to the plan);

(j) Where the lessee is not an entity owned and operated by the tribe, documents that demonstrate the technical capability of the lessee or lessee's agent to construct, operate, maintain, and terminate the proposed project and the lessee's ability to successfully design, construct, or obtain the funding for a project similar to the proposed project, if appropriate;

(k) A legal description of the land under § 162.547;

(l) If the lease is being approved under 25 U.S.C. 415, information to assist us in our evaluation of the factors in 25 U.S.C. 415(a); and

(m) If the lessee is a corporation, limited liability company, partnership, joint venture, or other legal entity, except a tribal entity, information such as organizational documents, certificates, filing records, and resolutions, that demonstrates that:

(1) The representative has authority to execute a lease;

(2) The lease will be enforceable against the lessee; and

(3) The legal entity is in good standing and authorized to conduct business in the jurisdiction where the land is located.

§ 162.564 Will BIA review a proposed WSR lease before or during preparation of the NEPA review documentation?

Upon request of the Indian landowners, we will review the proposed WSR lease after negotiation by the parties, before or during preparation of the NEPA review documentation and any valuation. Within 60 days of receiving the proposed lease, we will provide an acknowledgement of the terms of the lease and identify any provisions that, based on this acknowledgment review, would justify disapproval of the lease, pending results of the NEPA review and any valuation.

§ 162.565 What is the approval process for a WSR lease?

(a) Before we approve a WSR lease, we must determine that the lease is in the best interest of the Indian landowners. In making that determination, we will:

(1) Review the lease and supporting documents;

(2) Identify potential environmental impacts and ensure compliance with all applicable environmental laws, land use laws, and ordinances;

(3) If the lease is being approved under 25 U.S.C. 415, assure ourselves that adequate consideration has been given to the factors in 25 U.S.C. 415(a); and

(4) Require any lease modifications or mitigation measures necessary to satisfy any requirements including any other Federal or tribal land use requirements.

(b) Upon receiving a WSR lease package, we will promptly notify the parties whether the package is or is not complete. A complete package includes all the information and supporting documents required under this subpart, including but not limited to, NEPA review documentation and valuation documentation, where applicable.

(1) If the WSR lease package is not complete, our letter will identify the missing information or documents required for a complete package. If we do not respond to the submission of a WSR lease package, the parties may take action under § 162.588.

(2) If the WSR lease package is complete, we will notify the parties of the date of receipt. Within 60 days of the receipt date, we will approve or disapprove the lease, return the package for revision, or inform the parties in writing that we need additional review time. If we inform the parties in writing that we need additional time, then:

(i) Our letter informing the parties that we need additional review time must identify our initial concerns and invite the parties to respond within 15 days of the date of the letter; and

(ii) We have 30 days from sending the letter informing the parties that we need additional time to approve or disapprove the lease.

(c) If we do not meet the deadlines in this section, then the parties may take appropriate action under § 162.588.

(d) We will provide any lease approval or disapproval and the basis for the determination, along with notification of any appeal rights under part 2 of this chapter, in writing to the parties to the lease.

(e) We will provide approved WSR leases on tribal land to the lessee and provide a copy to the tribe. We will provide approved WSR leases on

individually owned Indian land to the lessee, and make copies available to the Indian landowners upon written request.

§ 162.566 How will BIA decide whether to approve a WSR lease?

(a) We will approve a WSR lease unless:

(1) The required consents have not been obtained from the parties to the lease;

(2) The requirements of this subpart have not been met; or

(3) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) We will defer, to the maximum extent possible, to the Indian landowners' determination that the WSR lease is in their best interest.

(c) We may not unreasonably withhold approval of a WSR lease.

§ 162.567 When will a WSR lease be effective?

(a) A WSR lease will be effective on the date that we approve the lease, even if an appeal is filed under part 2 of this chapter.

(b) The lease may specify a date on which the obligations between the parties to the lease are triggered. Such date may be before or after the approval date under paragraph (a) of this section.

§ 162.568 Must a WSR lease document be recorded?

(a) Any WSR lease document must be recorded in the LTRO with jurisdiction over the leased land.

(1) We will record the lease document immediately following our approval.

(2) If our approval of an assignment or sublease is not required, the parties must record the assignment or sublease in the LTRO with jurisdiction over the leased land.

(b) The tribe must record lease documents for the following types of leases in the LTRO with jurisdiction over the tribal lands, even though BIA approval is not required:

(1) Leases of tribal land that a corporate entity leases to a third party under 25 U.S.C. 477; and

(2) Leases of tribal land under a special act of Congress authorizing leases without our approval.

§ 162.569 Will BIA require an appeal bond for an appeal of a decision on a WSR lease document?

(a) If a party appeals our decision on a WSR lease, assignment, amendment, or sublease, then the official to whom the appeal is made may require the appellant to post an appeal bond in accordance with part 2 of this chapter. We will not require an appeal bond:

(1) For an appeal of a decision on a leasehold mortgage; or

(2) If the tribe is a party to the appeal and requests a waiver of the appeal bond.

(b) The appellant may not appeal the appeal bond decision. The appellant may, however, request that the official to whom the appeal is made reconsider the bond decision, based on extraordinary circumstances. Any reconsideration decision is final for the Department.

WSR Lease Amendments

§ 162.570 May the parties amend a WSR lease?

The parties may amend a WSR lease by obtaining:

(a) The lessee's signature;

(b) The Indian landowners' consent under the requirements in § 162.571; and

(c) BIA approval of the amendment under §§ 162.572 and 162.573.

§ 162.571 What are the consent requirements for an amendment to a WSR lease?

(a) Unless the lease provides otherwise, the lessee must notify all Indian landowners of the proposed amendment.

(b) The Indian landowners, or their representatives under § 162.013, must consent to an amendment of a WSR lease in the same percentages and manner as a new WSR lease under § 162.012, unless the lease:

(1) Provides that individual Indian landowners are deemed to have consented if they do not object in writing to the amendment within a specified period of time following the landowners' receipt of the amendment and the lease meets the requirements of paragraph (c) of this section;

(2) Authorizes one or more representatives to consent to an amendment on behalf of all Indian landowners; or

(3) Designates us as the Indian landowners' representative for the purposes of consenting to an amendment.

(c) If the lease provides for deemed consent under paragraph (b)(1) of this section, it must require the parties to submit to us:

(1) A copy of the executed amendment or other documentation of any Indian landowners' actual consent;

(2) Proof of mailing of the amendment to any Indian landowners who are deemed to have consented; and

(3) Any other pertinent information for review.

(d) Unless specifically authorized in the lease, a written power of attorney, or a court document, Indian landowners may not be deemed to have consented to, and an Indian landowner's designated representative may not negotiate or consent to, an amendment that would:

(1) Reduce the payment obligations to the Indian landowners;

(2) Increase or decrease the lease area;

(3) Terminate or change the term of the lease; or

(4) Modify dispute resolution procedures.

§ 162.572 What is the approval process for an amendment to a WSR lease?

(a) When we receive an amendment that meets the requirements of this subpart, we will notify the parties of the date we receive it. We have 30 days from receipt of the executed amendment, proof of required consents, and required documentation to approve or disapprove the amendment or inform the parties in writing that we need additional review time. Our determination whether to approve the amendment will be in writing and will state the basis for our approval or disapproval.

(b) Our letter informing the parties that we need additional review time must identify our initial concerns and invite the parties to respond within 15 days of the date of the letter. We have 30 days from sending the letter informing the parties that we need additional time to approve or disapprove the amendment.

(c) If we do not meet the deadline in paragraph (a) of this section, or paragraph (b) of this section if applicable, the amendment is deemed approved to the extent consistent with Federal law. Unless the lease provides otherwise, provisions of the amendment that are inconsistent with Federal law will be severed and unenforceable; all other provisions of the amendment will remain in force.

§ 162.573 How will BIA decide whether to approve an amendment to a WSR lease?

(a) We may disapprove a WSR lease amendment only if at least one of the following is true:

(1) The Indian landowners have not consented and their consent is required;

(2) The lessee's mortgagees or sureties have not consented;

(3) The lessee is in violation of the lease;

(4) The requirements of this subpart have not been met; or

(5) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) We will defer, to the maximum extent possible, to the Indian

landowners' determination that the amendment is in their best interest.

(c) We may not unreasonably withhold approval of an amendment.

WSR Lease Assignments

§ 162.574 May a lessee assign a WSR lease?

(a) A lessee may assign a WSR lease by meeting the consent requirements in § 162.575 and obtaining our approval of the assignment under §§ 162.576 and 162.577 or by meeting the conditions in paragraphs (b) or (c) of this section.

(b) Where provided in the lease, the lessee may assign the lease to the following without meeting consent requirements or obtaining BIA approval of the assignment, as long as the lessee notifies BIA of the assignment within 30 days after it is executed:

(1) Not more than three distinct legal entities specified in the lease; or

(2) The lessee's wholly owned subsidiaries.

(c) The lessee may assign the lease without our approval or meeting consent requirements if:

(1) The assignee is a leasehold mortgagee or its designee, acquiring the lease either through foreclosure or by conveyance;

(2) The assignee agrees in writing to assume all of the obligations and conditions of the lease; and

(3) The assignee agrees in writing that any transfer of the lease will be in accordance with applicable law under § 162.014.

§ 162.575 What are the consent requirements for an assignment of a WSR lease?

(a) Unless the lease provides otherwise, the lessee must notify all Indian landowners of the proposed assignment.

(b) The Indian landowners, or their representatives under § 162.013, must consent to an assignment in the same percentages and manner as a new WSR lease under § 162.012, unless the lease:

(1) Provides that individual Indian landowners are deemed to have consented where they do not object in writing to the assignment within a specified period of time following the landowners' receipt of the assignment and the lease meets the requirements of paragraph (c) of this section;

(2) Authorizes one or more representatives to consent to an assignment on behalf of all Indian landowners; or

(3) Designates us as the Indian landowners' representative for the purposes of consenting to an assignment.

(c) If the lease provides for deemed consent under paragraph (b)(1) of this section, it must require the parties to submit to us:

(1) A copy of the executed assignment or other documentation of any Indian landowners' actual consent;

(2) Proof of mailing of the assignment to any Indian landowners who are deemed to have consented; and

(3) Any other pertinent information for us to review.

(d) The lessee must obtain the consent of the holders of any bonds or mortgages.

§ 162.576 What is the approval process for an assignment of a WSR lease?

(a) When we receive an assignment that meets the requirements of this subpart, we will notify the parties of the date we receive it. If our approval is required, we have 30 days from receipt of the executed assignment, proof of required consents, and required documentation to approve or disapprove the assignment. Our determination whether to approve the assignment will be in writing and will state the basis for our approval or disapproval.

(b) If we do not meet any of the deadlines in this section, the lessee or Indian landowners may take appropriate action under § 162.588.

§ 162.577 How will BIA decide whether to approve an assignment of a WSR lease?

(a) We may disapprove an assignment of a WSR lease only if at least one of the following is true:

(1) The Indian landowners have not consented and their consent is required;

(2) The lessee's mortgagees or sureties have not consented;

(3) The lessee is in violation of the lease;

(4) The assignee does not agree to be bound by the terms of the lease;

(5) The requirements of this subpart have not been met; or

(6) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) In making the finding required by paragraph (a)(6) of this section, we may consider whether:

(1) The value of any part of the leased premises not covered by the assignment would be adversely affected; and

(2) If a performance bond is required, the assignee has posted the bond or security and provided supporting documents that demonstrate that:

(i) The lease will be enforceable against the assignee; and

(ii) The assignee will be able to perform its obligations under the lease or assignment.

(c) We will defer, to the maximum extent possible, to the Indian landowners' determination that the assignment is in their best interest.

(d) We may not unreasonably withhold approval of an assignment.

WSR Lease Subleases

§ 162.578 May a lessee sublease a WSR lease?

(a) A lessee may sublease a WSR lease by meeting the consent requirements in § 162.579 and obtaining our approval of the sublease under §§ 162.580 and 162.581, or by meeting the conditions in paragraph (b) of this section.

(b) The lessee may sublease without meeting consent requirements or obtaining BIA approval of the sublease, if:

(1) The lease provides for subleasing without meeting consent requirements or obtaining BIA approval;

(2) The sublease does not relieve the lessee/sublessor of any liability; and

(3) The parties provide BIA with a copy of the sublease within 30 days after it is executed.

§ 162.579 What are the consent requirements for a sublease of a WSR lease?

(a) Unless the lease provides otherwise, the lessee must notify all Indian landowners of the proposed sublease.

(b) The Indian landowners, or their representatives under § 162.013, must consent to a sublease in the same percentages and manner as a new WSR lease under § 162.012, unless the lease:

(1) Provides that individual Indian landowners are deemed to have consented where they do not object in writing to the sublease within a specified period of time following the landowners' receipt of the sublease and the lease meets the requirements in paragraph (c) of this section;

(2) Authorizes one or more representatives to consent to a sublease on behalf of all Indian landowners; or

(3) Designates us as the Indian landowners' representative for the purposes of consenting to a sublease.

(c) If the lease provides for deemed consent under paragraph (b)(1) of this section, it must require the parties to submit to us:

(1) A copy of the executed sublease or other documentation of any Indian landowners' actual consent;

(2) Proof of mailing of the sublease to any Indian landowners who are deemed to have consented; and

(3) Any other pertinent information for us to review.

§ 162.580 What is the approval process for a sublease of a WSR lease?

(a) When we receive a sublease that meets the requirements of this subpart,

we will notify the parties of the date we receive it. If our approval is required, we have 30 days from receipt of the executed sublease, proof of required consents, and required documentation to approve or disapprove the sublease or inform the parties to the sublease and Indian landowners in writing that we need additional review time. Our determination whether to approve the sublease will be in writing and will state the basis for our approval or disapproval.

(b) Our letter informing parties that we need additional review time must identify our initial concerns and invite the parties to respond within 15 days of the date of the letter. We have 30 days from sending the letter informing the parties that we need additional time to approve or disapprove the sublease.

(c) If we do not meet the deadline in paragraph (a) of this section, or paragraph (b) of this section if applicable, the sublease is deemed approved to the extent consistent with Federal law. Unless the lease provides otherwise, provisions of the sublease that are inconsistent with Federal law will be severed and unenforceable; all other provisions of the sublease will remain in force.

§ 162.581 How will BIA decide whether to approve a sublease of a WSR lease?

(a) We may disapprove a sublease of a WSR lease only if at least one of the following is true:

(1) The Indian landowners have not consented and their consent is required;

(2) The lessee's mortgagees or sureties have not consented;

(3) The lessee is in violation of the lease;

(4) The lessee will not remain liable under the lease; and

(5) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) In making the finding required by paragraph (a)(5) of this section, we may consider whether the value of any part of the leased premises not covered by the sublease would be adversely affected.

(c) We will defer, to the maximum extent possible, to the Indian landowners' determination that the sublease is in their best interest.

(d) We may not unreasonably withhold approval of a sublease.

WSR Leasehold Mortgages

§ 162.582 May a lessee mortgage a WSR lease?

(a) A lessee may mortgage a WSR lease by meeting the consent requirements in § 162.583 and obtaining our approval of the leasehold mortgage under §§ 162.584 and 162.585.

(b) Refer to § 162.574(c) for information on what happens if a sale or foreclosure under an approved mortgage of the leasehold interest occurs.

§ 162.583 What are the consent requirements for a leasehold mortgage of a WSR lease?

(a) Unless the lease provides otherwise, the lessee must notify all Indian landowners of the proposed leasehold mortgage.

(b) The Indian landowners, or their representatives under § 162.013, must consent to a leasehold mortgage in the same percentages and manner as a new WSR lease under § 162.012, unless the lease:

(1) States that landowner consent is not required for a leasehold mortgage and identifies what law would apply in case of foreclosure;

(2) Provides that individual Indian landowners are deemed to have consented where they do not object in writing to the leasehold mortgage within a specified period of time following the landowners' receipt of the leasehold mortgage and the lease meets the requirements of paragraph (c) of this section;

(3) Authorizes one or more representatives to consent to a leasehold mortgage on behalf of all Indian landowners; or

(4) Designates us as the Indian landowners' representative for the purposes of consenting to a leasehold mortgage.

(c) If the lease provides for deemed consent under paragraph (b)(2) of this section, it must require the parties to submit to us:

(1) A copy of the executed leasehold mortgage or other documentation of any Indian landowners' actual consent;

(2) Proof of mailing of the leasehold mortgage to any Indian landowners who are deemed to have consented; and

(3) Any other pertinent information for us to review.

§ 162.584 What is the approval process for a leasehold mortgage of a WSR lease?

(a) When we receive a leasehold mortgage that meets the requirements of this subpart, we will notify the parties of the date we receive it. We have 20 days from receipt of the executed leasehold mortgage, proof of required consents, and required documentation to approve or disapprove the leasehold mortgage. Our determination whether to approve the leasehold mortgage will be in writing and will state the basis for our approval or disapproval.

(b) If we do not meet the deadline in this section, the lessee may take appropriate action under § 162.588.

§ 162.585 How will BIA decide whether to approve a leasehold mortgage of a WSR lease?

(a) We may disapprove a leasehold mortgage of a WSR lease only if at least one of the following is true:

(1) The Indian landowners have not consented and their consent is required;

(2) The lessee's mortgagees or sureties have not consented;

(3) The requirements of this subpart have not been met; or

(4) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.

(b) In making the finding required by paragraph (a)(4) of this section, we may consider whether:

(1) The leasehold mortgage proceeds would be used for purposes unrelated to the leased premises; and

(2) The leasehold mortgage is limited to the leasehold.

(c) We will defer, to the maximum extent possible, to the Indian landowners' determination that the leasehold mortgage is in their best interest.

(d) We may not unreasonably withhold approval of a leasehold mortgage.

WSR Lease Effectiveness, Compliance, and Enforcement

§ 162.586 When will an amendment, assignment, sublease, or leasehold mortgage of a WSR lease be effective?

(a) An amendment, assignment, sublease, or leasehold mortgage of a WSR lease will be effective when approved, even if an appeal is filed under part 2 of this chapter, except:

(1) If the amendment or sublease was deemed approved under § 162.572(b) or § 162.580(b), the amendment or sublease becomes effective 45 days from the date the parties mailed or delivered the document to us for our review or, if we sent a letter informing the parties that we need additional time to approve or disapprove the lease, the amendment or sublease becomes effective 45 days from the date of the letter informing the parties that we need additional time to approve or disapprove the lease; and

(2) An assignment that does not require our approval under § 162.574(b) or a sublease that does not require our approval under § 162.578(b) becomes effective on the effective date specified in the assignment or sublease. If the assignment or sublease does not specify the effective date, it becomes effective upon execution by the parties.

(b) We will provide copies of approved documents to the party requesting approval, to the tribe for tribal land, and upon request, to other parties to the lease document.

§ 162.587 What happens if BIA disapproves an amendment, assignment, sublease, or leasehold mortgage of a WSR lease?

If we disapprove an amendment, assignment, sublease, or leasehold mortgage of a WSR lease, we will notify the parties immediately and advise the landowners of their right to appeal the decision under part 2 of this chapter.

§ 162.588 What happens if BIA does not meet a deadline for issuing a decision on a lease document?

(a) If a Superintendent does not meet a deadline for issuing a decision on a lease, assignment, or leasehold mortgage, the parties may file a written notice to compel action with the appropriate Regional Director.

(b) The Regional Director has 15 days from receiving the notice to:

(1) Issue a decision; or

(2) Order the Superintendent to issue a decision within the time set out in the order.

(c) The parties may file a written notice to compel action with the BIA Director if:

(1) The Regional Director does not meet the deadline in paragraph (b) of this section;

(2) The Superintendent does not issue a decision within the time set by the Regional Director under paragraph (b)(2) of this section; or

(3) The initial decision on the lease, assignment, or leasehold mortgage is with the Regional Director, and he or she does not meet the deadline for such decision.

(d) The BIA Director has 15 days from receiving the notice to:

(1) Issue a decision; or

(2) Order the Regional Director or Superintendent to issue a decision within the time set out in the order.

(e) If the Regional Director or Superintendent does not issue a decision within the time set out in the order under paragraph (d)(2), then the BIA Director must issue a decision within 15 days from the expiration of the time set out in the order.

(f) The parties may file an appeal from our inaction to the Interior Board of Indian Appeals if the Director does not meet the deadline in paragraph (d) or (e) of this section.

(g) The provisions of 25 CFR 2.8 do not apply to the inaction of BIA officials with respect to a decision on a lease, amendment, assignment, sublease, or leasehold mortgage under this subpart.

§ 162.589 May BIA investigate compliance with a WSR lease?

(a) We may enter the leased premises at any reasonable time, upon reasonable notice, and consistent with any notice requirements under applicable tribal law and applicable lease documents, to protect the interests of the Indian landowners and to determine if the lessee is in compliance with the requirements of the lease.

(b) If an Indian landowner notifies us that a specific lease violation has occurred, we will promptly initiate an appropriate investigation.

§ 162.590 May a WSR lease provide for negotiated remedies if there is a violation?

(a) A WSR lease of tribal land may provide either or both parties with negotiated remedies in the event of a lease violation, including, but not limited to, the power to terminate the lease. If the lease provides one or both parties with the power to terminate the lease:

(1) BIA approval of the termination is not required;

(2) The termination is effective without BIA cancellation; and

(3) The Indian landowners must notify us of the termination so that we may record it in the LTRO.

(b) A WSR lease of individually owned Indian land may provide either or both parties with negotiated remedies, so long as the lease also specifies the manner in which those remedies may be exercised by or on behalf of the Indian landowners of the applicable percentage of interests under § 162.012 of this part. If the lease provides one or both parties with the power to terminate the lease:

(1) BIA concurrence with the termination is required to ensure that the Indian landowners of the applicable percentage of interests have consented; and

(2) BIA will record the termination in the LTRO.

(c) The parties must notify any surety or mortgagee of any violation that may result in termination and the termination of a WSR lease.

(d) Negotiated remedies may apply in addition to, or instead of, the cancellation remedy available to us, as specified in the lease. The landowners may request our assistance in enforcing negotiated remedies.

(e) A WSR lease may provide that lease violations will be addressed by the tribe, and that lease disputes will be resolved by a tribal court, any other court of competent jurisdiction, or by a tribal governing body in the absence of a tribal court, or through an alternative dispute resolution method. We may not be bound by decisions made in such forums, but we will defer to ongoing actions and proceedings, as appropriate, in deciding whether to exercise any of the remedies available to us.

§ 162.591 What will BIA do about a violation of a WSR lease?

(a) In the absence of actions or proceedings described in § 162.590(e), or if it is not appropriate for us to defer to the actions or proceedings, we will follow the procedures in paragraphs (b) and (c) of this section.

(b) If we determine there has been a violation of the conditions of a WSR lease, other than a violation of payment provisions covered by paragraph (c) of this section, we will promptly send the lessee and any surety and mortgagee a notice of violation by certified mail, return receipt requested.

(1) We will send a copy of the notice of violation to the tribe for tribal land, or provide constructive notice to Indian landowners for individually owned Indian land.

(2) The notice of violation will advise the lessee that, within 10 business days of the receipt of a notice of violation, the lessee must:

(i) Cure the violation and notify us, and the tribe for tribal land, in writing that the violation has been cured;

(ii) Dispute our determination that a violation has occurred; or

(iii) Request additional time to cure the violation.

(3) The notice of violation may order the lessee to cease operations under the lease.

(c) A lessee's failure to pay compensation in the time and manner required by a WSR lease is a violation of the lease, and we will issue a notice of violation in accordance with this paragraph.

(1) We will send the lessees and any surety and mortgagee a notice of violation by certified mail, return receipt requested:

(i) Promptly following the date on which payment was due, if the lease requires that payments be made to us; or

(ii) Promptly following the date on which we receive actual notice of non-payment from the Indian landowners, if the lease provides for payment directly to the Indian landowners.

(2) We will send a copy of the notice of violation to the tribe for tribal land, or provide constructive notice to the Indian landowners for individually owned Indian land.

(3) The notice of violation will require the lessee to provide adequate proof of payment.

(d) The lessee and its sureties will continue to be responsible for the

obligations in the lease until the lease expires or is terminated or cancelled.

§ 162.592 What will BIA do if a lessee does not cure a violation of a WSR lease on time?

(a) If the lessee does not cure a violation of a WSR lease within the required time period, or provide adequate proof of payment as required in the notice of violation, we will consult with the tribe for tribal land or, where feasible, with Indian landowners for individually owned Indian land, and determine whether:

(1) We should cancel the lease;

(2) The Indian landowners wish to invoke any remedies available to them under the lease;

(3) We should invoke other remedies available under the lease or applicable law, including collection on any available performance bond or, for failure to pay compensation, referral of the debt to the Department of the Treasury for collection; or

(4) The lessee should be granted additional time in which to cure the violation.

(b) Following consultation with the tribe for tribal land or, where feasible, with Indian landowners for individually owned Indian land, we may take action to recover unpaid compensation and any associated late payment charges.

(1) We do not have to cancel the lease or give any further notice to the lessee before taking action to recover unpaid compensation.

(2) We may still take action to recover any unpaid compensation if we cancel the lease.

(c) If we decide to cancel the lease, we will send the lessee and any surety and mortgagee a cancellation letter by certified mail, return receipt requested, within 5 business days of our decision. We will send a copy of the cancellation letter to the tribe for tribal land, and will provide Indian landowners for individually owned Indian land with actual or constructive notice of the cancellation. The cancellation letter will:

(1) Explain the grounds for cancellation;

(2) If applicable, notify the lessee of the amount of any unpaid compensation or late payment charges due under the lease;

(3) Notify the lessee of the lessee's right to appeal under part 2 of this chapter, including the possibility that the official to whom the appeal is made may require the lessee to post an appeal bond;

(4) Order the lessee to vacate the property within 31 days of the date of receipt of the cancellation letter, if an appeal is not filed by that time; and

(5) Order the lessee to take any other action BIA deems necessary to protect the Indian landowners.

(d) We may invoke any other remedies available to us under the lease, including collecting on any available performance bond, and the Indian landowners may pursue any available remedies under tribal law.

§ 162.593 Will late payment charges or special fees apply to delinquent payments due under a WSR lease?

(a) Late payment charges will apply as specified in the lease. The failure to pay these amounts will be treated as a lease violation.

(b) We may assess the following special fees to cover administrative costs incurred by the United States in the collection of the debt, if compensation is not paid in the time and manner required, in addition to late payment charges that must be paid to the Indian landowners under the lease:

The lessee will pay . . .	For . . .
(1) $50.00	Any dishonored check.
(2) $15.00	Processing of each notice or demand letter.
(3) 18 percent of balance due	Treasury processing following referral for collection of delinquent debt.

§ 162.594 How will payment rights relating to WSR leases be allocated?

The WSR lease may allocate rights to payment for insurance proceeds, trespass damages, compensation awards, settlement funds, and other payments between the Indian landowners and the lessee. If not specified in the lease, insurance policy, order, award, judgment, or other document, the Indian landowners will be entitled to receive these payments.

§ 162.595 When will a cancellation of a WSR lease be effective?

(a) A cancellation involving a WSR lease will not be effective until 31 days after the lessee receives a cancellation letter from us, or 41 days from the date we mailed the letter, whichever is earlier.

(b) The cancellation decision will not be effective if an appeal is filed unless the cancellation is made immediately effective under part 2 of this chapter. While a cancellation decision is ineffective, the lessee must continue to pay compensation and comply with the other terms of the lease.

§ 162.596 What will BIA do if a lessee remains in possession after a WSR lease expires or is terminated or cancelled?

If a lessee remains in possession after the expiration, termination, or cancellation of a WSR lease, we may treat the unauthorized possession as a trespass under applicable law in consultation with the Indian landowners. Unless the Indian landowners of the applicable percentage of interests under § 162.012 have notified us in writing that they are engaged in good faith negotiations with the holdover lessee to obtain a new lease, we may take action to recover possession on behalf of the Indian landowners, and pursue any additional remedies available under applicable law, such as a forcible entry and detainer action.

§ 162.597 Will BIA appeal bond regulations apply to cancellation decisions involving WSR leases?

(a) Except as provided in paragraph (b) of this section, the appeal bond provisions in part 2 of this chapter will apply to appeals from lease cancellation decisions.

(b) The lessee may not appeal the appeal bond decision. The lessee may, however, request that the official to whom the appeal is made reconsider the appeal bond decision, based on extraordinary circumstances. Any reconsideration decision is final for the Department.

§ 162.598 When will BIA issue a decision on an appeal from a WSR leasing decision?

BIA will issue a decision on an appeal from a WSR leasing decision within 60 days of receipt of all pleadings.

§ 162.599 What happens if the lessee abandons the leased premises?

If a lessee abandons the leased premises, we will treat the abandonment as a violation of the lease. The lease may specify a period of non-use after which the lease premises will be considered abandoned.

■ 16. Add subpart G to read as follows:

Subpart G—Records

Sec.

Subpart G—Records

§ 162.701 Who owns the records associated with this part?

(a) Records are the property of the United States if they:

(1) Are made or received by a tribe or tribal organization in the conduct of a Federal trust function under 25 U.S.C. 450f *et seq.*, including the operation of a trust program; and

(2) Evidence the organization, functions, policies, decisions, procedures, operations, or other activities undertaken in the performance of a Federal trust function under this part.

(b) Records not covered by paragraph (a) of this section that are made or received by a tribe or tribal organization in the conduct of business with the Department of the Interior under this part are the property of the tribe.

§ 162.702 How must records associated with this part be preserved?

(a) Any organization, including a tribe or tribal organization, that has records identified in § 162.701(a) of this part, must preserve the records in accordance with approved Departmental records retention procedures under the Federal Records Act, 44 U.S.C. chapters 29, 31 and 33. These records and related records management practices and safeguards required under the Federal Records Act are subject to inspection by the Secretary and the Archivist of the United States.

(b) A tribe or tribal organization should preserve the records identified in § 162.701(b) of this part, for the period of time authorized by the Archivist of the United States for similar Department of the Interior records under 44 U.S.C. chapter 33. If a tribe or tribal organization does not preserve records associated with its conduct of business with the Department of the Interior under this part, it may prevent the tribe or tribal organization from being able to adequately document essential transactions or furnish information necessary to protect its legal and financial rights or those of persons directly affected by its activities.

§ 162.703 How does the Paperwork Reduction Act affect this part?

The collections of information in this part have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned OMB Control Number 1076–0155. Response is required to obtain a benefit. A Federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB Control Number.

Dated: June 7, 2012.

Donald E. Laverdure,

Acting Assistant Secretary—Indian Affairs.

[FR Doc. 2012–28926 Filed 11–28–12; 4:15 pm]

BILLING CODE 4310–6W–P

FEDERAL REGISTER

Vol. 77 Wednesday,
No. 234 December 5, 2012

Part III

Environmental Protection Agency

40 CFR Part 52
Approval, Disapproval and Promulgation of Air Quality Implementation Plans; Arizona; Regional Haze State and Federal Implementation Plans; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2012–0021, FRL–9754–3]

Approval, Disapproval and Promulgation of Air Quality Implementation Plans; Arizona; Regional Haze State and Federal Implementation Plans

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is taking final action to approve in part and disapprove in part a portion of Arizona's State Implementation Plan (SIP) submittal for its regional haze program and to promulgate a Federal Implementation Plan (FIP) for the disapproved elements of the SIP. The State and Federal plans are to implement the regional haze program in Arizona for the first planning period through 2018. This final rule addresses only the portion of the SIP related to Arizona's determination of Best Available Retrofit Technology (BART) to control emissions from eight units at three electric generating stations: Apache Generating Station, Cholla Power Plant and Coronado Generating Station. Consistent with our proposal, EPA approves in this final rule the State's determination that the three sources are subject to BART, and approves the State's emissions limits for sulfur dioxide (SO_2) and particulate matter less than or equal to 10 micrometers (PM_{10}) at all the units, but disapproves Arizona's BART emissions limits for nitrogen oxides (NO_X) at the coal-fired units of the three power plants. We also are promulgating a FIP that contains new emissions limits for NO_X at these coal-fired units and compliance schedules for implementation of BART as well as requirements for equipment maintenance, monitoring, recordkeeping and reporting for all units and all pollutants at the three sources. In today's action, we are revising some elements of the proposed FIP in response to comments and additional information that we received.

DATES: *Effective date:* This rule is effective January 4, 2013.

Compliance dates: The owners/operators of each unit subject to this final rule shall comply by the dates specified in the regulatory text.

ADDRESSES: EPA has established docket number EPA–R09–OAR–2012–0021 for this action. Generally, documents in the docket are available electronically at *http://www.regulations.gov* or in hard copy at EPA Region 9, 75 Hawthorne Street, San Francisco, California. Please note that while many of the documents in the docket are listed at *http://www.regulations.gov,* some information may not be specifically listed in the index to the docket and may be publicly available only at the hard copy location (e.g., copyrighted material, large maps, multi-volume reports or otherwise voluminous materials), and some may not be available at either locations (e.g., confidential business information). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed directly below.

FOR FURTHER INFORMATION CONTACT: Thomas Webb, U.S. EPA, Region 9, Planning Office, Air Division, Air-2, 75 Hawthorne Street, San Francisco, CA 94105. Thomas Webb can be reached at telephone number (415) 947–4139 and via electronic mail at *webb.thomas@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, wherever "we," "us," or "our," is used, we mean the United States Environmental Protection Agency (EPA).

Definitions

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

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

(2) The initials *ACC* refer to the Arizona Corporation Commission.

(3) The initials *ACCCE* mean or refer to American Coalition for Clean Coal Electricity.

(4) The initials *ADEQ* mean or refer to the Arizona Department of Environmental Quality.

(5) The initials *AEPCO* mean or refer to Arizona Electric Power Cooperative.

(6) The initials *AFUDC* mean or refer to allowance for funds used during construction.

(7) The term *Apache* refers to Apache Generating Station.

(8) The initials *APS* mean or refer to Arizona Public Service Company.

(9) The words *Arizona* and *State* mean the State of Arizona.

(10) The initials *BART* mean or refer to Best Available Retrofit Technology.

(11) The term *BART units* refers to Apache Generating Station Units 1, 2 and 3; Cholla Power Plant Units 2, 3 and 4 and Coronado Generating Station Units 1 and 2.

(12) The initials *CBI* mean or refer to Confidential Business Information.

(13) The initials *CCM* mean or refer to EPA's Cost Control Manual.

(14) The initials *CEMS* mean or refer to continuous emission monitoring system.

(15) The term *Cholla* refers to Cholla Power Plant.

(16) The term *Class I area* refers to a mandatory Class I Federal area.[1]

(17) The term *coal-fired BART units* refers to Apache Generating Station Units 2 and 3; Cholla Power Plant Units 2, 3 and 4 and Coronado Generating Station Units 1 and 2.

(18) The initials *COFA* mean or refer to close-coupled overfire air.

(19) The term *Coronado* refers to Coronado Generating Station.

(20) The initials *CY* mean or refer to Calendar Year.

(21) The initials *EGU* mean or refer to Electric Generating Unit.

(22) The initials *ESPs* mean or refer to electrostatic precipitators.

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

(24) The initials *FGD* mean or refer to flue gas desulfurization.

(25) The initials *FGR* mean or refer to flue gas recirculation.

(26) The initials *FIP* mean or refer to Federal Implementation Plan.

(27) The initials *FLMs* mean or refer to Federal Land Managers.

(28) The initials *FR* mean or refer to the **Federal Register**.

(29) The initials *GEP* mean or refer to Good Engineering Practice.

(30) The initials *IMPROVE* mean or refer to Interagency Monitoring of Protected Visual Environments monitoring network.

(31) The initials *IWAQM* mean or refer to Interagency Workgroup on Air Quality Modeling.

(32) The initials *IPM* mean or refer to Integrated Planning Model.

(33) The initials *LNB* mean or refer to low-NO_X burners.

(34) The initials *LTS* mean or refer to Long-Term Strategy.

(35) The initials *MMBtu* mean or refer to Million British thermal units.

(36) The initials *MW* mean or refer to megawatts.

(37) The initials *MWh* mean or refer to megawatt hours.

(38) The initials *NEI* mean or refer to National Emission Inventory.

(39) The initials NH_3 mean or refer to ammonia.

(40) The initials NO_X mean or refer to nitrogen oxides.

(41) The initials *NP* mean or refer to National Park.

[1] Although states and tribes may designate as Class I additional areas which they consider to have visibility as an important value, the requirements of the visibility program set forth in section 169A of the CAA apply only to "mandatory Class I Federal areas."

(42) The initials *NPRM* mean or refer to Notice of Proposed Rulemaking.
(43) The initials *O&M* mean or refer to operation and maintenance.
(44) The initials *OC* mean or refer to organic carbon.
(45) The initials *OFA* mean or refer to over fire air.
(46) The initials *PM* mean or refer to particulate matter.
(47) The initials PM_{10} mean or refer to particulate matter with an aerodynamic diameter of less than 10 micrometers (coarse particulate matter).
(48) The initials $PM_{2.5}$ mean or refer to fine particulate matter with an aerodynamic diameter of less than 2.5 micrometers.
(49) The initials *PNG* mean or refer to pipeline natural gas.
(50) The initials *ppm* mean or refer to parts per million.
(51) The initials *PSD* mean or refer to Prevention of Significant Deterioration.
(52) The initials *RACT* mean or refer to Reasonably Available Control Technology.
(53) The initials *RAVI* mean or refer to Reasonably Attributable Visibility Impairment.
(54) The initials *RATA* mean or refer to relative accuracy test audit.
(55) The initials *RHR* mean or refer to the Regional Haze Rule, originally promulgated in 1999 and codified at 40 CFR 51.301–309.
(56) The initials *RMB* refer to RMB Consulting & Research, Inc.
(57) The initials *RMC* mean or refer to Regional Modeling Center.
(58) The initials *RP* mean or refer to Reasonable Progress.
(59) The initials *RPG* or *RPGs* mean or refer to Reasonable Progress Goal(s).
(60) The initials *RPOs* mean or refer to regional planning organizations.
(61) The initials *SCR* mean or refer to Selective Catalytic Reduction.
(62) The initials *SIP* mean or refer to State Implementation Plan.
(63) The initials *SNCR* mean or refer to Selective Non-catalytic Reduction.
(64) The initials SO_2 mean or refer to sulfur dioxide.
(65) The initials *SOFA* mean or refer to separated over fire air.
(66) The initials *SRP* mean or refer to Salt River Project Agricultural Improvement and Power District.
(67) The initials *TCI* mean or refer to total capital investment.
(68) The initials *tpy* mean tons per year.
(69) The initials *TSD* mean or refer to Technical Support Document.
(70) The initials *VOC* mean or refer to volatile organic compounds.
(71) The initials *WA* mean or refer to Wilderness Area.
(72) The initials *WEP* mean or refer to Weighted Emissions Potential.
(73) The initials *WFGD* mean or refer to wet flue gas desulfurization.
(74) The initials *WRAP* mean or refer to the Western Regional Air Partnership.

Table of Contents

I. Background

A. Summary of Our Proposed Action

Our notice of proposed rulemaking (NPRM) was signed on July 2, 2012, and was published in the **Federal Register** on July 20, 2012.[2] In that notice, we proposed to approve in part and disapprove in part a portion of Arizona's Regional Haze SIP (submitted on February 28, 2011) and proposed a FIP to address the deficiencies in the disapproved portions of the SIP. The proposed rule addressed the BART requirements for eight units at three electric generating stations: Arizona Electric Power Company's (AEPCO) Apache Generating Station (Apache) Units 1, 2 and 3; Arizona Public Service's (APS) Cholla Power Plant (Cholla) Units 2, 3 and 4; and Salt River Project's (SRP) Coronado Generating Station (Coronado) Units 1 and 2. We did not propose action on any other part of Arizona's SIP related to the remaining requirements of the Regional Haze Rule (RHR). In summary, we proposed the following:

Proposed Approval: We proposed to approve Arizona's determination that the following sources and units are subject to BART: Apache Units 1, 2 and 3; Cholla Units 2, 3 and 4; and Coronado Units 1 and 2 (collectively "BART units"). We proposed to approve Arizona's BART emissions limits for SO_2 and PM_{10} at all three sources and units and the emissions limit for NO_X at Apache Unit 1.

Proposed Disapproval: We proposed to disapprove Arizona's BART emissions limits for NO_X at all of the coal-fired BART units (i.e., all of the BART units except for Apache Unit 1). We also proposed to disapprove the compliance schedules and requirements for equipment maintenance and operation, including monitoring, recordkeeping and reporting requirements for BART at all of the BART units, since these were not included in the SIP submittal.

Proposed FIP: The proposed FIP contained BART emissions limits for NO_X at all of the coal-fired BART units, as well as compliance deadlines and requirements for equipment maintenance and operation, including monitoring, recordkeeping and reporting, to ensure the enforceability of the BART limits for all of the BART units. Because our proposed FIP emission limits would likely result in changes in stack conditions from those anticipated in the SIP, we invited comment on whether an alternative test method to the one required in the SIP is acceptable for PM_{10}. In addition, we specifically sought comment on whether we should require lower SO_2 emissions limits or removal efficiency requirements for any of the coal-fired BART units. Finally, in the regulatory text in our NPRM, we proposed to incorporate by reference into the FIP two provisions of the Arizona Administrative Code, R18–2–310 and R18–2–310.01, which we characterized as establishing an affirmative defense for excess emissions due to malfunctions.[3]

B. Legal Basis for Our Final Action

Our action is based on an evaluation of Arizona's Regional Haze SIP submitted on February 28, 2011, to meet the requirements of Section 308 of the RHR. We evaluated the SIP against the requirements of the RHR and Clean Air Act (CAA) sections 169A and 169B. We also applied the general SIP requirements in CAA section 110. Our authority for action on Arizona's Regional Haze SIP is based on CAA section 110(k). Our authority to promulgate a FIP is based on CAA section 110(c).

II. Overview of Final Action

EPA is taking final action to approve in part and disapprove in part a portion of Arizona's SIP for Regional Haze, and to promulgate a FIP for the disapproved elements of the SIP. This final rule only addresses the BART requirements for the eight BART units identified above.

[2] 77 FR 42834.

[3] Those provisions also include an affirmative defense for excess emissions due to startups and shutdowns, which we did not intend to incorporate.

Most notably, and with the exception of Apache Unit 1, the FIP includes NO_X emission limits for all the units that are achievable with SCR. At this time, EPA is not taking action on the State's other BART determinations or any other parts of the SIP regarding the remaining requirements of the RHR.

EPA takes very seriously a decision to disapprove any state plan. To approve a state plan, EPA must be able to find that the state plan is consistent with the requirements of the CAA and EPA's regulations. Further, EPA's oversight role requires us to ensure fair implementation of CAA requirements by states across the country, even while acknowledging that individual decisions from source to source or state to state may not have identical outcomes. In this instance, for the reasons described in our proposal and in this document, we find that the State's NO_X BART determinations for the coal-fired units are not consistent with the applicable statutory and regulatory requirements. Furthermore, the Arizona Regional Haze SIP does not include the necessary compliance schedules and requirements for equipment maintenance and operation, including monitoring, recordkeeping and reporting requirements for BART. As a result, EPA believes this final disapproval is the only path that is consistent with the Act at this time.

We encourage the State to submit a revised SIP to replace all portions of our FIP, and are ready to work with the State to develop a revised plan. The CAA requires states to prevent any future and remedy any existing man-made impairment of visibility in 156 national parks and wilderness areas designated as Class I areas. Arizona has a wealth of such areas. The three power plants affect visibility at 18 national parks and wilderness areas, including the Grand Canyon, Mesa Verde and the Petrified Forest. The State and EPA must work together to ensure that plans are in place to make progress toward natural visibility conditions at these national treasures.

III. Final BART Determinations

This section is a summary of EPA's final action on the BART determinations for the BART units at Apache, Cholla and Coronado electric generating stations. Please refer to Table 1 that compares this final rule to the proposal that was published on July 20, 2012. Where EPA has modified our proposal to respond to comments or additional information, we explain our analysis in the next section titled "EPA's Responses to Comments." We have fully considered all comments on our proposal, and have concluded that some changes are warranted based on public comments and additional information we received in response to questions raised in the proposal.

Final Approval: EPA is approving Arizona's determination that the following sources and units are subject to BART: Apache Units 1, 2 and 3; Cholla Units 2, 3 and 4; and Coronado Units 1 and 2 (collectively "BART units"). We are approving the emissions limits for NO_X, PM_{10} and SO_2 at Apache Unit 1 as proposed. We are approving the State's emissions limits for PM_{10} and SO_2 for all the units.

Final Disapproval: Based on our evaluation described in the proposal and in this document, we are disapproving the State's BART emissions limits for NO_X at all the BART units except for Apache Unit 1, for which the SIP's BART determination consists of fuel switching to pipeline natural gas (PNG). We also are disapproving the compliance schedules and requirements for equipment maintenance and operation, including monitoring, recordkeeping and reporting requirements for BART at all the BART units since these were not included in the Arizona Regional Haze SIP.[4]

Final Federal Implementation Plan: We are promulgating a FIP that includes emissions limitations representing BART for NO_X at all the coal-fired BART units. The FIP also includes compliance schedules and requirements for equipment maintenance, monitoring, testing, recordkeeping and reporting for all the BART units. For PM_{10} at all units, we allow the use of Method 5 as an alternative to Method 201A/202. In addition, the FIP includes a removal efficiency requirement for SO_2 on Cholla Units 2, 3 and 4, which will ensure that the scrubbers on these units are properly operated and maintained. Finally, we are incorporating into the FIP an affirmative defense provision for excess emissions due to malfunctions.[5]

We have revised certain elements of our proposed FIP based on public comments and additional information as follows:

- *Apache Units 2 and 3:* The final emissions limit for NO_X is 0.070 pounds per million British thermal units (lb/MMBtu) determined as an average of the two units, based on a rolling 30-boiler-operating-day average. Compared to the proposed emissions limit of 0.050 lb/MMBtu on each unit, this higher limit and the addition of a two-unit average provides an extra margin of compliance to account for periods of startup and shutdown as well as additional operational flexibility for Apache given AEPCO's status as a small entity. When either one of the two units is not operating, its emissions from its own preceding thirty boiler-operating-days will continue to be included in the two-unit average. The final compliance date for this NO_X limit remains five years from the date of publication of this final rule. For SO_2 and PM_{10} we are extending the compliance deadline to four years from publication of this final rule in order to provide AEPCO with sufficient time to implement upgrades to the existing scrubbers and electrostatic precipitators (ESPs) at these units.
- *Cholla Units 2, 3 and 4:* The final emissions limit for NO_X is 0.055 lb/MMBtu determined as an average of the three units, based on a rolling 30-boiler-operating-day average. Compared to the proposed emissions limit of 0.050 lb/MMBtu on each unit, the higher limit and three-unit average provide an extra margin of compliance to account for periods of startup and shutdown. When any of the three units is not operating, its emissions from its own preceding thirty boiler-operating-days will continue to be included in the three-unit average. As proposed, the final compliance date to install and operate controls is five years from the date of publication of this final rule. For SO_2, we are adding a removal efficiency requirement of 95 percent for the scrubbers on Cholla Units 2, 3 and 4, in order to ensure that these scrubbers are properly operated and maintained, consistent with 40 CFR 51.308(e)(1)(v). We are retaining the other compliance deadlines as proposed, except for Cholla Unit 2, where we are extending the

[4] For each BART source, the SIP must include a requirement to install and operate control equipment as expeditiously as practicable (40 CFR 51.308(e)(1)(iv)); a requirement to maintain control equipment (40 CFR 51.308(e)(1)(v)); and procedures to ensure control equipment is properly operated and maintained, including requirements for monitoring, recordkeeping and reporting (40 CFR 51.308(e)(1)(v)).

[5] In the regulatory text in our NPRM, we proposed to incorporate by reference into the FIP two provisions of the Arizona Administrative Code, R18–2–310 and R18–2–310.01, which we characterized as establishing an affirmative defense for excess emissions due to malfunctions. However, those provisions also include an affirmative defense for excess emissions due to startups and shutdowns, which we did not intend to incorporate. As explained below, the emission limits that we are promulgating today include an adequate margin of compliance to account for periods of startup and shutdown. Accordingly, as indicated by the title of this provision in our proposed regulatory text ("Affirmative Defense for Malfunctions"), we are only incorporating into the FIP the malfunction-related provisions of these rules and not the startup and shutdown provisions. Our final regulatory text clarifies this distinction and also incorporates the definition of malfunction.

compliance deadline to April 1, 2016, for both SO_2 and PM_{10} in order to provide APS with sufficient time to install a new wet flue gas desulfurization (FGD) system and fabric filter on this unit.

• *Coronado Units 1 and 2:* The final emissions limit for NO_X is 0.065 lb/MMBtu determined as an average of the two units, based on a rolling 30-boiler-operating-day average. Compared to the proposed emissions limits of 0.050 on Unit 1 and 0.080 on Unit 2, this new limit based on a two-unit average provides an extra margin of compliance to account for startup and shutdown. When either one of the two units is not operating, its emissions from its own preceding thirty boiler-operating-days will continue to be included in the two-unit average. The final compliance date for the two units is five years from the date of publication of this final rule.

TABLE 1—SUMMARY OF CHANGES FROM PROPOSAL TO FINAL RULE: EMISSIONS LIMITS (LB/MMBTU) AND COMPLIANCE DATES IN SIP AND FIP

Source	NO_X		PM_{10}		SO_2	
	Proposal	Final	Proposal	Final	Proposal	Final
Apache Unit 1	0.056, Five years	0.056, Five years	0.0075, 180 days	0.0075, 180 days	0.00064, 180 days	0.00064, 180 days.
Apache Unit 2	0.050, Five years	0.070 (across two units)	0.03, 180 days	0.03, Four years	0.15, 180 days	0.15, Four years.
Apache Unit 3	0.050, Five years	Five years	0.03, 180 days	0.03, Four years	0.15, 180 days	0.15, Four years.
Cholla Unit 2	0.050, Five years	0.055 (across three units)	0.015, Jan 1, 2015	0.015, Apr 1, 2016	0.15, 180 days	Add 95 percent efficiency Apr 1, 2016.
Cholla Unit 3	0.050, Five years	Five years	0.015, 180 days ...	0.015, 180 days	0.15, 180 days	Add 95 percent efficiency 1 year.
Cholla Unit 4	0.050, Five years		0.015, 180 days ...	0.015, 180 days	0.15, 180 days	Add 95 percent efficiency 1 year.
Coronado Unit 1	0.050, Five years	0.065 (across two units)	0.03, 180 days	0.03, 180 days	0.08, 180 days	0.08, 180 days.
Coronado Unit 2	0.080, June 1, 2014.	Five years	0.03, 180 days	0.03, 180 days	0.08, 180 days	0.08, 180 days.

IV. EPA's Responses to Comments

We are responding to comments on our proposed rule published on July 20, 2012.[6] We held an initial public hearing in Phoenix, Arizona, on July 31, 2012. In response to concerns that more time was needed to analyze the proposal and develop comments, we added two additional public hearings in Holbrook and in Benson, Arizona, on August 14 and 15, respectively, and extended the public comment deadline to September 18, 2012.[7] The three public hearings were attended by hundreds of citizens, local and state government officials, workers and officials from the power plants, and representatives from environmental organizations. Testimony and comments from the three public hearings are organized in the docket by location and available for viewing at *www.epa.gov/region9/air/actions/arizona.html* and *http://www.regulations.gov*.

We also received a number of written comments, including extensive comments from stakeholders and government agencies who offered policy and technical analyses addressing the details of our proposed rule. These stakeholders included AEPCO, APS, SRP, PacifiCorp, Arizona Utilities Group (AUG), National Park Service (NPS), Arizona Department of Environmental Quality (ADEQ), and a consortium of conservation organizations (National Parks Conservation Association, Sierra Club, Physicians for Social Responsibility—Arizona Chapter, Dine' Citizens Against Ruining Our Environment, Grand Canyon Trust, and San Juan Citizens Alliance) represented by Earthjustice. All of the comments we received along with attached technical reports and analyses are available for review in the docket.

A. General Comments on ADEQ's Approach to BART

1. ADEQ's Identification of BART Sources

Comment: One commenter (Earthjustice) stated that EPA must provide further factual support for its determination that Cholla Unit 1 is not BART-eligible. The commenter indicated that the record lacks the requisite support for this conclusion. Recounting the history of ADEQ's finding that Unit 1 is not BART-eligible, the commenter noted that APS claimed, and ADEQ concurred, that Unit 1 is not BART-eligible based on a 50-year-old document entitled "Operating Notes For May 1962" which allegedly shows that Unit 1 began operations on May 1, 1962, and was thus placed into operation just months before the August 7, 1962, BART-eligibility cut-off. The commenter added that EPA apparently approved, without any scrutiny, ADEQ's determination that Cholla Unit 1 is not BART-eligible.

The commenter (Earthjustice) requested that EPA properly analyze the BART-eligibility of Cholla Unit 1. Specifically, the commenter requested that EPA identify which "aspects of the process by which ADEQ identified its eligible-for-BART and subject-to-BART sources" it disagrees with, the basis of each disagreement, and whether any such disagreement implicates Cholla Unit 1. In addition, the commenter stated that EPA's independent analysis of this issue must be supported by the following information, which is needed to verify the actual date that Cholla Unit 1 began operating:

• The document entitled "Operating Notes for May 1962" referenced in ADEQ's SIP;

• All available 1962 operating records for Cholla Unit 1;

• All initial CAA construction and operating permits issued to Cholla Unit 1;

• All emissions data from the year 1962 for Cholla Unit 1;

• Notes of the meeting between ADEQ and APS in August 2007 or any other time ADEQ and APS discussed the BART-eligibility of Cholla Unit 1; and

• Any other documentation that either supports or contradicts whether Cholla Unit 1 was placed into

[6] 77 FR 42834.

[7] 77 FR 45326 (July 31, 2012).

commercial operation before August 7, 1962.

Response: We did not specifically propose to take action on ADEQ's determination that Cholla Unit 1 is not BART-eligible and our statement that "we do not agree with all aspects of the process by which ADEQ identified its eligible-for-BART and subject-to-BART sources" was not intended to apply to this unit. Nonetheless, we agree with the commenter that it is appropriate to give some consideration to this issue in the context of today's rulemaking action, which covers ADEQ's BART determinations for the other three units at Cholla.

Contrary to the commenter's assertion, the WRAP did not find Cholla Unit 1 subject to BART. The WRAP document cited by the commenter merely indicates that ADEQ notified APS on July 13, 2007 that Cholla Units 1–4 were "Potentially Subject to BART."[8] The WRAP's "Arizona BART Eligibility TSD" further explains that:

> [Cholla] Unit 1 is listed as potentially date eligible as information shows that the emissions unit was in service only 2 months prior to the cut-off date. Recommend requesting additional supporting documentation for final determination.[9]

ADEQ received this additional documentation from APS in August 2007 in the form of a document dated May 23, 1962, and entitled "Operating Notes For May 1962."[10] This document indicates that, "[o]n Tuesday, May 1, 1962, unit [#1 was] placed into commercial operation."[11] After reviewing this documentation, ADEQ concurred that Unit 1 was not BART eligible.[12]

Following the close of the public comment period, we requested and received from APS a copy of the "Operating Notes For May 1962" along with additional information concerning the operation of Cholla Unit 1.[13] We have placed these materials in the docket and, based on our initial review, we believe this documentation is sufficient to confirm ADEQ's determination that this unit is not BART-eligible. However, because this question was not addressed in our proposed rulemaking, we are not taking final action on it at this time. We intend to address Cholla Unit 1's BART eligibility when we take action on the remainder of the Arizona Regional Haze SIP.

2. ADEQ's BART Control Analyses

Comment: One commenter (PacifiCorp) states that EPA improperly focuses on only two factors, costs and visibility improvement, in rejecting the ADEQ's entire NO_X BART determination. The commenter states that EPA inappropriately places more weight on these factors.

Response: EPA disagrees with the comment that we inappropriately focused on costs and visibility improvement in our decision to disapprove ADEQ's NO_X BART determinations. As outlined in our proposal, we considered ADEQ's evaluation of the energy and non-air quality environmental impacts of compliance of the control technologies, any existing pollution control technology in use at each of the sources, and the remaining useful life of each source, to be generally reasonable and consistent with the RHR and the BART Guidelines.[14] However, we also found that the costs of control were not calculated in accordance with the BART Guidelines, and that the visibility impacts were not appropriately evaluated and considered. These findings formed part of the basis for our disapproval of ADEQ's NO_X BART determinations.

Comment: Several commenters objected to EPA's use of non-specific and undefined parameter levels for both the "cost-effectiveness" and "sufficient visibility improvement" parameters in rejecting ADEQ's SIP. One commenter (Pacificorp) further noted that states cannot meet EPA's specific targets unless and until those targets are clearly defined.

Response: The RHR and the BART Guidelines do not require the development of specific thresholds, but rather require evaluation of each BART determination on a case-by-case basis for each source.[15] We have not established a specific cost threshold that makes a particular control option BART based on just a dollars per ton number, and there is not a specific target, either in terms of cost-effectiveness or visibility improvement, for ADEQ to meet. All five factors must be evaluated and weighed to determine the level of control that is BART on a case-by-case basis.

a. ADEQ's Approach to Costs of Compliance

Comment: One commenter (NPS) agreed with EPA's conclusions that the costs of control were not calculated by ADEQ in accordance with the BART Guidelines and that costs were included for items not allowed by EPA Control Cost Manual (CCM or the Manual) (e.g., owner's costs, surcharge, escalation, and Allowance for Funds Utilized During Construction—AFUDC), which inflates the total cost of compliance and the cost per ton of pollutant reduced. According to the commenter, a review of industry data (detailed in Appendix A of the commenter's submission) indicates that the total capital investment (TCI) for SCR retrofits is typically about $200/kW, while the TCI estimates for Apache and Cholla equaled or exceeded $250/kW.

The commenter (NPS) noted that the BART Guidelines recommend use of the Manual if vendor data are not available. The commenter conducted detailed cost analyses of SCR using an approach that the commenter believes is similar to that used by EPA in its evaluation of SCR on the Colstrip power plant—using the cost methodologies of the Manual and relying on EPA's Integrated Planning Model (IPM) to reflect the most recent cost levels. The commenter observed that most of the ADEQ SCR cost estimates were based on TCI costs that were relatively high ratios of the reported direct capital costs (DCC). The commenter indicated that according to the Manual, the ratio of TCI to DCC is 141 percent, while ADEQ's estimates were as follows:

- At Apache, TCI is 179 percent of DCC for both units and included $6 million in costs for each unit not typically allowed by EPA.
- At Cholla, TCI is 258 percent of DCC for all three units and included $11 million in costs for Units 2 and 3 (each) and $15 million for Unit 4 that are not typically allowed by EPA.
- At Coronado, data were not sufficient to calculate these values.

The commenter asserted that this supports EPA's concern that control costs submitted by the utilities either included costs not typically allowed by EPA or were inadequately documented.

Response: We appreciate the information provided by the National Park Service and are in agreement that ADEQ's cost estimates of SCR are overestimated. As indicated in our proposal, our cost estimates for SCR generally produced lower values than those in the Arizona Regional Haze SIP,

[8] Exhibit 17 to Earthjustice Comments, WRAP BART Clearinghouse (Oct. 24, 2008).

[9] "Supporting Documentation on Emissions Unit Bart Eligibility Analysis", section 5.1.2.

[10] Arizona Regional Haze SIP at page 155.

[11] *Id.*

[12] *Id.*

[13] Email from Sue Kidd, APS, to Colleen McKaughan, EPA (October 10, 2012, 9:17 a.m.) and attachments.

[14] See 77 FR 42841.

[15] See, e.g., BART Guidelines, 40 CFR Part 51, Appendix Y, section IV.D.5 ("a 0.3 deciview improvement may merit a stronger weighting in one case versus another, so one "bright line" may not be appropriate.")

and at a level that we consider cost-effective. Although we recognize that NPS's estimates produce even lower values than those from our proposal, we have not updated our own cost estimates to reflect NPS's comments since we already consider SCR to be cost-effective. We do note that in order to address the comments from the utilities, we have performed supplemental cost analyses for each facility based on the costs provided by the utilities, and in doing so have accounted for those costs not allowed by CCM methodology.

Comment: Two commenters (ADEQ and AUG) stated that EPA did not and cannot show that ADEQ failed to consider relevant cost information in making its BART determination, the State fully complied with its CAA obligations, and EPA's rationale is insufficient to reject ADEQ's cost determinations. AUG asserted that:

> Arizona has expressly stated that it has considered each of the BART factors. EPA plainly cannot—and does not—demonstrate that Arizona failed to take the costs of compliance with BART emission limits into consideration. The state is required to do no more than that, and EPA cannot lawfully disapprove the state's determinations on the basis that the Agency would prefer a different form of, or format for, explanation of those determinations.

The commenters further stated that the other reason EPA rejected ADEQ's cost determinations is that EPA believed that ADEQ relied on inadequately documented costs. The commenters contended that there is nothing in the CAA or BART rules that requires a state to present any particular level of cost documentation or that limits a state's discretion in its consideration of the cost factor in making a BART determination.

Response: We disagree with this comment. First, while Arizona may have "expressly stated" that it considered each of the BART factors, it must do more than "state" that it considered a BART factor, but must also provide some type of analysis demonstrating that it considered the BART factors.[16] Although ADEQ has presented information relevant to each of the BART factors, it has not provided an explanation regarding how this information was used to develop its BART determinations. Specifically, in the case of cost calculations, the Arizona Regional Haze SIP includes relevant information for multiple NO_X control options, but does not provide evidence that this information has been analyzed in any way. In the case of Apache and Coronado, the Arizona Regional Haze SIP does not analyze this cost information in even a qualitative manner. In the case of Cholla, the terms "least expensive" and "most expensive" are used, but only in the context of providing a reference for visibility impacts, and not in the context of an evaluation of costs. This does not constitute "consideration," as it involves little more than ensuring the presence of cost values, with no judgment, analysis, or interpretation of their meaning.

Second, we disagree with the commenter's characterization of our disapproval as based on a "preference" for a different format or form of explanation for ADEQ's BART determinations. As discussed in the previous paragraph, ADEQ has not discussed its BART determination rationale, particularly with regard to costs of compliance, in *any* format. While ADEQ's RH SIP does include cost information, it provides no explanation regarding how, or even if, this cost information was used in arriving at its NO_X BART determinations. Although we agree that the RHR does provide states significant discretion in their consideration of the BART factors, AUG's comment presupposes that these costs were considered. The Arizona Regional Haze SIP does not indicate that they were considered.

Comment: ADEQ noted that the same principles were used for the PM_{10} and SO_2 BART evaluations as were used for the NO_X BART evaluation, yet EPA accepted the approach for only PM_{10} and SO_2.

Response: We disagree that we accepted ADEQ's approach for PM_{10} and SO_2. Although we did not disapprove ADEQ's PM_{10} and SO_2 BART determinations, the absence of a disapproval of these determinations should not be construed to represent acceptance of the approach by which they were developed. We acknowledge that ADEQ took a similar approach in its analyses for PM_{10} and SO_2 as for NO_X, and that these analyses exhibit the same deficiencies we have noted elsewhere for the NO_X BART determinations. However, we did not disapprove the PM_{10} and SO_2 determinations because we find that the shortcomings in these analyses did not result in unreasonable BART determinations and therefore were generally "harmless errors."

With regard to PM_{10}, we note that ADEQ determined the most stringent control technology (fabric filters) was BART for each of the Cholla units. For Apache and Coronado, ADEQ determined that the current control technology (hot-side ESPs) was BART and eliminated the most stringent control technology (fabric filters). We note that PM emissions from EGUs typically contribute only a small percentage of the modeled visibility impact from EGUs, and that controlling their emissions results in very small visibility benefit. For example, CALPUFF visibility modeling performed by WRAP indicates that for Apache, the maximum baseline PM_{10} visibility impact at the most affected Class I area (Chiricahua NM) is 0.04 dv.[17] Assuming that a more stringent control technology could achieve 100 percent PM control and eliminate this entire visibility impact, a more stringent PM_{10} BART determination would therefore achieve, at most, a visibility benefit of 0.04 dv. Although ADEQ did not document its analysis or weighing of the five factors in arriving at the PM_{10} BART determinations for Apache or Coronado, additional analysis would not have the potential to result in selection of a more stringent control technology in light of the small potential for visibility benefit.

With regard to SO_2, ADEQ selected the most stringent control technology (wet FGD) for all units at Apache, Cholla, and Coronado. Although ADEQ did not "take into account the most stringent emission control level that the technology is capable of achieving," correcting for this flaw would not have the potential to result in the selection of a more stringent control technology, since wet FGD, which is the most stringent control technology, was already selected as BART. Further discussion of our evaluation of ADEQ's BART analyses for PM_{10} and SO_2 is provided below.

Comment: The commenters stated that one of EPA's reasons for rejecting ADEQ's cost determinations is because the costs are inconsistent with the CCM. The commenters noted that use of the outdated Manual is not required by the CAA or the BART rules and provide references in which EPA has stated that the Manual is only one tool that can be used but that other cost data should also be considered.

Response: We partially agree with this comment. We acknowledge that our BART guidelines state, "In order to maintain and improve consistency, cost estimates should be based on the [CCM], where possible" and that "[w]e believe that the [CCM] provides a good

[16] See, e.g., BART Guidelines, 40 CFR Part 51, Appendix Y, section IV.E.2. ("You should provide a justification for adopting the technology that you select as the 'best' level of control, including an explanation of the CAA factors that led you to choose that option over other control levels.")

[17] See Docket Item No. B–12, "Summary of WRAP RMC BART Modeling for Arizona."

reference tool for cost calculations, but if there are elements or sources that are not addressed by the Control Cost Manual or there are additional cost methods that could be used, we believe that these could serve as useful supplemental information."[18] The Manual contains two types of information: (1) Study level cost estimates of capital and operation and maintenance (O&M) costs for certain specific types of pollution control equipment, such as SCR, and (2) a broader costing methodology, known as the overnight method. We agree that the language of the BART Guidelines does not require strict adherence to the study level equations and cost methods used to estimate capital and O&M costs.

We consider the use of the broader costing methodology used by the CCM, the overnight method, as crucial to our ability to assess the reasonableness of the costs of compliance. Evaluation of the cost of compliance factor requires an evaluation of the cost-effectiveness associated with the various control options considered for the facility. A proper evaluation of cost-effectiveness allows for a reasoned comparison not only of different control options for a given facility, but also of the relative costs of controls for similar facilities. If the cost-effectiveness of a control technology for a particular facility is outside the range for other similar facilities, the control technology may be rejected as not cost-effective.[19] In order for this type of comparison to be meaningful, the cost estimates for these facilities must be performed in a consistent manner. Without an 'apples-to-apples' comparison of costs, it is impossible to draw rational conclusions about the reasonableness of the costs of compliance for particular control options. Use of the CCM methodology is intended to allow a fair comparison of pollution control costs between similar applications for regulatory purposes. This is why the BART guidelines specify the use of the CCM where possible[20] and why it is reasonable for us to insist that the CCM methodology be observed in the cost estimate process. However, we note that the overnight method has been used for decades for regulatory control technology cost analyses, and that its use ensures equitable BART determinations across states and across sources.

Comment: One commenter (SRP) stated that ADEQ appropriately considered the "dollars-per-deciview" cost-effectiveness of different control options, which is reasonable and entirely within the broad discretion afforded to the states under the CAA. SRP stated that because BART is a component of the CAA's visibility program, it is more crucial to evaluate control costs in relation to the visibility improvements that may be expected using a dollars per deciview ($/dv) metric.

Response: The BART Guidelines require that cost-effectiveness be calculated in terms of annualized dollars per ton of pollutant removed, or $/ton, but also list the $/deciview ratio as an additional cost-effectiveness measure that can be employed along with $/ton for use in a BART evaluation.[21] However, the $/dv metric is only useful to the extent that it reflects appropriately calculated costs and visibility benefits. As explained elsewhere in this document, we have determined that ADEQ did not evaluate costs and visibility benefits in a manner consistent with the RHR and the BART Guidelines. Therefore, while ADEQ certainly had the discretion to take $/dv into consideration as part of its BART analyses, the values that it relied upon in doing so were not reasonable.

b. ADEQ's Approach to Energy and Non-Air Quality Environmental Impacts

Comment: One commenter (SRP) stated that EPA inappropriately downplayed the energy and non-air quality factor in its review of ADEQ's BART analysis. Another commenter (ADEQ) noted that because fly ash ammonia residues have the potential to contaminate ground and surface waters, ADEQ included potential environmental impacts and the economics of disposing the fly ash in its BART analysis.

Response: We do not agree that we inappropriately downplayed the energy and non-air quality environmental impacts factor in our review of ADEQ's BART analyses. ADEQ provided only brief consideration of this factor in its BART analyses and did not explain how it weighed this factor against the other statutory factors. Because ADEQ's analysis of this factor was limited in scope, our evaluation of this factor in reviewing the SIP was similarly limited. We discuss our analysis of this factor in our FIP action below.

c. ADEQ's Approach to Degree of Visibility Improvement

Comment: Several commenters (American Coalition for Clean Coal Electricity (ACCCE), AEPCO, APS, AUG, Navajo Nation, PacifiCorp, SRP) asserted that EPA improperly dismissed ADEQ's visibility impacts analyses. The commenters cited the BART Guidelines (70 FR 39170, July 6, 2005) to assert that there is no prescribed method for states to consider and weigh visibility impacts and, thus, EPA has no legal grounds for disapproving a SIP based on the method the State has chosen to consider visibility impacts or improvements. The commenters added that whatever EPA's preference, it has no discretion to substitute its method or its conclusion for those of the State. According to the commenters, it is clear that the BART rules envision—or, at a minimum, allow—a visibility improvement analysis that is focused on visibility impacts in the most impacted area.

Regarding ADEQ's BART determination at Coronado in particular, one commenter (SRP) noted that ADEQ evaluated a visibility index derived from an average of modeled visibility improvements at the nine Class I areas closest to Coronado. The commenter asserted that this approach was well within the State's discretion to assess visibility under the BART rules. Another commenter (AUG) argued this consideration of an average visibility impacts index is an even more thorough type of evaluation than that required by the BART rules.

One commenter (AEPCO) added that EPA's proposal to disapprove ADEQ's NO_X BART determinations was largely based on its concern with ADEQ's reliance on the Western Regional Air Partnership (WRAP) modeling.

By contrast, another commenter asserted that since the facilities' modeling results indicated that controls would contribute to visibility improvements in multiple Class I areas, ADEQ should consider these benefits rather than looking at the benefits in only a single Class I area. The commenter believes that overlooking significant visibility benefits in this way considerably understates the overall benefit of controls to improved visibility. The commenter contended that the procedure followed by ADEQ is not a sufficient basis for making BART determinations for sources with substantial benefits across many Class I areas.

Response: EPA's proposed disapproval of ADEQ's NOx BART determinations was not based on any concern with the WRAP modeling

[18] BART Guidelines, 40 CFR Part 51, Appendix Y, section IV.D.4.a.

[19] See *Id.* section IV.D.4.f ("A reasonable range [of cost-effectiveness values] would be a range that is consistent with the range of cost-effectiveness values used in other similar permit decisions over a period of time.")

[20] BART Guidelines, 40 CFR Part 51, Appendix Y, section IV.D.4.

[21] BART Guidelines sections IV.D.4.c and IV.E.

protocol, upon which ADEQ relied for its BART analyses. On the contrary, we found that the modeling procedures relied upon by ADEQ were "in accord with EPA guidance." [22] However, we noted that ADEQ's use of the results of modeling in making BART decisions was "problematic in several respects." [23] In other words, our concern with the visibility analysis was not with the technical adequacy of the modeling itself, but rather with how ADEQ interpreted the results of this modeling.

In its BART analyses for Apache and Cholla, ADEQ considered visibility improvements only at the single Class I area with the greatest modeled impact from a facility. This neglects improvements that would occur at other nearby Class I areas, and in general is not adequate for assessing the overall visibility benefit from candidate BART controls. As noted by commenters, the BART Guidelines provide that, "[i]f the highest modeled impacts are observed at the nearest Class I area, [a State] may choose not to analyze the other Class I areas any further and additional analyses might be unwarranted." [24] Commenters argued that this language shows that Arizona's exclusive focus on improvements at a single Class I area is allowed under the BART Guidelines. However, this language is not intended as an invitation for states to ignore significant visibility improvements at multiple Class I areas. Rather, it is intended to provide a way of streamlining a complex and difficult modeling exercise where "an analysis may add a significant resource burden to a State." [25] For example, when the visibility benefits at the most impacted Class I area alone are sufficient to justify the selection of the most stringent control technology as BART, then analysis of additional areas would be unnecessary and the state could conserve resources by not modeling the impacts on those additional areas. Here, by contrast, ADEQ did not perform its own modeling at all, but instead relied on modeling performed by contractors for the facilities. This modeling indicated that the installation of more stringent controls (i.e., SNCR or SCR) would result in visibility benefits at multiple Class I areas, yet ADEQ chose to consider the benefits only at the most impacted area. Where, as here, the benefits of controls have been modeled for a number of surrounding areas and consideration of these benefits is useful in determining the appropriate level of controls, EPA does not agree that these benefits may be ignored.[26]

While there may be no single prescribed method to consider and weigh visibility impacts, the BART Guidelines do require that certain visibility impacts be included in the considering and weighing. EPA disagrees that state flexibility extends to categorically excluding consideration of visibility improvements occurring at multiple Class I areas. Considering benefits at multiple areas does not necessarily require use of the "cumulative" improvement approach (i.e., the direct sum of improvements at all the areas), but does require that improvements at those areas be taken into account in some way. For example, one could simply list visibility improvements at the various areas, and qualitatively weigh the number of areas and the magnitudes of the improvements. However, ADEQ did not do this for any of the sources covered by this action.

With respect to ADEQ's consideration of visibility improvements for Coronado, EPA agrees that average visibility index used by ADEQ could be acceptable in itself as part of assessing multiple area impacts and improvements; indeed it is a variant of the cumulative improvement approach. However, without any consideration of particular area improvements, the averaging process causes especially large benefits at some individual areas to be diluted or lost, effectively discounting some of the more important effects of the controls. In addition, the approach is counter to ADEQ's emphasis elsewhere in the SIP on the importance of considering the visibility improvement at the single area having the largest impact from a given facility. Finally, ADEQ provided no discussion of how the results of the visibility index were weighed against the other BART factors.

In addition, ADEQ considered visibility improvements from controls on only a single emitting unit at a time, despite the fact that each of the three sources has multiple BART-eligible units. This neglects the full improvement that would result from controls on the facility, with the potential for dismissing emitting unit benefits that are individually small, but that collectively could have a significant visibility benefit. The RHR requires RH SIPs to include a "determination of BART for each BART-eligible source in the State that emits any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility in any mandatory Class I Federal area." [27] The BART Guidelines explain that, "[i]f the emissions from the list of emissions units at a stationary source exceed a potential to emit of 250 tons per year for any visibility-impairing pollutant, then that collection of emissions units is a BART-eligible source." [28] Therefore, it is that collection of units for which one must make a BART determination. The Guidelines state "you must conduct a visibility improvement determination for the source(s) as part of the BART determination. * * *" [29] This requires consideration of the visibility improvement from BART applied to the facility as a whole.

The RHR and the Guidelines do not preclude consideration of visibility improvement from controls on individual units, but that would be in addition to considering the improvement from the whole facility. The BART Guidelines clearly allow for the consideration of technical feasibility and cost-effectiveness on a unit-by-unit basis where appropriate, but those considerations fall under different factors than the assessment of the degree of visibility improvement, and do not remove the obligation to consider visibility improvement from BART applied to the facility as a whole. In sum, while the State has some flexibility in choosing a specific procedure to consider these cumulative area and multiple unit benefits, when such benefits are significant, it is not reasonable to ignore them altogether as ADEQ did.

Comment: One commenter (NPS) agrees with EPA that the ammonia background concentration assumed by ADEQ for Cholla and Coronado may be too low, ranging from 1 part per billion (ppb) down to 0.2 ppb. According to the commenter, EPA guidance recommends the use of a 1 ppb ammonia background for areas in the west, absent compelling evidence to the contrary.

Other commenters (APS and AUG) state that the Interagency Workgroup on Air Quality Modeling (IWAQM) recommended value of 1ppb is outdated and should not be used now that better data have been gathered and since the CALPUFF model was updated to allow for monthly, rather than yearly, average ammonia concentrations. APS also noted that EPA Region 9 has explicitly

[22] 77 FR 42841.

[23] *Id.*

[24] BART Guidelines, 40 CFR Part 51, Appendix Y, section IV.D.5.

[25] See 70 FR 39126.

[26] See, e.g., 76 FR 52388, 52430 (San Juan Generating Station); 77 FR 51620, 51631–51632 (Four Corners Power Plant); and 77 FR 51915, 51922–51923 (Roseton and Danskammer Generating Stations).

[27] 40 CFR 51.308(e)(1)(ii).

[28] 40 CFR Part 51, Appendix Y, section II.A.4.

[29] *Id.* section IV.D.5.

approved the use of the same monthly-varying background ammonia concentrations, which were based on actual field measurements, in running the CALPUFF model for two other sites located close to Cholla and that were used by ADEQ in its analysis. These values range from 1 ppb during the summertime to 0.2 ppb during cold winter months. EPA has also stated in response to comments on the Montana regional haze FIP (77 FR 57864, September 18, 2012) that "it is preferable to use ambient ammonia measurements when such data are available rather than using default background ammonia concentrations." Another commenter (Navajo Nation) agrees that EPA should use actual, recorded data wherever possible, especially ammonia background values. AUG concludes that EPA has no basis for rejecting the use of refined background ammonia concentration values in disapproving the SIP.

Response: The IWAQM Guidance [30] is the only guidance available for choosing ammonia background concentrations. Because of the paucity of monitoring data and the uncertainty in other ammonia estimation methods, EPA concludes that it is appropriate to use the default 1 ppb from the IWAQM Guidance.

As stated by the commenter, EPA did originally accept monthly varying ammonia values of 0.2 to 1.0 ppb for BART analyses performed by AECOM for APS for the Four Corners Power Plant (FCPP), and by SRP for the Navajo Generating Station (NGS). However, shortly after that, the USDA Forest Service brought to EPA's attention ammonia monitored in the Four Corners area showing concentrations up to 3 ppb, described in a journal paper [31] by Mark Sather and others. EPA and the Forest Service also estimated ammonia concentrations by "back calculating" the amount of ammonia needed to form the ammonium nitrate and ammonium sulfate collected at Arizona and New Mexico sites in the IMPROVE monitoring network. This yielded concentrations ranging from 0.4 to 1.3 ppb, with winter values considerably higher than the AECOM 0.2 ppb recommended by the commenter.[32] Since this method accounts only for ammonium, and not remaining free gaseous ammonia, the total ammonia originally available to form visibility-impairing compounds may actually be higher. Because of uncertainty in the "back-calculation" method, and criticism of it, EPA relied on it in the FCPP FIP only as corroboration for the IWAQM default of 1 ppb.[33] Nevertheless, it supports the idea that winter ammonia levels in the Class I areas affected by emissions from sources in Arizona are likely substantially higher than 0.2 ppb.

EPA agrees with commenters that it would be preferable to use actual monitoring data to determine background ammonia concentrations. However, much of the existing data cited by the commenters is from other states, and so is unlikely to be representative for evaluating visibility impacts at Arizona's Class I areas. Further, the data comprises only ammonia itself, and not ammonium; or if it does include ammonium, that is not cited by the commenters. Visibility-impairing ammonium sulfate and ammonium nitrate are formed from ammonia, SO_2, and NO_X. Therefore the ammonium represents part of the pool of ammonia that could be available to interact with the SO_2 and NO_X from a facility and contribute to visibility impacts, and should be accounted for in estimating ammonia background concentrations. In several of the research papers [34] cited by commenter APS, the amount of measured ammonium is comparable to and at times much greater than the amount of ammonia.

New ammonia monitoring data were collected by SRP at several sites between NGS and the two nearest Class I areas, Capitol Reef National Park and Grand Canyon National Park, from December 2009 through April 2010. The monitoring report,[35] cited by commenter APS, describes a surprisingly high spatial variability in ammonia concentrations. The two monitors in the Cameron area south of NGS (and east-southeast of the Grand Canyon) showed consistent concentration differences despite being less than five miles from each other; this may be due to relatively localized ammonia sources. These sites also showed consistently lower measurements than the Halls Crossing site, north of NGS (and southwest of Capitol Reef). The range in concentrations was comparable to the range seen between the AECOM values at the low end, and EPA's back-calculated values at the high end. Unfortunately, because of the variability and its unknown causes, the data collected did not lead to a clear picture of appropriate and representative ammonia background concentrations to use with CALPUFF.

In any case, as mentioned above, some nearby monitored data reported in Sather's paper show considerably higher ammonia than recommended by some commenters, so it is not clear that values lower than 1 ppb should be used. EPA concludes that there is not a compelling case for using ammonia background concentrations other than the 1 ppb found in the only authoritative guidance document available on this topic and supported by the FLMs.

Comment: Two commenters (APS and AUG) noted that the RHR and BART Guidelines are silent regarding whether visibility improvements should be modeled on a unit-by-unit basis or a plant-wide basis, and there is no legal requirement that units be modeled aggregately. Given that visibility benefits are approximately additive, the commenters contend that it is unreasonable for EPA to conclude that

[30] *Interagency Workgroup On Air Quality Modeling (IWAQM) Phase 2 Summary Report And Recommendations For Modeling Long Range Transport Impacts* (EPA–454/R–98–019), EPA OAQPS, December 1998, *http://www.epa.gov/scram001/7thconf/calpuff/phase2.pdf.*

[31] Mark E. Sather *et al.*, "Baseline ambient gaseous ammonia concentrations in the Four Corners area and eastern Oklahoma, USA". *Journal of Environmental Monitoring*, 2008, 10, 1319–1325, DOI: 10.1039/b807984f.

[32] See, e.g., Proposed Rule: Source Specific Federal Implementation Plan for Implementing Best Available Retrofit Technology for Four Corners Power Plant: Navajo Nation Technical Support Document, pages 59–61, 65–66, 68–73.

[33] *Id.* at page 68.

[34] *RoMANS—Rocky Mountain Atmospheric Nitrogen & Sulfur Study*, William C. Malm and Jeffrey L. Collett. National Park Service, CSU–CIRA. Fort Collins, CO. ISSN 0737–5352–84. October 2009. *http://www.noture.nps.gov/air/Studies/romans.cfm.* Table 3.9 on p.3–38 shows ammonium comparable to or about half of ammonia, depending on measurement method. It also shows that the spring time mean and maximum ammonium are about 0.22 and 0.57 μg/m^3, respectively, or 0.38 and 0.78 ppb; and the mean and maximum ammonia are about 0.38 and 1.0 μg/m^3 or 0.51 and 1.4 ppb. The sum of these means and maxima is 0.81 and 2.2 ppb, respectively. Figure 4.26 on p.4–26 shows daily sums of ammonium and ammonia, with values of 2.5–5 μg/m^3 or 3.6–7.2 ppb occurring frequently. These are substantially higher than values cited by the commenters. "NH_3 Monitoring in the Upper Green River Basin, Wyoming", by John V. Molenar, H. James Newell, Jeffrey Collett, *et al.* Extended Abstract #70, A&WMA Specialty Conference "Aerosol & Atmospheric Optics: Visual Air Quality and Radiation", Moab, Utah, 28 April—2 May 2008, p.3 Figure 1 and p.4 Figure 3 show ammonium comparable to ammonia in summer and far greater in winter. "Aerosol Ion Characteristics During the Big Bend Regional Aerosol and Visibility Observational Study," Taehyoung Lee, Sonia M. Kreidenweis & Jeffrey L. Collett Jr. *Journal of the Air & Waste Management Assoc.* vol.54, issue 5, 2004, pages 585–592. DOI:10.1080/10473289.2004.10470927, Table 1 p. 587 shows ammonium about four times as high as ammonia.

[35] "Measurements of Ambient Background Ammonia on the Colorado Plateau and Visibility Modeling Implications", Salt River Project, Dr. Ivar Tombach, Consultant, and Robert Paine, AECOM Environment, September 2010. •

ADEQ's BART analyses failed to consider any significant visibility effect merely because ADEQ modeled the units separately. In addition, AUG notes that it is necessary to determine the effects of emissions from units individually so that projected visibility impacts can be considered in light of costs and other impacts associated with BART-candidate controls for that particular unit, and modeling units together could obscure these comparisons.

Response: Considering the visibility benefits of multiple units together does not preclude a state from also considering individual unit benefits, as well as individual unit costs. EPA does not agree that modeling the units together obscures these other comparisons. Rather, the benefit of controls for an entire BART-eligible source is a factor that should be considered along with those other comparisons. In any case, whether considered unit by unit or all units together, visibility improvement has no effect on the assessment of cost-effectiveness as measured by dollars per ton of reductions.

B. Comments on ADEQ's Individual BART Analyses and Determinations

1. ADEQ's BART Analyses and Determinations for Apache Unit 1

Comment: One commenter (NPS) concurred with ADEQ's and EPA's proposals for BART at Apache Unit 1.

Response: We acknowledge NPS's concurrence.

2. ADEQ's BART Analyses and Determinations for Apache Units 2 and 3

a. ADEQ's BART Analysis and Determination for NO_X

Comment: One commenter (Earthjustice) commended EPA's decision to disapprove ADEQ's NO_X BART determination for Apache Units 2 and 3. The commenter stated that EPA correctly concluded that ADEQ's BART determination for NO_X inflated the costs of more-stringent NO_X controls by including costs not allowed by EPA Cost Control Manual, provided little reasoning about the visibility benefits of additional NO_X controls, and did not weigh the visibility impacts at all nearby Class I areas. The commenter asserted that because ADEQ's BART analysis does not comply with the RHR's requirements, EPA must disapprove ADEQ's BART determinations for Apache Units 2 and 3.

Response: We agree that ADEQ's BART analysis for Apache Units 2 and 3 does not comply with the RHR's requirements. As discussed further below, we performed a supplemental analysis using the version of AEPCO's cost estimate that adheres to our assumptions regarding costs that are allowed by the CCM (i.e., capital costs for the installation of SCR with LNB and OFA of $164.9 million), and we also considered the fact that AEPCO is a small entity under the Regulatory Flexibility Act.[36]

b. ADEQ's BART Analysis and Determination for PM_{10}

Comment: One commenter (NPS) agreed with ADEQ and EPA that BART for PM_{10} at Apache Units 2 and 3 is upgrades to the existing electrostatic precipitators (ESPs) and a PM_{10} emissions limit of 0.03 lb/MMBtu. The commenter noted that ADEQ stated that PM_{10} emissions would be measured by conducting EPA Method 201/202 tests.

In contrast, a second commenter (Earthjustice) disagreed with EPA's proposal to approve ADEQ's PM_{10} BART determination for Apache Units 2 and 3. The commenter contended that EPA proposed to approve the BART determination despite acknowledging that ADEQ did not conduct a full BART analysis for PM_{10} because it overestimated costs and failed to consider upgrades to the existing ESPs. However, the commenter believes that lower emission rates are achievable and, as a result, that EPA should disapprove ADEQ's BART determination, conduct a full five-factor BART analysis and set a lower emission limit as BART for PM_{10}. According to the commenter, the Sahu report demonstrates that nearly 150 EGUs across the nation with a variety of PM controls achieve emission rates lower than 0.03 lb/MMBtu. The commenter asserted that neither ADEQ nor EPA provided any explanation why Apache Units 2 and 3 could not similarly meet a lower emission limit.

Response: As we noted in our proposal, ADEQ's BART analysis did not demonstrate that all potential upgrades to the existing ESPs at Apache Units 2 and 3 were fully evaluated or that the costs were calculated in compliance with the Control Cost Manual. However, we concluded that this was a harmless error because of the relatively small visibility improvement associated with PM_{10} reductions from these units.[37] Therefore, we proposed to approve ADEQ's determination that BART for PM_{10} at Apache Units 2 and 3 is upgrades to the existing ESPs and a PM_{10} emissions limit of 0.03 lb/MMBtu.

One commenter asserted that this limit is too lenient, since other coal-fired units are achieving lower limits, based on test data submitted by various utilities to EPA as part of an Information Collection Request (ICR) for the Mercury and Air Toxics (MATS) Rule.[38] EPA disagrees with this comment. The MATS Rule establishes an emission standard of 0.030 lb/MMBtu filterable PM (as a surrogate for toxic non-mercury metals) as representing Maximum Achievable Control Technology (MACT) for coal-fired EGUs.[39] This standard derives from the average emission limitation achieved by the best performing 12 percent of existing coal-fired EGUs (taking into account the variability in the testing results for these facilities), based upon to the same test data referred to by the commenter.[40] The BART Guidelines provide that, "unless there are new technologies subsequent to the MACT standards which would lead to cost-effective increases in the level of control, you may rely on the MACT standards for purposes of BART."[41] Therefore, we are approving ADEQ's determination that a PM_{10} limit of 0.03 lb/MMBtu represents BART for these units.

c. ADEQ's BART Analysis and Determination for SO_2

Comment: One commenter (Earthjustice) disagreed with EPA's proposal to approve ADEQ's SO_2 BART determination at Apache Units 2 and 3. The commenter states the approval is contrary to the RHR because ADEQ's BART determination is not supported by a valid five-factor analysis. The commenter states that EPA cannot speculate that it would reach the same conclusion as ADEQ, and it must undertake an independent full five-

[36] As explained in our proposal, a firm primarily engaged in the generation, transmission, and/or distribution of electric energy for sale is small if, including affiliates, the total electric output for the preceding fiscal year did not exceed 4 million megawatt hours. 77 FR 42867. AEPCO sold under 3 million megawatt hours in 2011 and is therefore a small entity.

[37] 77 FR 42847.

[38] Information Collection Request For National Emission Standards For Hazardous Air Pollutants (NESHAP) for Coal- And Oil-Fired Electric Utility Steam Generating Units (OMB Control No. 2060-0631). See *http://www.epa.gov/ttn/atw/utility/utilitypg.html* for detailed information obtained through this ICR.

[39] 77 FR 9304, 9450, 9458 (February 16, 2012) (codified at 40 CFR 60.42Da(a), 60.50Da(b)(1)).

[40] See Memorandum from Jeffrey Cole (RTI International) to Bill Maxwell (EPA) regarding "National Emission Standards for Hazardous Air Pollutants (NESHAP) Maximum Achievable Control Technology (MACT) Floor Analysis for Coal- and Oil-fired Electric Utility Steam Generating Units for Final Rule" (Dec. 16, 2011).

[41] 40 CFR Part 51, Appendix Y, Section IV.C.

factor BART analysis. The commenter argues that an SO_2 limit of 0.04 lb/MMBtu is achievable and cost-effective for Apache Units 2 and 3 according to the Sahu report. The commenter further asserts that, based on this report, scrubber upgrades can achieve SO_2 removal efficiencies of 98 percent and should have been investigated.

Another commenter (NPS) noted that that AEPCO's BART reports indicate that uncontrolled SO_2 emissions are 0.69 lb/MMBtu, and that the ADEQ BART proposal would reduce SO_2 emissions by 78 percent down to 0.15 lb/MMBtu. Based on the SO_2 control data submitted by the commenter, the commenter asserted that other BART upgrades are achieving higher removal efficiencies and/or lower SO_2 limits. The commenter believes that the existing scrubbers can be upgraded to achieve better removal efficiency and lower emission rates than the 78 percent and 0.15 lb/MMBtu proposed by EPA. The commenter cited various examples of upgraded scrubbers achieving limits of less than 0.15 lb/MMBtu or removal rates of greater than 90 percent.

By contrast, ADEQ and AEPCO expressed opposition to both a lower limit and a removal efficiency requirement. ADEQ asserted that "the limits included in the state SIP submittal are acceptable as BART" and "imposing dual-limitations will be unnecessary and burdensome for the facility." AEPCO commented that ADEQ permit conditions, which require SO_2 absorption systems to be operated and maintained at all times in a manner consistent with good air pollution control practices for minimizing emissions, is sufficient, and an additional control efficiency limit is not necessary. An efficiency limit would also require modification to the monitors to include the capability to measure scrubber inlet SO_2 in addition to stack emissions, which would require additional capital and O&M expenditures.

Response: We proposed to approve ADEQ's determination that BART for SO_2 at Apache Units 2 and 3 is upgrades to the existing scrubbers with an associated emission limit of 0.15 lb/MMBtu (30-day rolling average). However, we also solicited comment on whether an efficiency requirement should be part of the BART requirement, since Apache has the ability to use coal from various sources that have varying sulfur content. After reviewing the comments received on our proposal, we have concluded that the emission limit set by ADEQ appropriately reflects BART for SO_2 at these units and that a removal efficiency requirement would not be appropriate for these units.

While new wet scrubbers are capable of achieving 95 percent or better removal of SO_2,[42] the Apache scrubbers were manufactured in the 1970s and designed to meet a limit of 0.8 lb/MMBtu (i.e., a control efficiency of up to 70 percent).[43] For such existing scrubbers achieving greater than 50 percent control, the BART Guidelines (which are not mandatory for these units) do not provide a presumptive limit or removal efficiency, but recommend consideration of cost-effective scrubber upgrades designed to improve the system's overall SO_2 removal efficiency.[44] In August 2009, AEPCO provided information to ADEQ concerning potential scrubber upgrades at Apache Units 2 and 3.[45] AEPCO noted that it was in the process of upgrading its limestone grinding system and described other potential upgrades, such as improving operation of the scrubber bypass damper system, upgrading the mist eliminator wash system, adding another sieve tray, and modifying the flue gas inlet. The enclosed "Wet FGD Implementation Plan" indicated that AEPCO intended to proceed with upgrading the limestone grinding system, improving operation of the scrubber bypass damper system, and upgrading the mist eliminator wash system, but that "[t]he remaining wet FGD options were not selected on the basis of low probability of successfully making a significant difference in scrubber performance and/or high cost." [46]

Based on this information, we conclude that no further cost-effective scrubber upgrades are likely to be feasible for this facility and we are therefore deferring to ADEQ's determination that 0.15 lb/MMBtu represents BART for these units. Given the age of these scrubbers, we find that an additional removal efficiency requirement would be unnecessarily burdensome. This approach is consistent with our consideration of AEPCO's status as a small entity in our FIP determination. We note that our final FIP includes a requirement to maintain and operate air pollution control equipment at all units in "a manner consistent with good air pollution control practices for minimizing emissions" at all times. We expect that this requirement will help to ensure that the scrubbers on Apache Units 2 and 3 are properly maintained and operated under all conditions.

[42] See BART Guidelines, 40 CFR Part 51, Appendix Y, section IV.E.4.

[43] See Apache Title V Permit Technical Support Document (2007), Table 9; Title V Permit (2007), Attachment B, section II.E.1.a.

[44] See BART Guidelines, 40 CFR Part 51, Appendix Y, section IV.E.4.

[45] Letter from Michelle Freeark, AEPCO, to Trevor Baggiore, ADEQ (July 8, 2009).

[46] *Id.*

3. ADEQ's BART Analyses and Determinations for Cholla Units 2, 3 and 4

Comment: One commenter (APS) remarked that EPA stated that APS's contractor did not provide supporting information for its capital cost estimate, such as detailed equipment lists. The commenter argues that detailed equipment lists are typically not necessary for the level of accuracy needed for the process selection phase of a project and noted that its contractor used vendor quotes for the major pieces of equipment and factors for construction, balance of plant, electrical, owner's costs, surcharges, AFUDC and contingency.

Response: We do not agree with this comment. The BART Guidelines provide that:

> You should include documentation for any additional information you used for the cost calculations, including any information supplied by vendors that affects your assumptions regarding purchased equipment costs, equipment life, replacement of major components, and any other element of the calculation that differs from the [CCM].[47]

Thus, detailed cost documentation is necessary to the extent that cost assumptions differ from the CCM. In this case, several of ADEQ's and APS's cost assumptions for control costs at Cholla differed from the CCM, but no such documentation was provided as part of the Arizona Regional Haze SIP.

a. BART Analysis and Determination for NO_X

Comment: One commenter (Earthjustice) commended EPA's decision to disapprove ADEQ's NO_X BART determination for Cholla Units 2, 3 and 4. The commenter stated that EPA correctly concluded that ADEQ's BART determination for NO_X inflated the costs of more-stringent NO_X controls by including costs not allowed by the Manual, and substantially underestimated the visibility benefits of additional NO_X controls. The commenter asserted that because ADEQ's BART analysis does not comply with the RHR's requirements, EPA must disapprove ADEQ's BART determinations for Cholla Units 2, 3 and 4.

[47] 40 CFR Part 51, Appendix Y, section IV.4.a., note 15.

Response: As explained in our proposal and elsewhere in this document, we agree that ADEQ's BART analyses and determinations for NO_X at Cholla Units 2, 3 and 4 do not comply with the requirements of the CAA and RHR. We are therefore disapproving these determinations.

b. BART Analysis and Determination for PM_{10}

Comment: One commenter (NPS) agreed with EPA's proposal to approve ADEQ's BART determination for Cholla Units 2, 3 and 4 of an emission limit of 0.015 lb/MMBtu for PM_{10} based on the use of fabric filters, the most stringent control technology available. In contrast, a second commenter (Earthjustice) disagreed with EPA's proposal to approve ADEQ's PM BART determination for Cholla Units 2, 3 and 4. The commenter contended that EPA proposed to approve the BART determination despite acknowledging that ADEQ did not conduct a full BART analysis for PM because fabric filters are the most stringent PM control technology available and ADEQ's 0.015 lb/MMBtu emission limit is "consistent" with other EGUs employing fabric filters (citing 77 FR 42849). However, the commenter believes that lower emission rates are achievable with fabric filters and, as a result, that EPA should disapprove ADEQ's BART determination, conduct a full five-factor BART analysis and set a lower emission limit as BART for PM_{10}. According to the commenter, the BART Guidelines' exemption from a full five-factor analysis for the most stringent control technology is not applicable in this case because improvements to the fabric filters are possible and a lower emission rate is thus achievable.

The latter commenter (Earthjustice) stated that had EPA conducted the PM_{10} BART analysis required by the RHR, it would show that an emission rate lower than 0.015 lb/MMBtu is BART for Cholla. According to the commenter, an expert report accompanying the commenter's submission (the "Sahu report") demonstrates that upgrades to the fabric filters can achieve a lower emission limit and, moreover, that nearly 100 EGUs across the nation with a variety of PM controls achieve emission rates lower than 0.015 lb/MMBtu. The commenter asserted that neither ADEQ nor EPA provided any explanation why Cholla Units 2, 3 and 4 could not similarly meet a lower emission limit.

Response: We are finalizing our approval of ADEQ's PM_{10} BART determination at Cholla Units 2, 3 and 4. We find that an emission limit of 0.015 lb/MMBtu represents what can be continuously achieved with a properly operated baghouse on these units. The fabric filters (i.e., baghouses) at Cholla will all be new since they are scheduled to be installed between 2008 and 2016. Recent PSD BACT limits for coal-fired EGUs with new baghouses have typically ranged from 0.01 to 0.015 lb/MMBtu using Method 5.

As to the commenter's position that bag material selection would influence the level of PM that could be achieved, EPA notes that there are a number of factors that influence a utility's selection of proper bag material such as bag life, compatibility with exhaust gas stream and control of other pollutants such as mercury (Hg) or sulfuric acid mist (H_2SO_4). In addition, it should be noted that the latest revision to the EGU NSPS requires modified units to meet a PM limit of 0.015 lb/MMBtu.[48] Also, as noted above, the recent EGU MATS rule sets a PM emissions standard of 0.03 lb/MMBtu, and the BART Guidelines provide that, "unless there are new technologies subsequent to the MACT standards which would lead to cost-effective increases in the level of control, you may rely on the MACT standards for purposes of BART."[49] Therefore, we are finalizing our proposed approval of ADEQ's BART determination for PM_{10} at Cholla Units 2, 3 and 4.

c. ADEQ's BART Analysis and Determination for SO_2

Comment: Citing various examples of lower SO_2 limits at other coal-fired units, one commenter argued that the existing scrubbers at Cholla can be upgraded to achieve lower emission rates than the 0.15 lb/MMBtu proposed by EPA. Based on the SO_2 control data submitted by the commenter, the commenter asserted that other BART upgrades are achieving higher removal efficiencies and/or lower SO_2 limits.

Another commenter (Earthjustice) disagreed with EPA's proposal to approve ADEQ's SO_2 BART determination for Cholla Units 2, 3 and 4. The commenter states the approval is contrary to the RHR because ADEQ's BART determination is not supported by a valid five-factor analysis, which the commenter believes had flaws in its cost and visibility improvement analyses. The commenter alleged that EPA proposed to approve the SO_2 BART determinations based on unsupported speculation that the outcome would be the same if EPA performed the BART analysis required by the RHR, although EPA identified nothing in the docket to support its claim that a full BART analysis would have yielded the same result. The commenter states that EPA cannot speculate that it would reach the same conclusion as ADEQ, and it must undertake an independent full five-factor BART analysis.

The commenter further stated that ADEQ's SO_2 BART analysis for Cholla Units 2, 3 and 4 is also flawed because ADEQ failed to analyze controls and upgrades that would result in emission rates lower than the BART Guidelines' presumptive BART limits. According to the commenter, EPA has recognized multiple times that the presumptive BART limits are merely the starting point for the BART determination, not the ending point. Moreover, the commenter asserted that the presumptive limits are often outdated with the result that appropriate consideration of the five statutory BART factors can result in far lower emission rates than presumptive BART. The commenter cited statements by EPA Region 6 (76 FR 64186, 64203, October 17, 2011, regarding proposed actions on Arkansas' RH SIP) and EPA Region 9 (77 FR 51633 regarding the final RH FIP for the Four Corners Power Plant).

Earthjustice also presented documentation that the commenter believes to show that lower SO_2 emission limits are achievable and cost-effective at Cholla Units 2, 3 and 4. According to the commenter, a report submitted with the comments (the "Stamper report")[50] shows that a proper BART determination for Cholla would have found that 98 percent SO_2 control efficiency achieving a 0.04 lb/MMBtu emission limit is BART for the units, and that even with the less-stringent 95 percent SO_2 control efficiency that is the basis of ADEQ's BART determinations, ADEQ should have required an SO_2 emission limit of 0.10 lb/MMBtu because 0.15 lb/MMBtu limit does not reflect 95 percent SO_2 removal.

Another commenter (APS) noted that the SO_2 content of the coal source for the Cholla plant is up to 3.0 lbs/MMBtu, and the maximum rate of removal that will be continuously achievable after the plant upgrades its scrubbers is 95 percent. Therefore, the commenter asserts that 0.15 lb/MMBtu is the

[48] 77 FR 9450 (February 16, 2012) (codified at 40 CFR 60.42Da).

[49] 40 CFR Part 51, Appendix Y, Section IV.C.

[50] Attachment 1 to Earthjustice Comments, Technical Support Document to Comments of Conservation Organizations, Proposed Arizona Regional Haze Partial SIP Approval and Partial FIP SO_2 and NO_X BART Determinations for Cholla Units 2, 3 and 4 (September 17, 2012), prepared by Victoria Stamper.

maximum achievable SO_2 emissions limit.

Response: A number of commenters indicated that lower emission levels are being achieved at other sources with wet FGDs and western coal. However, none of these examples are based on coal with as high a potential SO_2 level as the coal that is currently burned at Cholla. APS historically burned coal from the McKinley mine located on the Navajo Reservation at the Cholla units. Following the closure of this mine, APS obtained coal from various sources until the company signed a long-term contract for coal from the El Segundo and Lee Ranch mines in New Mexico.[51] The sulfur content of coal from these two mines is substantially higher than Powder River Basin (PRB) coal and also much higher than coal from the former source, the McKinley mine.[52] The current coal contract for these units indicates that the typical sulfur content of this coal is equivalent to 2.4 lb/MMBtu SO_2 and can be as high as 3.0 lb/MMBtu.[53] Given that the transition to this coal has already occurred and that company has entered into a contract to continue purchasing this coal until 2024, we consider emissions based on this coal supply to "represent a realistic depiction of anticipated annual emissions for the source." [54] The RHR and the BART Guidelines do not require states to restrict or alter a facility's selection of the coal supply in order to meet a specific limit.

APS's comments on the proposal indicate that the company intends to upgrade the existing SO_2 controls at Unit 2 to a new wet flue gas desulfurization (FGD) system, identical to those already installed on Units 3 and 4.[55] APS further explained that:

> The coal source for [Cholla] is El Segundo and Lee Ranch coal with an SO_2 content of up to 3.0 lbs/mmBtu.The maximum rate of removal that will be continuously achievable after the scrubber upgrades * * * are performed is 95 percent. If compliance is determined on a 30-day rolling average basis, the maximum SO_2 emission limit achievable at Cholla on a continuous basis is, therefore, 0.15 lb/mmBtu. [56]

Given this information, EPA finds that the ADEQ BART limit of 0.15 lb/MMBtu represents BART for SO_2 at these units. As noted by APS, this limit would require a removal efficiency of 95 percent when these units are burning this "worst-case" (highest-sulfur) coal (i.e., 3.0 lb/MMBtu). Therefore, we are finalizing our approval of ADEQ's BART limit of 0.15 lb/MMBtu of SO_2 for these units.

However, we remain concerned that this worst case coal is not representative of the typical coal that APS will receive from the El Segundo and Lee Ranch mines. APS's current contract for this coal indicates that the minimum sulfur content is equivalent to 1.88 lb/MMBtu of SO_2 for the El Segundo coal and 1.64 lb/MMBtu of SO_2 for the Lee Ranch Coal.[57] When burning this lower-sulfur coal, the units would only need to achieve 90 to 92 percent control in order to meet the BART limit of 0.15 lb/MMBtu of SO_2. While APS has stated that the scrubbers on Cholla Units 2, 3 and 4 will be able to continuously achieve a removal efficiency of 95 percent, the Arizona Regional Haze SIP does not include a requirement or procedures to ensure that the scrubbers are operated and maintained to achieve this level of control. Therefore, in order to ensure that these scrubbers are properly operated and maintained, consistent with 40 CFR 51.308(e)(1)(v), we are finalizing a removal efficiency requirement for SO_2 of 95 percent on a 30-day rolling basis for Cholla Units 2, 3 and 4. This requirement is explained further under "Comments on Enforceability Requirements in EPA's BART FIP."

4. ADEQ's BART Analyses and Determinations for Coronado Units 1 and 2

a. ADEQ's BART Analysis and Determination for NO_X

Comment: One commenter (NPS) agreed with EPA that ADEQ's BART selection of LNB with OFA for Coronado is not adequately supported for the following reasons:

- ADEQ did not consider the typical visibility metrics of benefit at the area with maximum impact, nor benefits summed over the areas.
- Using the default 1 ppb ammonia background concentration would have increased estimated impacts and control benefits.
- There is no weighing of the visibility benefits and visibility cost-effectiveness for the various candidate controls and the various Class I areas.
- ADEQ does not indicate whether it considered any cost thresholds to be reasonable or expensive in analyzing the costs of compliance for the various control options.

Similarly, another commenter (Earthjustice) supported EPA's disapproval of ADEQ's NO_X BART determination for Coronado Units 1 and 2. For the reasons discussed by the commenter above for Cholla Units 2, 3 and 4, the commenter agreed with what the commenter said was EPA's conclusion that all of ADEQ's BART determinations are fatally flawed in numerous respects (e.g., inflated costs and underestimated visibility benefits). Specific to Coronado, the commenter agreed that ADEQ failed to provide detailed and verifiable cost information and to properly consider the costs of compliance for each control option in its BART analysis (citing 77 FR 42851). In addition, the commenter indicated that ADEQ failed to properly evaluate the visibility benefits of more-stringent NO_X controls at Coronado, used a novel and unapproved metric to measure visibility benefits, failed to consider cumulative visibility benefits across all affected Class I areas, and used incorrect background ammonia concentrations in its modeling. The commenter added that ADEQ also failed to explain how it evaluated the five statutory BART factors and selected BART based on the factors. The commenter asserted that because ADEQ's BART analysis does not comply with the RHR's requirements, EPA properly disapproved ADEQ's NO_X BART determinations for Coronado.

Response: We agree that ADEQ's BART analysis for NO_X at Coronado Units 1 and 2 did not comply with the requirements of the CAA and RHR.

Comment: One commenter (SRP) stated that EPA must accept ADEQ's BART determination for NO_X because it was a complete and thorough five-factor analysis conducted in accordance with the BART Guidelines and resulted in a reasonable and appropriate determination of NO_X BART for Coronado.

Response: We do not agree with this comment. As explained in the NPRM and elsewhere in this document, ADEQ's BART determinations for NO_X did not comply with the requirements of the RHR or the BART Guidelines. Therefore, we are finalizing our disapproval of these NO_X BART determinations, including the determinations at Coronado Units 1 and 2.

b. ADEQ's BART Analysis and Determination for PM_{10}

Comment: One commenter (NPS) agreed with EPA's proposal to approve ADEQ's PM_{10} BART determination for

[51] See "Additional APS Cholla BART response", Appendix B.

[52] See, e.g., "APS Cholla Unit 2 BART report", Table 2–2.

[53] See "Additional APS Cholla BART response", Appendix B, Section 6.2.

[54] BART Guidelines, 40 CFR Part 51, Appendix Y, section IV.D.4.d.

[55] "Comments of Arizona Public Service Company", page 27.

[56] *Id.* page 63.

[57] See "Additional APS Cholla BART response", Appendix B, Section 6.2.

Coronado Units 1 and 2, noting that that emissions of PM_{10} from Coronado Units 1 and 2 are currently controlled by hot-side ESPs and that, in terms of the consent decree, SRP is required to optimize its ESPs to achieve a PM_{10} emission rate of 0.030 lb/MMBtu.

Another commenter (SRP) stated that EPA's approval of the Arizona BART determination for PM_{10} is reasonable and appropriate, believing it to be consistent with the CAA and supported by the technical record in this rulemaking. The commenter does not believe any upgrades to the ESPs are warranted as part of the BART determination, as SRP has in place a plan to optimize performance of the existing equipment. The commenter noted that as part of the consent decree between SRP and EPA for Coronado, SRP is required to operate the ESPs "at all times when the Unit it serves is in operation to maximize PM emission reductions, provided that such operation of the ESP is consistent with the technological limitations, manufacturers' specifications, and good engineering and maintenance practices for the ESP," and this requirement also is reflected in Coronado's current Title V operating permit.

The commenter also noted that the PM_{10} limit in the recently promulgated MATS Rule will be more stringent than the PM_{10} limit proposed as BART. The commenter indicated that it makes sense for BACT to be more stringent than BART, and it likewise is appropriate for the MATS requirements to impose more stringent compliance obligations on utilities than a BART determination since MATS is intended to protect the public health from hazardous air pollutants, while BART is aimed at aesthetic concerns that Congress intended the states to address very gradually.

In contrast, a third commenter (Earthjustice) disagreed with EPA's proposal to approve ADEQ's PM_{10} BART determination for Coronado Units 1 and 2. The commenter contended that EPA proposed to approve the BART determination despite acknowledging that ADEQ did not conduct a full BART analysis for PM_{10} because EGUs with ESPs elsewhere have BART limits of 0.03 lb/MMBtu. However, the commenter believes that lower emission rates are achievable and, as a result, that EPA should disapprove ADEQ's BART determination, conduct a full five-factor BART analysis and set a lower emission limit as BART for PM_{10}. According to the commenter, the Sahu report demonstrates that nearly 150 EGUs across the nation with a variety of PM controls achieve emission rates lower than 0.03 lb/MMBtu. The commenter asserted that neither ADEQ nor EPA provided any explanation why Coronado Units 1 and 2 could not similarly meet a lower emission limit.

Response: EPA acknowledges that ADEQ did not perform a rigorous five-factor BART analysis for PM_{10} at Coronado. However, a full five-factor analysis would be very unlikely to result in a change of control technology for PM_{10}. Modeling of visibility impacts from direct PM_{10} emissions has shown very small impairment for EGU PM_{10} emissions in comparison to visibility impairment resulting from SO_2 and NO_X emissions. The existing hotside ESPs at Coronado Units 1 and 2 control PM_{10} by greater than 98 percent. In addition, SRP is required under a Consent Decree to optimize the performance of these ESPs and to meet a PM limit of 0.030 lb/MMBtu as measured by Method 5.[58] The consent decree also requires Coronado to install and conduct performance specification testing of a particulate matter CEMS (PMCEMS).

Installing the best control, a baghouse, would result in a cost exceeding $100,000/ton of additional PM removed. From a cost and visibility improvement standpoint, it is not justifiable to require replacement of controls that can achieve a reasonably low emission level on a continuous basis. As noted previously, 0.030 lb/MMBtu is the limit for filterable PM in the recently issued EGU MATS rule. Therefore, we are finalizing our approval of ADEQ's BART determination for PM_{10} at these units.

c. ADEQ's BART Analysis and Determination for SO_2

Comment: One commenter (NPS) noted that the consent decree between EPA and SRP requires installation of wet flue gas desulfurization (WFGD) systems on both Coronado units to achieve a 30-day rolling average SO_2 removal efficiency of at least 95 percent or a 30-day rolling average SO_2 emissions rate of no greater than 0.080 lb/MMBtu. The commenter added that EPA proposed to approve ADEQ's BART SO_2 emission limit of 0.08 lb/MMBtu (30-day rolling average) for Coronado Units 1 and 2, which the commenter indicated would be consistent with the more stringent limits on WFGD upgrades that the commenter has seen.

One commenter (SRP) stated that EPA's approval of ADEQ's BART determination for SO_2 is reasonable and appropriate, believing it to be supported by the technical record. In response to EPA's request for comment on whether a lower emission limit may be achievable when the units are burning a lower-sulfur coal, the commenter responded that it is inappropriate for EPA to establish a BART limit that would be premised on any restriction of SRP's fuel supply. According to the commenter, this type of restriction would increase unit operating costs and reduce operational flexibility, and EPA provides no technical record to support consideration of this emissions reduction option.

Another commenter (Earthjustice) disagreed with EPA's proposal to approve ADEQ's SO_2 BART determination. The commenter states the approval is contrary to the RHR because ADEQ's BART analyses are not supported by a valid five-factor analysis. The commenter states that EPA cannot speculate that it would reach the same conclusion as ADEQ, and it must undertake an independent full five-factor BART analysis, which the commenter believes would result in a SO_2 BART limit of 0.04 lb/MMBtu based on a 30-day rolling average. Earthjustice further asserted that, according to the Sahu report, WFGD can achieve SO_2 removal efficiencies of 98 percent and the use of low-sulfur coals, which can further reduce SO_2 emissions, also should have been investigated.

Response: EPA does not agree that we should disapprove the ADEQ BART determination and set an emission limit as low as 0.04 lb/MMBtu for SO_2. EPA does acknowledge that while burning some coals, such as from PRB, these limits can be achieved at new units (though only achieved continuously over longer than 30-day averages), but EPA does not find that this limit would be consistently achievable at Coronado. Coronado receives its coal supply by rail line and has access to various sources of coal including PRB, Colorado and New Mexico coals. As mentioned previously, the RHR and the BART Guidelines do not require emission limits to be set at a level that would restrict the flexibility of EGUs to use available coals with varying sulfur content.

The consent decree between EPA and SRP described in our proposal requires installation of wet flue gas desulfurization (WFGD) systems (i.e., new scrubbers) at both units at Coronado by January 1, 2013. These scrubbers are required to achieve either 0.080 lb/MMBtu of SO_2 or 95 percent reduction of SO_2 across the FGD, both

[58] Consent Decree in *United States* v. *Salt River Project*, CV 08–1479–PHX–JAT (entered Dec. 19, 2008).

over a rolling 30-day basis.[59] ADEQ has selected 0.08 lb/MMBtu as the BART emission limit for these units. We find that this is an appropriate limit for these units and are finalizing our approval of this determination.

We also note that the recently promulgated EGU MATS rule, which uses an SO_2 limit as an acceptable surrogate for limiting the emissions of hazardous acid gases, has set the limit at 0.20 lb/MMBtu of SO_2 for existing EGUs like Coronado Units 1 and 2.[60]

C. General Comments on EPA's BART FIP Analyses and Determinations

1. Selection of Baseline Period

Comment: Several commenters expressed disagreement with our general approach to the selection of baseline periods. One commenter (NPS) stated a general preference for the use of a baseline period that represents pre-control emissions, as advised in the BART Guidelines, to estimate baseline emissions for the purpose of calculating the average cost-effectiveness of the complete control system (e.g., combustion controls plus SCR). The commenter believes that this avoids any biasing of the calculations by sources that install combustion controls during the BART evaluation process. NPCA asserted that the "proper" baseline for BART determinations is 2001–2004. ADEQ asserted EPA violated the RHR provision in 51.308(d)(2)(i), which specifies the period for establishing baseline visibility conditions as 2000–2004, by using the period between 2008 and 2011 as a baseline period for EPA's BART analyses.

Response: We disagree that our use of updated baseline periods for BART determinations is inappropriate or inconsistent with the CAA or the RHR. While the RHR specifies 2000–2004 as the baseline for purposes of measuring reasonable progress at Class I areas during the first implementation period,[61] neither the RHR nor the BART Guidelines require that this particular timeframe be used as the baseline for BART determinations at individual sources. Rather, the Guidelines provide that, for purposes of calculating the costs of compliance:

> The baseline emissions rate should represent a realistic depiction of anticipated annual emissions for the source. In general, for the existing sources subject to BART, you will estimate the anticipated annual emissions based upon actual emissions from a baseline period.[62]

This provision is consistent with the statutory requirement that each BART determination take into consideration "any existing pollution control technology in use at the source."[63] While the Guidelines do not specify particular dates for this "baseline period" for BART analyses, in order to "represent a realistic depiction of anticipated annual emissions for the source" the baseline can account for controls already installed on the source, or, where appropriate, controls which are required to be installed in the near future.

In many instances, the 2000–2004 time frame was used as a baseline period for BART determinations because this time frame reflected existing controls in use at BART sources at the time BART analyses were performed, following the issuance of the final BART Guidelines in 2005. In Arizona's case, the initial BART analyses were performed in 2007, using baseline periods that varied by source: 2002–2007 for Apache; 2001–2003 for Cholla; and 2001–2003 for Coronado.[64] These periods appear to reflect controls in existence at the time that these BART analyses were performed. Our proposed disapproval of certain aspects of Arizona's BART determinations was not based on any flaw in the choice of baseline period.

However, having proposed to disapprove Arizona's BART determinations for NO_X on other grounds, we were obligated to conduct our own five-factor BART analyses for NO_X for these sources. At the time we conducted our analysis in 2011 and 2012, several of these units had been retrofitted with additional NO_X controls that were not in place between 2000 and 2004. In particular, Cholla had installed LNB on Units 2, 3 and 4 in 2008 to 2009, and Coronado had installed LNB at Unit 1 in 2009.[65] In addition, during this time period, Cholla completed its transition to a different coal with much higher potential NO_X emissions.[66] Thus, in order to take into account existing controls and to ensure that the baseline period accurately represented anticipated future emissions, we updated the baseline period for each unit to ensure that it reflected these changes.[67]

With respect to Coronado Unit 2, we also took into account the federally-enforceable emissions limits set by a Consent Decree between the United States and SRP, which was entered in 2008.[68] Again, this is consistent with the BART Guidelines, which provide that:

> When you project that future operating parameters (e.g., limited hours of operation or capacity utilization, type of fuel, raw materials or product mix or type) will differ from past practice, and if this projection has a deciding effect in the BART determination, then you must make these parameters or assumptions into enforceable limitations. In the absence of enforceable limitations, you calculate baseline emissions based upon continuation of past practice.[69]

Consistent with this provision, for Coronado we used the consent decree-mandated NO_X emission limit of 0.08 lb/MMBtu in order to ensure that the baseline emissions rate would represent a realistic depiction of anticipated annual emissions for Unit 2.

We note that such an "updated baseline" might not be appropriate in all instances. For instance, if it appeared that controls had been installed early in order to avoid a more stringent BART determination, it would presumably not be appropriate to use a baseline representing these new controls. We find no evidence of such intent here. Rather, with respect to Coronado, the installation of new NO_X and SO_2 controls was required by a consent decree. With respect to Cholla, the installation of newly installed NO_X and SO_2 controls coincided with increases in potential emissions of these pollutants resulting from a change in coal supply.[70] Therefore, the more recent baseline is likely to be more representative of future operating conditions at these units.

Contrary to the assertions of some commenters, use of updated baselines did not unfairly penalize those sources that reduced their NO_X emissions in advance of a final BART determination. Rather, the updated baseline effectively *lowered* the baseline visibility impacts from these sources by reducing the baseline emissions. As a result, the projected benefits of additional controls

[59] Consent Decree in *United States* v. *Salt River Project*, CV 08–1479–PHX–JAT (entered Dec. 19, 2008).

[60] 77 FR 9490 (February 16, 2012), codified in Table 2 to Subpart UUUUU of 40 CFR Part 63.

[61] See 40 CFR 51.308(d)(2)(i).

[62] BART Guidelines, 40 CFR Part 51, Appendix Y, section IV.D.4.d.1

[63] CAA 169A(g)(2), 42 U.S.C. 7491(g)(2); see also 40 CFR 52.308(e)(ii)(A).

[64] See, e.g., SIP Appendix D at 4; Apache Unit 2 BART analysis at 2–2; Cholla.

[65] 77 FR 42859, 42861. Although no new NO_X controls were installed at Apache during this timeframe, we determined that more recent emissions data (2008–2011 rather than 2005–2007) were more likely to represent future emissions. 77 FR 42856.

[66] 77 FR 42856, 42859, 42861.

[67] 77 FR 42861.

[68] Consent Decree in *United States* v. *Salt River Project*, CV 08–1479–PHX–JAT (entered December 19, 2008).

[69] BART Guidelines, 40 CFR Part 51, Appendix Y, section IV.D.4.d.2.

[70] See Docket Item B–09, "Additional APS Cholla BART response", Appendix B, Section 6.2.

were less than if we had used the original baseline. This approach is consistent with the RHR and the BART Guidelines because it accurately reflects controls in place at the time we performed our BART analysis. Nonetheless, in order to address commenters' concerns about the effect of the updated baselines on our proposed determinations, we have also taken into account the original baseline periods considered by ADEQ, as part of the supplemental cost analyses described below.

Finally, we note that the use of a more recent baseline for purposes of our BART analyses does not alter the baseline used for purposes of measuring reasonable progress. As noted by several commenters, the RHR specifies that, for purposes of setting RPGs and measuring progress:

> The period for establishing baseline visibility conditions is 2000 to 2004. Baseline visibility conditions must be calculated, using available monitoring data, by establishing the average degree of visibility impairment for the most and least impaired days for each calendar year from 2000 to 2004. The baseline visibility conditions are the average of these annual values.[71]

In its Regional Haze SIP, Arizona used IMPROVE monitoring data from 2000–2004 to calculate baseline visibility for the best and worst visibility days for each Class I Area.[72] Since these baseline visibility conditions are calculated based on monitored conditions at Class I areas, they reflect actual emissions that occurred during the 2000–2004 time frame, rather than any subsequently implemented controls.

In developing its long-term strategy, a state must consider *inter alia* "[e]missions limitations and schedules for compliance to achieve the reasonable progress goal" and the "anticipated net effect on visibility due to projected changes in point, area, and mobile source emissions over the next 10 years."[73] This would include any reductions in emissions from BART sources that are implemented prior to a final BART determination, as well as any reductions resulting from such a determination. Thus, in setting its RPGs for 2018, a state may receive "credit" for any reductions achieved during the first implementation period, regardless of whether or not those reductions are reflected in the "baseline" emissions for a particular BART source.

EPA has not yet proposed action on Arizona's RPGs or long-term strategy. Our ultimate action on these elements of the plan will take into consideration all emissions reductions achieved during the first implementation period, consistent with the requirements of the CAA and the RHR.

2. Control Efficiencies and Emission Reductions for Alternative Controls

Comment: One commenter (NPS) concurred with EPA's reliance on an SCR level of performance of 0.05 lb/MMBtu. The commenter noted that this level is consistent with EPA's determination for the San Juan Generating Station in New Mexico and EPA's assumptions for the Colstrip and Corette power plants in Montana.

Response: We acknowledge the commenter's concurrence. As described further below, information received in comments on our proposal continues to support the use of an SCR level of performance of 0.05 lb/MMBtu on an annual average basis. Accordingly, we have retained the use of 0.05 lb/MMBtu in our cost calculations (which are based on annual emissions). However, in setting emission limits on a 30-day rolling average basis, it is necessary to account for startup and shutdown events, which raise the average emission rates over this shorter period of time. Therefore, we have revised our proposed emission limits for SCR at each of the sources. As explained below, we have also taken into account other site-specific factors in revising the emissions limits. In the case of Apache Units 2 and 3, we have performed a supplemental analysis using AEPCO's cost estimates that are allowed by the CCM (capital costs for the installation of SCR with LNB and OFA of $164.9 million). We also considered comments, the size of the Apache facility, AEPCO's classification as a small entity, the economic effects of requiring the use of SCR on Apache Units 2 and 3, and AEPCO's arguments regarding an SCR emissions limit of 0.07 lb/MMBtu. As discussed below in this preamble, we have concluded that in this case it is appropriate to revise the 30-day rolling average SCR limit to 0.070 lb/MMBtu, with a "bubble" across Apache Units 2 and 3. In the case of Cholla, we have taken into account the need to accommodate startup and shutdown events in the 30-day rolling average and have revised the limit to 0.055 lb/MMBtu, with a bubble across Units 2, 3 and 4. Finally, in the case of Coronado, we have taken into account both the need to accommodate startup and shutdown events, as well as the existing consent decree, which sets an emission limit of 0.080 lb/MMBtu for Unit 2. Based on these considerations, we have set a two-unit 30-day rolling average limit of 0.065 lb/MMbtu. For each of the three sources, we have established the compliance determination method such that when one unit is not operating, the emissions from its own preceding thirty boiler-operating-days will continue to be included in the 30-day rolling average. In the case of Coronado, for example, during periods when only one unit operates, this method allows the one operating unit to average out short-term emission spikes by using the most recent thirty boiler-operating-day value from the non-operating unit. Otherwise, averaging across units would not be possible during such periods, since the emissions value from the non-operating unit would be zero since it is not operating.

Comment: One commenter (Earthjustice), based on a report submitted with the comments (the "Sahu report"), stated that SCR can achieve greater NO_X reductions and visibility benefits at less cost than EPA's calculations. According to the commenter, while SCR systems are capable of achieving 90 percent or greater removal, EPA's proposed NO_X emission limit of 0.05 lb/MMBtu represents control levels of less than 90 percent at each of the Apache, Cholla and Coronado units. Accordingly, the commenter believes that EPA should have analyzed SCR with an emission limit of 0.04 lb/MMBtu because this level is achievable at 90 percent removal.

The commenter (Earthjustice), based on a separate report submitted with the comments (the "Stamper report"), stated that SCR systems are capable of achieving 90 percent or greater removal and EGUs elsewhere are subject to NO_X emission limits as low as 0.03 lb/MMBtu. The commenter cited several Prevention of Significant Deterioration (PSD) permit limits based on BACT determinations, including a 0.03 lb/MMbtu limit at Plant Washington, issued by Georgia Environmental Protection Division, and 0.035 lb/MMBtu for Desert Rock, issued by EPA Region 9. Accordingly, the commenter believes that EPA should have analyzed SCR with an emission limit of 0.04 lb/MMBtu because this level is achievable at 90 percent control for each of the units.

Response: We agree with the information provided by the commenters that SCR technology has the potential to achieve 90 percent and greater rates of removal, as well as achieve emission rates of less than 0.05 lb/MMBtu. However, we disagree with the commenter's assertion that emission limits associated with BART must meet the lowest emission rate achieved with

[71] 40 CFR 51.308(d)(2)(i).

[72] AZ Regional Haze SIP at page 39.

[73] 40 CFR 51.308(d)(3)(v)(G).

that technology at any coal-fired power plant. The RHR provides that:

> The determination of BART must be based on an analysis of the best system of continuous emission control technology available and associated emission reductions achievable for each BART-eligible source that is subject to BART * * *[74]

Additionally, the BART Guidelines state that: "[i]n assessing the capability of the control alternative, latitude exists to consider special circumstances pertinent to the specific source under review, or regarding the prior application of the control alternative"[75] and that "[t]o complete the BART process, you must establish enforceable emission limits that reflect the BART requirements * * *".[76] The five-factor BART analysis described in the Guidelines is a case-by-case analysis that considers site-specific factors in assessing the best technology for continuous emission controls. After a technology is determined as BART, the BART Guidelines require establishment of an emission limit that reflects the BART requirements, but does not specify that the emission limit must represent the maximum level of control achieved by the technology selected as BART. While the BART Guidelines and the RHR do not preclude selection of the maximum level of control achieved by a given technology as BART, the emission limit set to reflect BART must be determined based on a consideration and weighting of the five statutory BART factors. Therefore, limits set as BACT during PSD review (e.g., Desert Rock), or emission rates achieved from the operation of individual facilities under an emissions trading program (e.g., Clean Air Act Interstate Rule (CAIR)) may provide important information, but should not be construed to automatically represent the most appropriate BART limit for a given technology.

Comment: Several commenters (APS, AEPCO, SRP, AUG, Pacificorp) note that the proposed NO_X emission rate, as based on SCR technology, is more stringent than many other EPA actions. In its comments, SRP provided a contractor's report that found that the proposed limit is inconsistent with BACT determinations that EPA has approved for new coal-fired units in the following ways:

- Although there have been several units permitted with similar emissions limits, none of these limits are directly equivalent (same numeric limit and averaging time, including startup and shutdown periods).
- These units are based on new construction, which can be designed to optimize NO_X reduction in other aspects of combustion (i.e., pulverizer design, boiler height, etc.).
- There is inadequate data available to confirm the long-term achievability of the limits because the units have not begun operation or only recently became operational.

Other commenters note that, as part of the Cross State Air Pollution Rule (CSAPR), EPA concluded that a NO_X limit below 0.06 lb/MMBtu is not achievable through retrofit of SCR on coal-fired electric generating units.[77] AEPCO and APS also note that based on data from the RACT/BACT/LAER Clearinghouse, new coal-fired EGUs with SCR are only required to achieve 0.05 lb/MMBtu averaged over 12 months, and it is not appropriate to assume that a retrofit coal-fired unit can achieve this limit averaged over 30 days. SRP notes that the proposed limit for Coronado Unit 1 is more stringent than the recently promulgated NSPS for electric utility steam generating units constructed after May 3, 2011 (40 CFR part 60, subpart Da), which establishes a limit of 0.70 lb/MWh (0.077 lb/MMBtu) for new units, and 1.1 lb/MWh (0.11 lb/MMbtu) for modified units. APS also provided a report, originally prepared by RMB Consulting & Research, Inc. (RMB) for comment on the Regional Haze FIP for San Juan Generating Station, suggesting that the Subpart Da limits represent the most stringent level of available control. The RMB report states that EPA's Guidelines indicate that state regulatory agencies should consider NSPS limits in the BART evaluation except in cases where the NSPS might be considered outdated (e.g., "technology determinations from the 1970s or early 1980s"), which is not the case for the recently promulgated NSPS Subpart Da.

Response: We do not agree that our consideration of a NO_X emission limit of 0.050 lb/MMBtu was inappropriate. We note that, in its submitted comments, Earthjustice identified several recently issued permits that establish emission limits for SCR that are more stringent than our proposal. While limits set as BACT during PSD review may provide important information about the capabilities of various control technologies, they should not be construed to automatically represent (or in this context, constrain) the determination of what the most appropriate BART limit representative of a given technology is for a given facility. The emission limit set to reflect BART must be determined based on a consideration and weighing of the statutory BART factors. Although there are some similarities between the top-down BACT determination process and the five-step BART determination process, we note that a BACT determination is based almost exclusively on cost-effectiveness, and does not, for example, take visibility improvement at Class I areas into account.[78]

One of the commenters noted that in IPM modeling performed in support of the CSAPR rulemaking, we used an SCR emission rate of 0.06 lb/MMBtu for certain retrofit coal-fired EGUs, stating that this was the most stringent emission rate assumed achievable for retrofit units. It is important to note that IPM is a tool that operates using a large number of variables with values determined based upon a wide variety of assumptions. These assumptions, and the values upon which they are based, will necessarily change based upon the needs and context of the project or rulemaking for which IPM is used. It is therefore not appropriate to automatically consider a particular assumption or variable value (in this case, SCR emission rate) used in one application of IPM to represent a uniform standard or constraint against which all other uses of IPM should be compared.

In the case of the CSAPR rulemaking cited by the commenter, IPM was used to set state-wide budgets for NO_X based on assumptions that would be minimally achievable to a broad array of covered sources. The emission data and constraints fed into IPM therefore represented sector-wide modeling assumptions, which is a much different use and context than a BART determination, which must "take into account the most stringent emission control level" in order to establish a source-specific emission limit. As a result, we disagree that the 0.06 lb/MMBtu assumption used in the CSAPR rulemaking should be construed to

[74] 40 CFR 51.308(e)(1)(ii)(A).

[75] BART Guidelines, 40 CFR Part 51, Appendix Y, section IV.D.3.

[76] *Id.* section V.

[77] Citing 76 FR 1109, 1115, January 7, 2011; EPA, Transport Rule Engineering Feasibility Response to Comments, Docket ID No. EPA–HQ–OAR–2009–0491–4529, at 13, July 6, 2011.

[78] We note that a Class I area impact analysis must be performed by certain PSD projects as part of the permit application process. However, the visibility results are not used in the BACT determination, which is typically determined prior to performing the visibility modeling, and are not used to determine the appropriate level of control except in those cases where the visibility impact is sufficiently high to warrant mitigation measures that end up involving additional emission reductions.

represent the most stringent emission control level for SCR.

Similarly, we also disagree that the recently promulgated NSPS Subpart Da represents the most stringent emission control level for SCR. First, we acknowledge that while the BART Guidelines state that "EPA no longer concludes that the NSPS level of controls automatically represents 'the best these sources can install'" [79] this was written in the context of older NSPS subparts with technology evaluations that could potentially be outdated and not representative of current pollution control technology performance. We also acknowledge that, while the BART Guidelines provide for "situations where NSPS standards do not require the most stringent level of available control for all sources within a category" and cite NSPS Subpart GG (stationary gas turbines) as a subpart that does not consider post-combustion controls,[80] the recently promulgated NSPS Subpart Da does consider post-combustion controls such as SCR.[81]

Despite this language, however, we disagree with the commenter's assertion that NSPS Subpart Da represents the most stringent emission control level for SCR, or that an NSPS Subpart, even a recently promulgated one, should be treated as a "floor" for establishing BART emission limits. While the BART Guidelines provide that, "you may rely on MACT standards for purposes of BART," [82] they do not indicate that the same is true for the NSPS standards. An NSPS standard must establish an emission rate that is appropriate for all the units within its category,[83] which in the case of Subpart Da includes a variety of boiler types, coal types, and baseline emission rates that may not be representative of the Apache, Cholla, and Coronado units. Specifically in the case of the RMB report, which was prepared for the San Juan Generating Station, the assertion that the Subpart Da standards represent the most stringent level of available control is undermined by the report's findings that emission modeling indicates that the San Juan units could achieve NO_X emission rates in the range of 0.047 to 0.068 lb/MMBtu, which are emission rates lower than the Subpart Da standards.

Comment: Multiple commenters (AUG, APS, SRP) stated that EPA must consider presumptive BART limits. The commenters asserted that EPA cannot ignore presumptive BART limits because, as part of the BART Guidelines, they are binding regulatory presumptions that should only be deviated from based on a careful consideration of the BART factors (70 FR 39171).

EPA's Proposed Rule, however, does not reflect any such consideration. Indeed, EPA's Proposed Rule never even mentions the presumptive limits except to note that Arizona considered them. (77 FR 42847). The nature of and basis for EPA-established presumptive NO_X BART limits for the relevant units at Apache, Cholla, and Coronado show that EPA's determination in its proposed FIP that SCR—a much more costly, post-combustion technology—represents BART at these facilities is, at least, presumptively incorrect. Because EPA failed to consider the presumptive limits in developing its proposed FIP's BART limits for NO_X, the Proposed Rule is flawed and must be withdrawn.

The commenters also note that the RHR also established presumptive BART emission limits for NO_X emissions from fossil fuel-fired units through notice-and-comment rulemaking. The presumptive NO_X emissions limits for coal-fired EGUs vary according to individual source characteristics, including fuel firing configuration (tangential/wall-fired, opposed wall-fired, cyclone) and type of fuel burned (bituminous, sub-bituminous, lignite, etc.). Commenters also argued that, because EPA shifted the baseline for BART, it did not include combustion controls, such as LNB, in its analysis, and only considered higher cost post-combustion controls (SNCR and SCR).

Response: We disagree with the commenters' assertions that we ignored the presumptive BART NO_X limits. Because Apache, Cholla and Coronado all have access to and have historically burned both bituminous and sub-bituminous coal,[84] there is no single presumptive NO_X limit that applies to any of these units.[85] Therefore, rather than rely upon the numerical values of the presumptive NO_X limits listed in the BART Guidelines, we have considered the technological basis for presumptive NO_X BART limits, such as the use of combustion control technology, boiler type, and coal type, as part of the five-factor analysis we performed for each facility. For each source, we considered combustion controls as a potential option for BART.[86]

We also disagree with commenters' assertions that our selection of non-presumptive BART technology as BART is flawed or presumptively incorrect. In the BART Guidelines EPA explained that:

> For coal-fired EGUs greater than 200 MW located at greater than 750 MW power plants and operating without post-combustion controls (*i.e.* SCR or SNCR), we have provided presumptive NO_X limits, differentiated by boiler design and type of coal burned. You may determine that an alternative control level is appropriate based on a careful consideration of the statutory factors. For coal-fired EGUs greater than 200 MW located at power plants 750 MW or less in size and operating without post-combustion controls, you should likewise presume that these same levels are cost-effective. You should require such utility boilers to meet the following NO_X emission limits, unless you determine that an alternative control level is justified based on consideration of the statutory factors.[87]

Therefore, the presumptive emission limits in the BART Guidelines are rebuttable, and the five statutory factors enumerated in the BART Guidelines provide the mechanism for establishing different requirements. Specifically, as explained in the preamble to the BART Guidelines:

> If, upon examination of an individual EGU, a State determines that a different emission limit is appropriate based upon its analysis of the five factors, then the State may apply a more or less stringent limit.[88]

Thus, the establishment of presumptive BART limits, and the corresponding technology upon which those limits are based, does not preclude states or EPA from setting limits that differ from those presumptions. The five-factor analysis we performed for these facilities demonstrates that, taking into consideration the expected remaining useful life and the existing controls present at the facilities, SCR is cost-effective, results in the most visibility improvement of all feasible control technologies, and that these factors are not outweighed by SCR's potential energy and non-air quality environmental impacts. As a result, regardless of the appropriateness of SCR

[79] BART Guidelines, 40 CFR Part 51, Appendix Y, section IV.D.1, n. 13.

[80] *Id.* section IV.D.1.

[81] 40 CFR Part 60, Subpart Da.

[82] *Id.* section IV.C.

[83] Or subcategories, which Subpart Da does not establish except for "new" and "modified" units.

[84] See, e.g., Final Report, Apache Unit 2 BART Analysis, Table 3–1 (December 2007); Cholla Unit 2 BART Report, page ES–2; SRP Comments on Proposed Rule (September 2012), RMB Technical Memorandum, page 3.

[85] See BART Guidelines, 40 CFR Part 51, Appendix Y, Table 1.

[86] At Apache Units 2 and 3, we considered combustion controls (LNB plus OFA) as one of the control scenarios. At Cholla and Coronado, combustion controls were considered as part of the baseline emission rate and were a potential BART option in the event that the five-factor analysis indicated that no additional controls beyond the baseline were justified.

[87] BART Guidelines, 40 CFR Part 51, Appendix Y, section IV.E.5.

[88] 70 FR 39132.

as a control technology for most units on a national scale, our five-factor analyses establish that NO_X BART limits more stringent than the presumptive limits are appropriate for these units.

3. Costs of Compliance

Comment: Several commenters stated that EPA inappropriately conducted its cost analysis using generalized data and a regional model, whereas the CAA requires a BART determination to be based, in part, on a site-specific cost evaluation. One commenter (Navajo Nation) stated that EPA should justify its use of the IPM and explain why it did not use or request line item costs from the facilities to make its analysis more site-specific. This commenter also stated that EPA's reliance on the IPM is misplaced because the model integrates health-based regulations and not the RHR.

Another commenter (SRP) added that the proposed rule and the TSD say almost nothing about how IPM was used to calculate costs, instead directing the public to an EPA contractor report for more information. The commenter asserted that no contractor report in the docket for the rulemaking supplies additional detail on precisely how IPM was used. The commenter believes that this failing renders EPA's proposed rule inconsistent with the CAA's public notice requirements.

Response: As described in our proposal, the IPM is a multi-regional linear programming model of the U.S. electric power sector. IPM relies upon a very large number of data inputs and provides forecasts of least-cost capacity expansion, electricity dispatch, and emission control strategies for meeting energy demand and environmental, transmission, dispatch, and reliability constraints. EPA has used IPM to evaluate the cost and emissions impacts of proposed policies, such as the recent Mercury and Air Toxics Standard (MATS) to limit pollutant emissions from the electric power sector.

We wish to clarify that, for our proposed action on Arizona's Regional Haze SIP, we did not actually run IPM. Rather, we used one component of IPM, specifically, the component that develops the costs of air pollution control technologies. Broadly speaking, IPM relies upon numerous components and sub-components to specify constraints and variable values that feed into the model algorithms used during an actual IPM model run. The air pollution control cost development component is just one of these numerous components. We relied upon the cost information and equations contained in this component by manually placing them into a spreadsheet that calculated the capital and O&M costs associated with pollution control options. While we relied upon the results of these spreadsheet calculations, we did not then use those results to run IPM, as the type of information generated by an actual IPM model run (e.g., generation dispatch decisions, capacity decisions) is not relevant to our action. We documented our use of the equations from IPM's air pollution control technology cost component by placing the raw cost calculation spreadsheet in the docket for our proposal.[89] This spreadsheet contained the IPM equations, corresponding variable values, selected notes regarding assumptions and variable ranges as well as selected tables from IPM Base Case v4.10 documentation. Since we did not perform an actual IPM model run, the spreadsheet and contractor's report in the docket for our proposal sufficiently document our use of the cost methodologies from the IPM air pollution control cost component.

We disagree with commenters' characterization of the cost development methodology contained in IPM as generalized or outdated. As noted in the documentation for IPM's cost development methodology for SCR, the cost estimate methodology is based upon two databases of actual SCR projects.[90] These databases include 2004 and 2006 industry cost estimates prepared for the Midwestern Ozone Group (MOG), and a proprietary in-house database maintained by engineering firm Sargent & Lundy (S&L). The MOG information was cross-referenced with actual 2009 projects, and escalated accordingly. S&L then used the information in these databases to develop the equations described in the cost component taking into account the pre-control NO_X emission level, degree of reduction, coal type, facility size, and numerous other unit-specific factors. While a costly engineering evaluation that included site visits would potentially produce a more refined cost estimate that could be considered more site-specific than our own, we disagree that our approach has produced cost estimates that are either "generic" or "generalized."

Comment: Several commenters contended that where specific knowledge is available, the CCM is oriented to allow and provide for the use of such information. The commenters also note that the RHR explicitly provides that the cost analysis should take into account any site-specific information that affect the costs of a particular BART technology option, and the *Corn Growers* court explained that BART determinations must be made on a source-specific basis.

Response: While we agree that BART determinations must be made on a source-specific basis, we do not agree that site-specific information is required for all aspects of a BART analysis. Nonetheless, in order to address commenters' concerns that our proposal was based on cost information that was insufficiently site-specific and that the costs of the SCR with LNB and OFA control option, in particular, are not representative of actual installation costs at these facilities, we have performed a supplemental cost analysis. The supplemental cost analyses for each facility are described in Section IV.D of this document, and incorporate much of the cost information provided by the facilities in their comments. In performing this supplemental cost analysis, we have adopted a "hybrid" approach that relies on cost estimates provided by the facilities for certain line items, but still retains the use of the CCM methodology as described in the following response.

Comment: Several commenters stated that EPA's cost estimating techniques are flawed and its reliance on the outdated EPA CCM led to underestimates of costs. Several of these commenters noted that EPA claimed that owner's costs, surcharges and Allowance for Funds Used During Construction (AFUDC) are not allowed by EPA's CCM and refute that these costs are not allowed by the Manual. The commenters state that while the Manual does not have specific line items for owner's costs and surcharges, it discusses some of the items that roll up into these categories. APS, for example, states that:

> Owner's costs are home office and plant support costs that are charged directly to specific projects. These would include costs related to project management, engineering, construction support, start-up, training, etc. Surcharges are home office costs associated with a project that may not be charged directly to that project. These costs would be related to overhead loads, procurement, accounting, finance, etc.[91]

APS also notes that there is a line item for AFUDC in the Manual but provides that it is assumed to be zero percent, but that in its experience AFUDC is a real cost and is never zero percent. In

[89] Document ID: EPA–R09–OAR–2012–0021–0008, File name: G–15_MODELING_FILES_EGU_BART_Costs_Apache_Cholla_Coronado_FINAL2.

[90] *http://www.epa.gov/airmarkets/progsregs/epa-ipm/docs/v410/Appendix52A.pdf.*

[91] APS comments, page 12.

addition, the commenters state neither the CAA nor the BART Guidelines require the Manual to be used to determine the costs of compliance.

Response: With regard to owner's costs and surcharges, we agree with commenters' assertions that the CCM does discuss some of the items that roll up into these line items as they have described in comments. For the control option of SCR with LNB and OFA, for example, the CCM does provide for "Engineering and Home Office Fees" [92] that could potentially include some of the home office and plant support costs described in comments. These types of costs are often included in estimates under some type of engineering/procurement/project services line item. In the case of the cost estimates provided by the utilities (both those submitted to ADEQ as part of the original BART analysis, and those submitted to us in comments on our proposal), we note that their cost estimates are not organized to list line item(s) that clearly correspond to "Engineering and Home Office Fees," and do not provide information indicating where these costs may be included. As a result, while owner's costs and surcharge are not line items included in the CCM, in this instance, as a conservative assumption, we have included the portion of owner's costs/surcharge in the total cost, up to the value specified for "Engineering and Home Office Fees" indicated by the CCM.

We disagree with commenters' assertions that AFUDC is a cost that should be incorporated into our cost analysis, as it is inconsistent with CCM methodology. The utility industry uses a method known as "levelized costing" to conduct its internal comparisons, which is different from the methods specified by the CCM. Utilities use "levelized costing" to allow them to recover project costs over a period of several years and, as a result, realize a reasonable return on their investment. The CCM uses an approach sometimes referred to as overnight costing, which treats the costs of a project as if the project were completed "overnight", with no construction period and no interest accrual. Since assets under construction do not provide service to current customers, utilities cannot charge the interest and allowed return on equity associated with these assets to customers while under construction. Under the "levelized costing" methodology, AFUDC capitalizes the interest and return on equity that would accrue over the construction period and adds them to the rate base when construction is completed and the assets are used. Although it is included in capital costs, AFUDC primarily represents a tool for utilities to capture their cost of borrowing and return on equity during construction periods. AFUDC is not allowed as a capitalized cost associated with a pollution control device under CCM's overnight costing methodology, and is specifically disallowed for SCRs (i.e., set to zero) in the CCM.[93] Therefore, in reviewing other BART determinations, EPA has consistently excluded AFUDC.[94]

Comment: The ACCCE notes that the Manual specifically states that it does not directly address the controls needed to control air pollution at EGUs, citing the following quote from the Control Cost Manual:

> * * * this Manual does not directly address the controls needed to control air pollution at electrical generating units (EGUs) because of the differences in accounting for utility sources. Electrical utilities generally employ the EPRI Technical Assistance Guidance (TAG) as the basis for their cost estimation processes.

Response: We disagree with the commenter's assertion that the CCM does not address control costs needed to control air pollution at EGUs. The quote cited by the commenter contains a footnote that reads as follows:

> This does not mean that this Manual is an inappropriate resource for utilities. In fact, many power plant permit applications use the Manual to develop their costs. However, comparisons between utilities and across the industry generally employ a process called "levelized costing" that is different from the methodology used here.[95]

The quote is merely a factual observation that electric utilities, in their planning and cost estimating for their own purposes, use a different accounting method than required by the CCM. The footnote clarifies that the CCM is appropriate for utilities for regulatory purposes.

4. Energy and Non-Air Environmental Impacts

Comment: One commenter (ADEQ) stated that EPA should consider the costs associated with fly ash ammonia removal in selecting BART. Further, additional problems during disposal of fly ash may cause environmental damage and should not be discounted.

Response: EPA disagrees with this comment. First, we note that ammonia adsorption in the fly ash is expected to be minimal from SCR because excess ammonia would likely react with sulfuric acid to form particulate ammonium sulfate or ammonium bisulfate, which would not pose the same odor problem in fly ash reuse as adsorbed ammonia. Second, the facilities' own BART analyses did not include costs of fly ash disposal or ammonia removal in the cost estimates for SCR, which indicates that they do not consider these potential costs to be significant. Finally, we note that the Arizona Department of Transportation has designated fly ash from each of the three sources as approved material.[96] As explained in our proposed rulemaking and the accompanying TSD, the presence of ammonia does not impact the integrity of the use of fly ash in concrete.[97] Therefore, we have no information that suggests that installation of SCR would result in a change to the facilities' current fly ash disposal and re-use practices.

Comment: One commenter (SRP) stated that EPA downplayed the energy and non-air quality factor its revised BART determination in the proposed FIP, presenting the narrow conclusion that potential energy and non-air quality impacts do not warrant elimination of any of the otherwise feasible control options for NO_X at any of the sources. The commenter asserted that this narrow consideration of this factor is not tenable because this factor must be weighed and considered in conjunction with the other BART factors in the overall assessment of what control option constitutes BART for a particular source. The commenter believes that EPA's approach minimizes the role of this factor in a BART analysis, which is beyond EPA's authority.[98]

Response: EPA does not agree with this comment. The RHR and the BART Guidelines allow the reviewing authority (State, Tribe, or EPA) the discretion to determine how to weigh and in what order to evaluate the

[92] As described in Table 2–5 of the CCM, Engineering and Home Office Fees represent 10 percent of purchased equipment costs.

[93] CCM (Tables 1.4 and 2.5 show AFUDC value as zero).

[94] See, e.g., 77 FR 20894, 20916–17 (Apr. 6, 2012) (explaining in support of the North Dakota Regional Haze FIP, "we maintain that following the overnight method ensures equitable BART determinations * * *."); 76 FR 52388, 52399–400 (August 22, 2011) (explaining in the New Mexico Regional Haze FIP that the Manual does not allow AFUDC).

[95] EPA Air Pollution Cost Control Manual, Sixth Edition page 1–3.

[96] Approved Materials Source List, Fly Ash, Natural Pozzolan, and Lime, Revised July 10, 2012, available at *http://www.azdot.gov/Highways/Materials/*.

[97] See 77 FR 42853–4284, TSD at 38.

[98] Citing *Corn Growers*, 291 F.3d at 6–7 (finding that EPA's original 1999 regional haze rules had improperly divorced consideration of the BART visibility benefits factor from the other BART factors).

statutory factors (cost of compliance, the energy and non-air quality environmental impacts of compliance, any existing pollution control technology in use at the source, the remaining useful life of the source, and the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology), as long as the reviewing authority justifies its selection of the "best" level of control and explains the CAA factors that led the reviewing authority to choose that option over other control levels.[99] In this case, having disapproved the state's BART determinations for NO_X at several units, "all of the rights and duties that would otherwise fall to the State accrue instead to EPA."[100] This includes a significant degree of discretion in deciding how to weigh the five factors, so long as that weighing is accompanied by reasoned explanation for adopting the technology selected as BART, based on the five factors, and in accordance with the BART Guidelines. EPA has provided a detailed explanation of our BART evaluation process and five-factor analyses in our proposal, TSD and elsewhere in this document. We have weighed the potential energy and non-air environmental quality impacts of the various control options along with the other statutory factors in our BART analyses and have concluded that impacts do not warrant elimination of any of the otherwise feasible control options for NO_X at any of the sources.[101]

5. Remaining Useful Life of the Source

Comment: One commenter (APS) did not dispute EPA's assumption of a twenty-year useful life of the emission control equipment in its annualized cost calculations.

Response: EPA agrees with the commenter that this is an appropriate assumption for these sources.

6. Degree of Improvement in Visibility

Comment: One commenter (NPS) agreed with EPA that a more complete assessment of visibility improvement for candidate BART controls would include consideration of the number of areas affected and the degree of improvement expected at all Class I areas rather than focusing on a single area. The commenter commended EPA for its reliance on deciview improvement and the number of areas showing improvement, plus its consideration of cumulative improvement, which provides a supplemental measure that combines information on the number of areas and on individual area improvement.

In contrast, several commenters (ADEQ, AEPCO, APS and AUG) disagreed that EPA's new visibility metric, "cumulative visibility improvement," is an appropriate metric, asserting that this metric incorrectly inflates the estimated visibility improvements of various control options and should not be used. The commenters further stated that this metric does not appear anywhere in the CAA, RHR or BART Guidelines, and that these rules and guidelines specifically give discretion to states to determine how to take into account visibility impacts in a BART evaluation. In addition, the RHR (at 70 CFR 39170) supports identifying the single Class I area that would have the greatest visibility effects from emission controls and does not support adding improvements from multiple Class I areas in determining visibility effects. The commenters affirmed that EPA should use a change in deciview at the Class I area with the highest impact as its visibility metric, consistent with EPA's RHR and the method used by other EPA regions and states.

The commenters further stated that to be relevant to the environmental effect that the regional haze program addresses, the metric by which visibility improvement is determined for purposes of assessing BART for a particular facility must reflect actual human perception of visibility. The commenters added that the cumulative impact approach used by EPA has no tie to human perception and can only distort a BART analysis. The commenters believe that this approach arbitrarily magnifies the benefit that might be associated with emission limitations at a single source.

Response: EPA agrees with NPS on the need to consider visibility improvements at all the nearby Class I areas as part of a comprehensive assessment of the degree of visibility improvement due to BART controls. EPA disagrees with some other commenters that cumulative improvement over multiple areas is an inappropriate metric, or that examining a single Class I area is sufficient. The cumulative improvement metric (i.e., the simple sum of impacts or improvements over all the Class I areas) is not intended to correspond to a single human's perception at a given time and place. The approach is simply one way of assessing improvements at multiple areas, for consideration along with other visibility metrics. Another approach would be to simply list visibility improvements at the various areas, and qualitatively weigh the number of areas and the magnitudes of the improvements. The cumulative sum is simply an easily understood and objective way of weighing cumulative visibility improvement, as part of the overall BART decision.

Comment: One commenter performed NO_2 modeling by scaling tropospheric column NO_2 derived from satellite measurements, as portrayed in imagery from the Institute of Environmental Physics, University of Bremen, Germany. The commenter states that SCR would reduce NO_2 closer to background levels.

Response: While the facilities considered for BART control are not the only NO_X sources in the area, the commenter's scaling of the concentrations in the satellite images according to the reductions expected from SCR can give a rough idea of its NO_2 benefit. However, to assess visibility impacts, the model used must account for the formation of visibility-impairing ammonium nitrate particles. Under the BART Guidelines, CALPUFF is the recommended model that incorporates this nitrate chemistry. Alternative models could potentially be used if they had the ability to handle this and other chemical transformations and had undergone a rigorous performance evaluation.

Comment: One commenter (NPS) commended EPA for the thoroughness of its visibility modeling analyses and the methodologies used. The commenter noted that EPA used CALPUFF methods 6 and 8 and modeled against annual average and 20 percent best natural background conditions. The commenter also pointed out that EPA modeled all pollutants while varying NO_X emissions to evaluate the effects of changing this one pollutant.

Response: EPA acknowledges the comment. It was our intention to estimate visibility impacts accurately and transparently so that one could more easily compare results to earlier applications of CALPUFF and clearly understand the effect of old versus revised IMROVE equations (methods 6 and 8) as well as alternative natural background conditions. We modeled all pollutants together in order to account for chemical interactions among the various pollutants and also the nonlinear dependence of deciviews upon extinction.

Comment: One commenter (APS) stated that EPA's proposal noted that it is appropriate to use Method 6a, 6b, 8a or 8b in CALPOST within the CALPUFF model, yet EPA inappropriately rejected

[99] See BART Guidelines, 40 CFR Part 51, appendix Y, section IV.E.2.

[100] Central Arizona Water Conservation Dist. v. EPA, 990 F.2d 1531, 1541 (9th Cir. 1993).

[101] See 77 FR 42853–4284, TSD at 38.

ADEQ's use of Method 6a in its own analysis and instead used Method 8b, which yielded higher predicted visibility improvements in Class I areas.

Response: EPA did not reject ADEQ's use of visibility method 6a, which remains a viable method for past visibility modeling work under an agreed upon protocol. Method 6a comprises CALPOST Method 6, the old IMPROVE equation for translating pollutant concentration into visibility impacts, and annual average (the "a") natural background concentrations. However, for new visibility modeling, such as EPA performed for the FIP, method 8b is preferable. Method 8b comprises CALPOST Method 8, the revised IMPROVE equation, and best 20 percent of days (the "b") natural backgrounds. The revised IMPROVE equation has superior performance for assessing visibility, and is recommended by the Federal Land Managers for regional haze assessments performed for New Source Review permitting.[102] EPA believes that using the best 20 percent of days as a basis for background concentrations is desirable since visibility impacts due to emissions from facilities are most noticeable on the best days, that is, most visible to visitors of Class I areas. EPA assessed the results of both methods (and also the "6b" and "8a" combinations), but primarily relied on 8b as the most appropriate method in the BART context.

Comment: One commenter (APS) objected to EPA shifting the CAA's mandate to compare costs and benefits under the BART program to an assessment of "cost-effectiveness" ($/ton) without specifying the threshold level of what is cost-effective. APS also noted that in the absence of a specific threshold for cost-effectiveness, the FLMs have referred to a benchmark of $20 million per deciview as the upper limit. The commenter also presented data showing the incremental costs of going from LNB/OFA to SNCR or SCR to be over $20 million per deciview for Cholla.

Response: The commenter is correct that the BART Guidelines list the $/deciview ratio as an additional cost-effectiveness metric that can be employed along with $/ton for use in a BART evaluation, and we have included this information in our proposal. While the FLMs have indicated that they consider $20 million/dv to be a benchmark for average cost-effectiveness, we note that the BART Guidelines do not require the development of a specific threshold. The BART Guidelines, however, require that cost-effectiveness be calculated in terms of annualized dollars per ton of pollutant removed, or $/ton.[103] We considered cost of controls by discussing the total capital costs, annual costs, $/ton, and incremental $/ton, and considered the degree of visibility improvement by discussing the individual and cumulative deciview improvement resulting from the various control technology options, as well as the percent change in improvement. Our consideration of other metrics in addition to $/dv in no way relegates visibility improvement to a secondary role. Finally, we note that the FLMs' recommended "benchmarks" for dollars per deciview are for average dollars per deciview not *incremental* dollars per deciview.[104] Neither the BART Guidelines nor the FLMs recommend consideration of incremental dollars per deciview.

Comment: One commenter (NPS) cautioned against any implication in EPA's analyses that visibility improvement must exceed 0.5 dv to be significant. The commenter believes that such an approach would be contrary to the BART Guidelines.

Response: EPA agrees that the 0.5 dv threshold for "contribute to visibility impairment" is only for the initial Subject-to-BART screening test and it is a maximum even for that purpose, according to the BART Guidelines.[105] Smaller improvements from controls should be considered in BART determinations, since they can be beneficial in considering effects from controls on multiple sources.[106] We have used the 0.5 dv level simply as one point of comparison, a "benchmark" or "yardstick," to gauge the magnitude of impacts under various control scenarios.

Comment: Several commenters (APS, AUG, Navajo Nation, PacifiCorp and SRP) asserted that EPA's proposed NO_X BART determination rests on a flawed assessment of visibility impacts. The commenters made the following arguments to support their contention that EPA's modeling overestimates the visibility benefits associated with BART control options. First, EPA used an outdated version of the CALPUFF model (version 5.8) that over-predicts visibility benefits. Based on citations provided by the commenters, CALPUFF version 6.42 has been shown to provide better agreement with observed levels of nitrates. The commenters provided modeling results using CALPUFF version 6.42 for EPA's consideration. Second, EPA's outdated use of constant ammonia background concentration of 1.0 ppb over-predicts visibility benefits and fails to account for known monthly or seasonal variations. EPA inappropriately rejected ADEQ's use of variable background concentrations, which was well within the state's discretion. Several of these commenters also noted that a case study[107] by Terhorst and Berkman based on the 2005 closure of the Mohave Generating Station found virtually no evidence that closure resulted in improved visibility at the Grand Canyon. In addition, SRP stated that EPA must consider visibility benefits from NO_X controls within the context of nitrate contributions to regional haze. Studies of visibility impairment on the Colorado plateau show that nitrate aerosols contribute only two to five percent to haze.

Response: EPA disagrees with the commenters that any new CALPUFF version should be used for the BART determination. EPA relied on version 5.8 of CALPUFF because it is EPA-approved version in accordance with the Guideline on Air Quality Models ("GAQM", 40 CFR 51, Appendix W, section 6.2.1.e). EPA updated the specific version to be used for regulatory purposes on June 29, 2007, including minor revisions as of that date. The approved CALPUFF modeling system includes CALPUFF version 5.8, level 070623, and CALMET version 5.8 level 070623. CALPUFF version 5.8 has been thoroughly tested and evaluated, and has been shown to perform consistently with the initial 2003 version in the analytical situations for which CALPUFF has been approved. Any other version, and especially one with such fundamental differences in its handling of chemistry, would be considered an "alternative model", subject to the provisions of GAQM section 3.2.2(b), requiring full model

[102] *Federal Land Managers' Air Quality Related Values Work Group (FLAG) Phase I Report—Revised (2010),* U.S. Forest Service, National Park Service, U.S. Fish and Wildlife Service, October 2010. *http://www.nature.nps.gov/air/Pubs/pdf/flag/FLAG_2010.pdf.*

[103] BART Guidelines section IV.D.4.c.

[104] See, e.g. National Park Service Comments on Best Available Retrofit Technology for Apache, Cholla, and Coronado Power Plants in Arizona (September 17, 2012) at 6.

[105] BART Guidelines, 40 CFR Part 51, Appendix Y, section III.A.1 ("As a general matter, any threshold that you use for determining whether a source "contributes" to visibility impairment should not be higher than 0.5 deciviews.")

[106] See, e.g. 70 FR 39129 ("Even though the visibility improvement from an individual source may not be perceptible, it should still be considered in setting BART because the contribution to haze may be significant relative to other source contributions in the Class I area.")

[107] Terhorst, Jonathan and Berkman, Mark, "Effect of Coal-fired Power Generation on Visibility in a Nearby National Park", *Atmospheric Environment* 44, 2524, 2530 (Apr. 2010).

documentation, peer-review, and performance evaluation. No such information for the later CALPUFF versions that meet the requirements of section 3.2.2(b) has been submitted to or approved by EPA. Experience has shown that when the full evaluation procedure is not followed, errors that are not immediately apparent can be introduced along with new model features. For example, changes introduced to CALMET to improve simulation of over-water convective mixing heights caused their periodic collapse to zero, even over land, so that CALPUFF concentration estimates were no longer reliable.[108]

The change from CALPUFF version 5.8 to CALPUFF 6.4 is not a simple model update to address minor issues, but a significant change in the model science that requires its own rulemaking with public notice and comment before it can be relied on for regulatory purposes.

Furthermore, it should be noted that the US Forest Service and EPA review of CALPUFF version 6.4 results for a limited set of BART applications showed that differences in its results from those of version 5.8 are driven by two input assumptions not associated with the chemistry changes in 6.4. Use of the so-called "full" ammonia limiting method and finer horizontal grid resolution are the primary drivers in the predicted differences in modeled visibility impacts between the model versions. These input assumptions have been previously reviewed by EPA and the FLMs and have been rejected based on lack of documentation, inadequate peer review, and lack of technical justification and validation.

Introducing a new regulatory model is a long process. EPA intends to conduct a comprehensive evaluation of the latest CALPUFF version along with other "chemistry" air quality models, including a full statistical performance evaluation, verification of its scientific basis, and determination of whether the underlying science has been incorporated into the modeling system correctly. To accommodate such a model, there would have to be an evaluation of the effect on the regulatory framework for its use, including in New Source Review permitting, and also changes to the Guideline on Air Quality Models and other modeling guidance, in consultation with the FLMs. CALPUFF version 5.8 has already gone through this comprehensive evaluation process and remains EPA-approved version, and is thus the appropriate version for EPA's BART determinations of these facilities.

The ammonia issue has already been addressed above. EPA believes that there is no compelling alternative to the use of the default 1 ppb background concentration.

The Terhorst & Berkman study cited by the commenter is worthy of consideration as the Regional Haze program evolves, but one study does not invalidate CALPUFF, which has had multiple performance evaluations and has gone through public comment and rulemaking. It also does not remove the legal requirement to perform BART determinations for eligible facilities.

While nitrate appears to be a smaller contributor to visibility impairment than some other compounds, section 169A of the Clean Air Act requires BART determinations on BART-eligible EGUs regardless of ambient visibility conditions. Application of BART is one means by which we can ensure the continuation of downward emission and visibility impairment trends. Modeling shows maximum visibility impacts of 1.2 to 4.5 deciviews depending on the facility, which are not negligible contributions to visibility impairment. Even if an individual pollutant or source category appears small to some commenters, the many segments of the emissions inventory taken together do cause visibility impairment, and each must be addressed in order to make progress towards the national goal of remedying visibility impairment from man-made pollution. EPA identifies stationary sources as an important category to evaluate under the Regional Haze program, including a BART analysis.

Comment: Several commenters argued that the proposed FIP is inconsistent with the goal of the RHR, which is to make progress toward natural visibility conditions by the year 2064. Another commenter added that Arizona's energy providers have already invested time and money (hundreds of millions of dollars) in order to reach the long-term goal of achieving natural background visibility by 2064, and that the accelerated timeline proposed by the rule would result in astronomical costs. Another commenter stated that EPA is front-loading as many emission reductions as possible in the first five years of this program, while ignoring other causes of visibility impairment, such as fires, in its FIP. Other commenters suggested that Arizona's haze is produced by a number of environmental factors, like pollution from wildfires, garbage burning along the Mexico/US border, and dust storms.

Response: We do not agree that we are front-loading emission reductions or that we have lost sight of the "end goal." While the goal of the regional haze program is to achieve natural visibility conditions in all mandatory Class I Federal areas by 2064, the requirement for states to implement BART applies only during the first planning period ending in 2018.[109] Where a State has not met the RHR requirements related to BART, EPA is obligated to disapprove that portion of the State's submittal. And, as explained elsewhere in this document, because the FIP clock has already expired for the Arizona Regional Haze plan, we are required to promulgate a FIP for any disapproved portion of the SIP. Our action fulfills part of this duty.

We agree that there are various other factors that contribute to haze at Arizona's Class I areas. However, these other factors are not relevant to the BART requirements, which govern today's action. Under the RHR, causes of haze other than BART sources are addressed under separate requirements for reasonable progress and a long-term strategy. We will address the remaining requirements of the RHR for the first implementation period in Arizona, including requirements for reasonable progress toward the 2064 goal, in a separate rulemaking action.

D. Source-Specific Comments on EPA's BART Analyses and Determinations

1. EPA's BART Analysis and Determination for NO_X at Apache Units 2 and 3

a. Control Efficiencies

Comment: Various commenters (ADEQ, AEPCO and AUG) asserted that EPA's proposed BART determination for Apache Units 2 and 3 was premised on the assumption that SCR can achieve an emission limit of 0.050 lb/MMBtu continuously on a 30-day rolling average, including periods of startup, shutdown and equipment malfunctions, but that this limit has not been shown to be feasible. They argued that EPA had failed to support either its proposed BART determination or its reliance on this limit in its BART analysis. In addition, AEPCO and AUG stated that EPA inappropriately relied on vendor information to support an emission rate of 0.050 lb/MMBtu using SCR. AEPCO also noted that it considered this support anecdotal and stated that it

[108] "CALPUFF Regulatory Update", Roger W. Brode, Presentation at Regional/State/Local Modelers Workshop, June 10–12, 2008; *http://www.cleanoirinfo.com/regionolstotelocalmodelingworkshop/orchive/2008/ogenda.htm.*

[109] See 40 CFR 51.308(f) (future Regional Haze plans must address reasonable progress and long-term strategy, but not BART).

cannot form the basis for a BART determination, as BACT rules expressly provide that EPA does "not consider a vendor guarantee alone to be sufficient justification that a control option will work." AEPCO requested that if EPA retains the SCR limits, that they be set at 0.07 lb/MMBtu due to the infeasibility of complying with a lower limit at the Apache station. Also, due to the load-following and cycling nature of the units and the need to accommodate startups and shutdowns, AEPCO requested that any lower limits be set as an annual average limit.

Response: We partially agree with this comment. In our proposal, our analysis was based on an SCR annual average design value of 0.050 lb/MMBtu, which was subsequently proposed as a rolling 30-day average emission limit. We disagree that our use of 0.050 lb/MMBtu as an annual average design value is merely anecdotally supported or based on vendor literature/guarantees alone. As discussed in our proposal, the ability of SCR to achieve control efficiencies in the range of 80 to 90 percent is well established. Although the information included in our proposal did include vendor estimates, it also included summaries of SCR control efficiencies that were achieved in practice. We have further supplemented the record to include more recent examples illustrating that SCR, as a technology, is capable of achieving control efficiencies in the range of 80 to 90 percent. For the Apache units, an annual average emission rate of 0.050 lb/MMBtu represents 87 to 89 percent control. While these values represent the upper range of SCR control and are more stringent than the control efficiencies used in the BART analyses prepared by AEPCO,[110] we reaffirm that these values are appropriate, given that they are still within the range of what is achievable with SCR and that the Apache units are among the highest baseline NO_X emission rate units considered in our proposal. We agree with the commenter that, when establishing a 30-day rolling average BART emission limit that would apply at all times, it is appropriate to accommodate emissions associated with startup and shutdown events in developing the emission limit. SRP raised similar concerns in comments on Coronado 1 and 2. As discussed in more detail in our responses on Coronado, SRP submitted information suggesting that the Coronado units cannot achieve an SCR emission rate of 0.050 lb/MMBtu on a rolling 30-day average and could only achieve in the range of 0.053 to 0.072 lb/MMBtu.[111] We have reviewed the analyses provided by SRP and note that while the results of SRP's analysis indicate that Coronado could meet a 0.050 lb/MMBtu limit on an annual average basis,[112] we agree that the Coronado units cannot achieve an SCR emission rate of 0.050 lb/MMBtu on rolling 30-day average. As a result, we conclude that 0.050 lb/MMBtu is appropriate as annual average design value, but not as 30-day rolling average emission limit at the Coronado units. While we acknowledge that Apache 2 and 3 are not identical to the Coronado units, we do note the following similarities:

- Both the Apache and Coronado units are of the same boiler type (Riley turbo).
- Both the Apache and Coronado units were constructed and placed into operation at approximately the same time. Construction commenced on the Apache units in 1976, and they were placed into operation in 1979. The Coronado units were placed into operation in 1979 and 1980.
- Both the Apache and Coronado units have access to, and could potentially use, a bituminous and sub-bituminous coal blend.[113]
- Although the historical operating profiles of the Apache and Coronado units are not identical, both the Apache and Coronado units are cycling units that exhibit a greater number of startup and shutdown events than baseload units.

Based on these similarities, we similarly conclude that the Apache units cannot achieve an SCR emission rate of 0.050 lb/MMBtu on a rolling 30-day average, but that use of 0.050 lb/MMBtu as an annual average design value is appropriate. We agree that when establishing a rolling 30-day BART emission limit that is based upon an annual average design value, it is appropriate to provide a compliance margin for periods of startup and shutdown. In addition to considering the boiler type, age of the units, and coal type to which Apache has access, we also note that AEPCO meets the definition of "small entity" as established for electric utility companies by the U.S. Small Business Administration.[114] We considered AEPCO's small entity status[115] and how to provide AEPCO with operational flexibility consistent with application of the five-factor BART analysis. Based on these considerations, we have decided to raise the rolling 30-day average emission limit from the proposed level of 0.050 lb/MMBtu to 0.070 lb/MMBtu. A rolling 30-day average of 0.070 lb/MMBtu represents an upward revision of 40 percent from an annual average design value of 0.050 lb/MMBtu and corresponds to the upper end of the range of lb/MMBtu values considered achievable by SRP's analysis. We consider this magnitude of upward revision appropriate to accommodate emissions from startup and shutdown events, as well to provide AEPCO a sufficient measure of operational flexibility as a small entity. In addition, in response to comments requesting that emission limits be established across units,[116] consistent with the BART Guidelines,[117] we have decided to set the emission limit as a "bubble" limit across Apache Units 2 and 3. We are therefore finalizing a 30-day rolling average BART emission limit of 0.070 lb/MMBtu for Apache Units 2 and 3 as a "bubble" across these two units.

Comment: One commenter (AEPCO) requested that if EPA establishes an

[110] See Docket Items B–03 and B–04, Appendix A. AEPCO's calculations are based on 83–85 percent SCR control efficiency, and 24-hour average emission rates of 0.07 lb/MMBtu.

[111] As discussed in further detail in the responses on Coronado, this range of values corresponds to an SCR unit designed to operate during all periods of normal operation and loading conditions.

[112] As discussed in further detail in the responses on Coronado, this is specifically in regards to Coronado Unit 1.

[113] The Apache units have access to a number of bituminous and sub-bituminous coal blends. See, e.g., Final Report, Apache Unit 2 BART Analysis, Table 3–1 (December 2007). While the Coronado units currently burn 100 percent sub-bituminous Powder River Basin coal, they have historically burned a mixture of PRB with bituminous coal. See SRP Comments on Proposed Rule (September 2012), RMB Technical Memorandum, page 3.

[114] As noted in our NPRM (77 FR 42867).

[115] See EPA's Action Development Process, Final Guidance for EPA Rulewriters: Regulatory Flexibility Act as amended by the Small Business Regulatory Enforcement Fairness Act, November 2006, at 3. This EPA guidance document states that prior to the enactment of the Small Business Regulatory Enforcement Fairness Act, EPA exceeded the requirements of the Regulatory Flexibility Act (RFA) by preparing a regulatory flexibility analysis for every rule that would have any impact on any number of small entities. In view of the changes made by SBREFA, however, EPA decided to implement the RFA as written—a regulatory flexibility analysis as specified by the RFA is not required simply because the rule has some impact on some number of small entities: "Instead, such analysis will be required only in cases where we will not certify that the rule will not have significant economic impact on a substantial number of small entities", but "It remains EPA policy that program offices should assess the direct adverse impact of every rule on small entities and minimize any adverse impact to the extent feasible, regardless of the magnitude of the impact or the number of small entities affected."

[116] Although AEPCO did not specifically request this, this comment was made in comments submitted by Arizona Utility Group on behalf of all of the utilities. As a result, we are also establishing bubble limits for the Apache units.

[117] BART Guidelines, 40 CFR Part 51, Appendix Y, section V ("You should consider allowing sources to "average" emissions across any set of BART-eligible emission units within a fenceline * * *).

SNCR limit, that the limits for Apache Units 2 and 3 be set at 0.23 lb/MMBtu. The commenter notes that while there are some differences in past utilization, the units are functionally identical and that, based on the best information available, a limit of 0.23 lb/MMBtu is likely the best consistently achievable limit given the load-following, unit-cycling and startup and shutdown issues that must be addressed as part of unit operation.

Response: Although AEPCO stated in comments that "based on the best information available, a limit of 0.23 lb/MMBtu is likely the best achievable limit" and cited unit cycling and startup/shutdown issues, AEPCO did not provide any information in its comments documenting how or to what extent these issues justify a 0.23 lb/MMBtu emission limit (rolling 30-day average). We note that AEPCO's original BART analysis also identified an SNCR emission estimate of 0.23 lb/MMBtu, but did not discuss the extent to which startup, shutdown, and malfunction events are accounted for in this emission rate.

We note, however, that SRP also provided information in its comments regarding SNCR performance at Coronado Unit 1. Again, because of the similarities between the Apache units and the Coronado units, we consider it useful to examine information provided for the Coronado units in evaluating SNCR performance and an appropriate SNCR emission limit for the Apache units. As noted in our responses to comments on Coronado, SRP submitted a conceptual design estimate for SNCR for Coronado 1 that included a vendor estimate of 25 percent control efficiency from LNB emission rates. As noted in our responses for Coronado, while this is less stringent than the 30 percent SNCR control efficiency used by our contractor, we consider it a reasonable estimate. Based upon 25 percent control efficiency, annual average emission rates for the SNCR with LNB and OFA option are presented in Table 2.

TABLE 2—APACHE: SNCR EMISSION RATE ESTIMATE

[Annual average]

Control technology	Control efficiency (percent) [1]	Apache 2 (lb/MMBtu)	Apache 3 (lb/MMBtu)	Average across units (lb/MMBtu)
OFA		0.37	0.44	0.40
LNB+OFA	30	0.26	0.31	0.28
SNCR+LNB+OFA	25	0.19	0.23	0.21

[1] This represents the incremental control efficiency from the previous control option, not the overall control efficiency from the baseline case of OFA.

If we were to establish a BART emission limit corresponding to the use of SNCR technology, we would use the annual average SNCR emission rates presented in Table 2 as our basis, rather than our original estimates based on 30 percent SNCR control efficiency. As noted in a separate response, when using an annual average design emission rate to establish a rolling 30-day limit that will apply during periods of startup, shutdown, and malfunction, we consider it appropriate to provide some type of measure that provides a compliance margin for such events. First, we would set the SNCR emission limit as a "bubble" limit across Apache 2 and 3. As seen in Table 2, the annual average SNCR emission rate, averaged across both units, is 0.21 lb/MMBtu. A 0.23 lb/MMBtu emission limit, as requested by AEPCO, established on a rolling 30-day average represents an approximate 10 percent increase from the 0.21 lb/MMBtu annual average emission rate. We would consider this magnitude of upward revision appropriate to accommodate startup, shutdown, and malfunction events as well as the unit cycling nature of the Apache units. As a result, if established, we would consider the BART emission limit corresponding to the SNCR with LNB and OFA option to be 0.23 lb/MMBtu, established as a bubble across both units.

For the purposes of our cost calculations or visibility modeling, however, we have retained the use of our original SNCR emission rates. A less stringent SNCR emission rate would, by itself, primarily serve to make the next most stringent control option, SCR, appear to remove a greater amount of emissions. This in turn would make the SCR control option appear more incrementally cost-effective (i.e., by removing a greater amount of emissions, relative to SNCR, for the same cost). As discussed in our proposal and in other responses to comments, we already consider SCR to be cost-effective, and it is not determinative to our decision to find that SCR is "even more" incrementally cost-effective.

b. Costs of Compliance

Comment: Two commenters (NPS and Earthjustice) conducted their own analyses of the cost and cost-effectiveness of SCR with LNB and OFA for reducing emissions of NO_X at Apache Units 2 and 3. NPS used the cost methodologies of the CCM, relied on the IPM to reflect the most recent SCR cost levels, and submitted the detailed calculations as Appendix B to its comments. The commenter's analysis yielded cost-effectiveness values of $2,392/ton to $3,144/ton. The commenter noted that EPA's analysis yielded cost-effectiveness values of $2,275/ton to $2,908/ton, which EPA considers cost-effective. According to Earthjustice, when the cost-effectiveness of SCR is calculated using more accurate costs and proper baselines, the result is a cost-effective SCR investment that reduces NO_X at a cost of $2,640/ton at Unit 2 and $2,275/ton at Unit 3.

Response: Based upon a review of the commenters' calculations, we recognize that there are certain aspects of cost calculations that would result in lower $/ton values under different assumptions. As noted in our proposal, we already consider the SCR with LNB and OFA control option to be cost-effective at $/ton values that are somewhat higher than those calculated by the commenters. As a result, we decline to modify our estimates of cost-effectiveness to reflect these comments, as it is not in any way determinative to our decision to find that SCR is "even more" cost-effective or that the incremental cost-effectiveness value between SCR and SNCR is "even more" incrementally cost-effective.

Comment: One commenter (AEPCO) stated EPA underestimated the site-specific costs for installing SCR at Apache, due principally to EPA's substitution of general data used in the IPM model for the site-specific data used by ADEQ. The commenter stated that EPA needs to reevaluate its numbers in light of AEPCO's site-

specific analysis. For operation and maintenance costs, AEPCO estimates total costs of $1,760,000, which is slightly lower than EPA's estimate of $1,822,463, with the main difference due to EPA's higher allowance for maintenance. For the base unit costs, EPA used a 25 percent reduction factor for "low dust" for Unit 3. AEPCO's vendors do not believe there will be any substantial reduction in cost based on "low dust," and estimates that installed costs will be approximately $39,094,000 compared to EPA's estimate of $33,279,000 for this unit. AEPCO estimates that the bare module cost will be near $48,119,000, rather than the $25,599,000 that EPA estimates, because EPA only included costs for induced draft (ID) fan upgrades and did not account for the additional costs of upgrading existing or running new electrical service to support the additional electrical loads required by SCR. The commenter also stated that EPA did not include contractor indirect costs and contingency with the capital, engineering and construction costs, nor did EPA include any owner's costs or allowance for funds during construction, including interest during construction. AEPCO does not believe EPA should disallow these costs. AEPCO's estimates with these costs are $85,666,000, compared with EPA's estimate of $33,279,000.

The commenter stated that based on AEPCO's estimated installed costs of SCR, the cost burden is disproportional to the benefits. Adding the costs of SCR to EPA's estimate for LNB and OFA, the annualized cost is $3,508 per ton and $13.9 million per deciview.

Another commenter (ACCCE) stated that EPA's proposal to require SCR at Apache Units 2 and 3 must be abandoned due to the high costs of SCR. The commenter notes that according to EPA's estimates, costs of SCR with LNB and OFA would be about $6 million for each unit, while the annualized costs of LNB and OFA estimated by ADEQ are only about $533,000 per unit. In addition, the commenter notes that the marginal improvement in visibility with SCR over LNB and OFA would be less than 1 deciview.

Response: We disagree with commenters' assertions that we underestimated the costs of SCR, or that the cost of SCR is disproportional to its benefits. In developing our proposed action for Apache Units 2 and 3, we examined the cost estimates for the SCR with LNB and OFA control option contained in AEPCO's original BART analysis.[118] By comparison, the SCR with LNB and OFA cost estimates we developed for our proposed action [119] do not differ significantly. A comparison of capital cost, total annual cost, and cost-effectiveness for these two estimates are summarized in Tables 3 and 4.

TABLE 3—APACHE UNIT 2: COST COMPARISON OF SCR WITH LNB AND OFA

	Capital cost ($)	Total annual cost ($/yr)	Emissions removed (tpy)	Average cost-effectiveness ($/ton)
EPA estimate	$44,779,657	$5,869,299	2,019	$2,908
AEPCO original estimate	48,740,300	6,102,740	3,250	1,878

TABLE 4—APACHE UNIT 3: COST COMPARISON OF SCR WITH LNB AND OFA

	Capital cost ($)	Total annual cost ($/yr)	Emissions removed (tpy)	Average cost-effectiveness ($/ton)
EPA estimate	$43,812,028	$6,103,078	2,683	$2,275
AEPCO original estimate	48,740,300	6,062,302	2,778	2,182

We note that while we used a different cost estimation methodology than AEPCO, our estimates of capital cost and total annual cost are very similar to the company's original estimates and differ, for example, by only 8 percent and 4 percent (respectively) at Apache Unit 2. More importantly, we note that AEPCO's original estimates for Apache Units 2 and 3 actually show lower $/ton values than our own, meaning that AEPCO's original estimate indicates that SCR with LNB and OFA is cost-effective.

In submitted comments, AEPCO provided multiple analyses comparing our SCR (stand alone) cost estimate with revised estimates prepared by engineering firm Burns and McDonnell.[120] AEPCO provided two sets of revisions: one in which it retained our assumptions regarding costs not included in the CCM, such as AFUDC and owner's costs, and another set in which it included those costs. In both cases, these analyses also contained revisions in order to reflect capital costs and O&M costs that AEPCO considered more representative and appropriate for the Apache units. These revisions included the following:

- Higher bare module SCR costs, involving the inclusion and upward revision of specific constituent cost items (e.g., concrete and piling, ductwork);
- Use of lower cost reduction for the low-dust SCR design as reflected in bare module cost (10 percent cost reduction, compared to a 25 percent cost reduction used in our estimate);
- Use of higher capacity factor (0.85 for both units, compared to 0.62 and 0.71);
- Lower SCR NO_X removal efficiency (based on an SCR emission rate of 0.07 lb/MMBtu, compared to 0.05 lb/MMBtu);
- Inclusion of an additional 15 percent engineering, procurement, contracting fee (not included in our cost estimate); and
- And certain other different assumptions regarding O&M costs that result in similar total O&M costs.

AEPCO then included our estimate of LNB and OFA costs with its SCR (standalone) costs to arrive at its overall cost estimate for the SCR with LNB and OFA control option. As discussed elsewhere in this preamble, we have decided to finalize a 30-day rolling average BART emission limit of 0.070

[118] Docket Item No. B–01, Arizona Regional Haze SIP, Appendix D, page 49.

[119] See 77 FR 42856, Table 16.

[120] The analysis was included in Attachment 1 to AEPCO's Comments on the page titled "SCR Capital Cost Comparison."

lb/MMBtu for Apache Units 2 and 3, and a "bubble" across these two units to provide AEPCO an adequate margin for compliance. Although this 30-day limit accommodates the possibility of multiple startups in a given 30-day period, we expect such spikes to be smoothed out over the course of a year, so that the annual average remains closer to 0.05 lb/MMBtu. For the other items noted above, such as bare module SCR costs, we are willing to defer to AEPCO's judgment on these issues in order to address AEPCO's concerns that our cost estimate was insufficiently site-specific. As a supplemental cost estimate, we have used the version of AEPCO's cost estimate that adheres to our assumptions regarding costs that are allowed by the CCM. As shown in Table 5, this results in revised SCR with LNB and OFA cost-effectiveness values of $3,450/ton and $2,973/ton for Apache 2 and 3, respectively, that are still within a range that we consider cost-effective when considered in conjunction with the visibility improvement associated with SCR.

TABLE 5—APACHE 2 AND 3: COST ESTIMATE OF SUPPLEMENTAL SCR WITH LNB AND OFA

Parameter	Apache 2	Apache 3	Notes
SCR Capital Cost ($)	71,938,250	71,938,250	1
LNB+OFA Capital Cost ($)	10,543,189	10,543,189	2
SCR+LNB+OFA Capital Cost ($)	82,481,439	82,481,439	
Interest Rate (percent)	7.0	7.0	
Equipment Lifetime (years)	20	20	
Capital Recovery Factor	0.094	0.094	2
Annualized Capital Cost ($/yr)	7,785,664	7,785,664	
Fixed O&M ($/yr)	466,000	466,000	1
Variable O&M ($/yr)	1,294,600	1,294,600	1
Total Annual O&M ($/yr)	1,760,600	1,760,600	
Total Annual Cost ($/yr)	9,546,264	9,546,264	
Heat Rate (MMBtu/hr)	2,316	2,223	2
Baseline Emission Rate (annual average lb/MMBtu)	0.371	0.438	
SCR Emission Rate (annual average lb/MMBtu))	0.050	0.050	2
SCR Control Efficiency (percent)	87	89	
Annual Capacity Factor	0.85	0.85	1
Baseline Emissions (tpy)	3,198	3,625	
SCR Emissions (tpy)	431	414	
Emissions Removed (tpy)	2,767	3,211	
Annual Cost ($/yr)	9,546,264	9,546,264	
Emissions Removed (tpy)	2,767	3,211	
Average Cost-Effectiveness ($/ton)	3,450	2,973	

Comment: One commenter (AEPCO) stated that according to EPA's estimates of SNCR costs, the incremental costs of SNCR with LNB and OFA compared to LNB and OFA are $3.3 million with a maximum incremental improvement of 0.47 dv at Chiricahua Wilderness Area. The commenter stated that this improvement in deciviews is insignificant compared with cost.

Response: As described above. EPA is not limited to considering incremental costs and benefits in comparing BART alternatives. The visibility benefits of SNCR at Chiricahua are a full 1 deciview with an annual cost of $6.6 million and a cost-effectiveness of $2,056 $/ton averaged over the two emitting units. In this case, even the incremental cost-effectiveness of $2,837 $/ton is well within the range that we consider cost-effective. The incremental visibility benefit of 0.47 dv is also substantial, and additional benefits would occur at multiple Class I areas. Considered as a contribution to visibility impairment, EPA disagrees that this improvement from SNCR is insignificant.

Comment: One commenter (AEPCO) stated that the Appendix Y BART Guidelines (40 CFR 51, App. Y, section IV.E.3.2) provide that the State and EPA must consider the economic effects of BART determinations. AEPCO estimates that to install and operate SCR with LNB and OFA, rates would need to rise by more than 17.5 percent. Further, the units could have to shut down if the cost of power from those units is out of line with the cost of power in the open market. Moreover, due to contract expirations, AEPCO has no certainty that even its existing 147,643 meters will be available to defray costs. AEPCO asserted that these factors are exactly the types of circumstances that were designed to be acknowledged in the BART Guidelines.

One commenter (AEPCO) stated that EPA failed to follow the requirements of CAA section 51.308 and Appendix Y in its cost analysis by failing to review the affordability of the final cost on AEPCO as a single facility cooperative, but rather examined only the cost per ton and the cost per deciview. EPA should also consider the implications of AEPCO's cooperative status and its limitations in obtaining funding for capital improvements. As a single generating station, with multiple units subject to BART requirements, the cooperative is unable to spread costs over unaffected units, other facilities or a large system of units and ratepayers. Also, as a cooperative, AEPCO is owned by its members and cannot sell stock or other equities to raise funding, and must seek long-term financing from the Rural Utilities Service, which has a limited budget and is being asked to fund efforts for other cooperatives and rural utilities to meet CAIR, CSAPR, other SIP initiatives, and the upcoming EGU MACT. In addition, the terms of AEPCO's mortgage agreement would necessitate a rate increase of more than 16 percent to accommodate SCR, and it is not certain whether the Arizona Corporation Commission (ACC) would grant such a rate increase or what the long term impact would be on AEPCO's working and patronage capital.

AEPCO also stated that the operating and financing costs are unreasonable for the Apache plant. EPA estimates the SCR system alone will have operating and maintenance costs of $3.3 million,

which is 35 percent of AEPCO's total net revenue of $9.5 million for 2010 and more than the net revenue of $1.9 million for 2011. AEPCO estimates that it will need to increase rates by $22.5 million a year over the O&M costs just to finance SCR with LNB and OFA on Units 2 and 3. This combined cost is 14 times AEPCO's net revenues in 2011 and 2.8 times 2010 net revenues. This cost does not include other expenditures that will be required for Units 1, 2 and 3 for BART. With only 147,643 metered customers and with many of these customers in low income areas, rate increases for these customers are not trivial. The commenter also stated that SNCR also is not affordable due to the operating costs. AEPCO estimates SNCR with LNB and OFA operating costs to be $6.8 million, which is three times AEPCO's net revenue 2011 and over two-thirds of net revenues in 2010.

Another commenter (Earthjustice) stated that SCR costs will not threaten AEPCO's continued viability or have a severe impact on its operations, which are the only two affordability conditions allowed to be considered under the BART Guidelines (Appendix Y, Section IV.E.3.). The commenter noted that guidance and case law on Reasonably Available Control Technology (RACT) and BACT determinations, which make clear that affordability issues are given relatively little weight, are instructive for BART determinations due to the similar analysis. For RACT and BACT, the commenter explained that Congress intended that all sources in a source category bear similar costs for pollution reduction and that sources should not be able to avoid cost-effective controls due to poor financial position, as this would reward inefficient or poorly-managed sources. The commenter cited two cases regarding RACT and BACT economic feasibility (*Michigan* v. *Thomas,* 805 F.2d 176, 180 (6th Cir. 1986), Nat'l Steel Corp., Great Lakes Steel Div. v. Gorsuch, 700 F.2d 314, 324 (6th Cir. 1983)). The commenter also noted that detailed economic data is required for sources to raise affordability issues under RACT and BACT, and the detailed economic analysis called for in the BART Guidelines should be similarly robust where EPA considers affordability issues for "unusual circumstances." The commenter also stated that Apache's continued viability is not threatened, based on a report by Paul Chernick at Resource Insight Inc., which shows that AEPCO's average operating margin over the last four years would cover 185 percent of the annual debt repayment for the SCR system, and the current equity capital of $94 million in 2011 would cover the entire cost of installation. The report also shows that AEPCO will receive refunds from a settlement with two railroads totaling $63 million. The commenter further refuted that AEPCO may not be able to borrow sufficient funds for SCR. The commenter stated that RUS loan funds are not raised or subsidized by taxpayers, and the RUS does not anticipate any shortage in funding. In addition, the commenter claimed that the National Rural Utility Cooperative Finance Corporation (NRUCFC) is financed by private investors, and AEPCO should not have any difficulty borrowing from the NRUCFC, if necessary.

Another commenter (ACCCE) stated that the large costs of SCR may adversely impact AEPCO and its customers due to AEPCO's small size, the low income profiles of AEPCO's service area, and AEPCO's ability to obtain financing. The commenter urges EPA to give full consideration to AEPCO's comments submitted June 29, 2012, on these issues.

Commenters from AEPCO's member cooperatives stressed the unique economic and engineering challenges they face—low population density, the demands of servicing vast remote areas with rugged topography, and transmission grid capacity limitations that make it difficult to import power. They noted that the majority of their power comes from the Apache Generating Station, so the cost impact of SCR installation would be especially acute, resulting in rate increases ranging from an estimated 15 percent to 30 percent. The commenters pointed out that their customer base has average incomes well below the national and Arizona averages, and would be especially hard hit by large rate increases; many customers struggle to pay their power bills as it is. The commenters stated that AEPCO and the associated cooperatives cannot finance or absorb the costs of SCR at the Apache Generating Station. The commenters indicated that closure of the large, load-following coal-fired units would threaten the reliability of the electrical system, particularly with the limited capacity of the local grid to import power from other areas.

Another commenter (Earthjustice) cited a report by Paul Chernick at Resource Insight Inc., which estimates that any rate increases at Apache would be limited to a 2 percent to 5 percent increase at most, resulting in an average extra cost of $3.28 per month on customer bills. The commenter stated that this is reasonable, as average annual increases have been up to 3 times as high as this increase, and this rate will likely be offset by a settlement award of $63 million. The commenter also noted that while the incomes of its customer base are relatively low, the cost of living in the area is also lower than the national average. The commenter further noted that utilities in similarly economically disadvantaged areas have successfully installed modern pollution controls costing significantly more than the cost of SCR at Apache.

Response: It is not EPA's intention to endanger the economic viability of Apache Generating Station or to place an undue burden on AEPCO's customers. EPA has considered the comments on these issues very carefully. Regarding the legal basis for our decision, neither the CAA nor the RHR requires states or EPA to consider the affordability of controls or ratepayer impacts as part of a BART analysis. Rather, the CAA and RHR require consideration of "the costs of compliance, the energy and non-air quality environmental impacts of compliance, any existing pollution control technology in use at the source, the remaining useful life of the source, and the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology." [121]

The BART Guidelines do allow for (but do not require) the consideration of "affordability" as part of the "costs of compliance" under certain circumstances, noting that:

> 1. Even if the control technology is cost effective, there may be cases where the installation of controls would affect the viability of continued plant operations.
>
> 2. There may be unusual circumstances that justify taking into consideration the conditions of the plant and the economic effects of requiring the use of a given control technology. These effects would include effects on product prices, the market share, and profitability of the source. Where there are such unusual circumstances that are judged to affect plant operations, you may take into consideration the conditions of the plant and the economic effects of requiring the use of a control technology. Where these effects are judged to have a severe impact on plant operations you may consider them in the selection process, but you may wish to provide an economic analysis that demonstrates, in sufficient detail for public review, the specific economic effects, parameters, and reasoning * * * Any analysis may also consider whether other competing plants in the same industry have

[121] CAA section 169A(g)(2), 42 U.S.C. 7491(g)(2); 40 CFR 51.308(e)(1)(ii)(A).

been required to install BART controls if this information is available.[122]

We interpret the question of affordability as a specific question of whether the viability of continued plant operations will be affected by the pollution control technology in question. Although one commenter asserted that the costs of SCR with LNB and OFA could cause a shutdown of Apache Units 2 and 3 if it causes power costs from those units to be out of line with the cost of power on the open market, the commenter did not provide evidence or analysis that supports this assertion. We agree that the terms of AEPCO's mortgage require AEPCO to have sufficient revenue to meet the financial metrics of Times Interest Earned Ratio and Debt Service Coverage ratio. But AEPCO is eligible to finance additional debt related to air pollution controls, and it has not shown that such financing is unavailable to it. Securing a rate increase from ACC may be time consuming, and thus supports our decision to grant AEPCO five years for installation of such controls. However, the information provided to us does not show that installation of SCR would affect the viability of continued plant operations. AEPCO is not being treated differently from other competing plants in its industry: many other electric utilities, including other rural electric cooperatives, are also being required to install BART controls.

Nonetheless, we performed additional analysis to understand better the impacts of the proposed pollution controls on AEPCO as a small entity. As we explained in our proposal, the U.S. Small Business Administration (SBA) defines an electric utility company as small if, including its affiliates, it is primarily engaged in the generation, transmission and/or distribution of electric energy for sale and its total electric output for the preceding fiscal year did not exceed 4 million megawatt hours (MWh).[123] In 2011, AEPCO member cooperatives sold 2,453,272 MWh of electricity.[124] As explained in the proposal, we conducted an initial assessment of the potential adverse impacts on AEPCO of requiring SCR with LNB and OFA. Using publicly available information, EPA estimated that the annualized cost of requiring SCR in Units 1 and 2 would likely be in the range of 3 percent of AEPCO's assets and between 6 and 7 percent of AEPCO's annual sales. We noted in the NPRM that the projected costs of SCR with LNB and OFA are approximately $12 million per year, and that this exceeds AEPCO's net margins of $9.5 million in 2010 and $1.9 million in 2011,[125] although the report by Paul Chernick at Resource Insight Inc., submitted by Earthjustice, notes that AEPCO's margin in 2008 was $17.4 million.

In addition to conducting this initial economic impact assessment, we requested information from AEPCO on the economics of operating Apache Generating Station and what impact the installation of SCR may have on the economics of operating Apache Generating Station. We received a description of plant conditions and potential economic effects before the NPRM was published,[126] and received additional information during the comment period. We noted in the NPRM that if our analysis of this information indicated that installation of SCR would have a severe impact on the economics of operating Apache Generating Station, we would incorporate such considerations in our selection of BART.

The BART cost figures provided in this final action do not include other expenditures that will be required for Apache Units 1, 2 and 3 to meet the BART emission limits included in Arizona's Regional Haze SIP. Under the CAA, EPA is not permitted to consider economic feasibility when taking action on a SIP.[127] To the extent these costs are relevant to our FIP action, we note that AEPCO did not provide any cost estimates for the required upgrades to the existing ESPs and scrubbers at Apache Units 2 and 3 and estimated that the total first year annualized cost of the required controls at Apache Unit 1 (LNB and FGR) would be $0.552 million.[128] These costs are two orders of magnitude lower than the SCR costs described elsewhere in this document. Therefore, even if we were to take them into account, they would not substantially affect our analyses.

Regarding the comment that the cost of SCR with LNB and OFA at Apache could be covered with funds from AEPCO's operating margins or legal settlements, while Apache Generating Station does have annual operating margins that vary according to various conditions, it is not necessarily true that AEPCO can cover the costs of pollution control equipment exclusively from these funds, or from the settlement agreement mentioned in the comment. Because AEPCO is a member-owned utility, operating margins and other surplus funds may be earmarked to be returned to its member cooperatives on a rotating basis. While some of these funds may be available for capital expenditures such as pollution controls, we have assumed for the purpose of our analysis that financing will be necessary to achieve the pollution reductions required by our action.

For electric utilities, EPA has not customarily analyzed or considered ratepayer impacts in BART determinations.[129] Nevertheless, we also analyzed ratepayer impacts in an effort to assess the potential effects of our action on AEPCO as a small entity. EPA requested an electricity rate analysis through our contractor, EC/R Inc., to assist us in evaluating the possible electricity rate increases discussed in the comments above. Our contractor noted that AEPCO's analysis appears to place the entire burden of the incremental capital and O&M costs on its Member Co-ops and their retail customers. However, the analysis should account for a share of the SCR cost going to off-system sales volumes and not only allocated to member rates. The contractor's Incremental Cost Model calculated an increment in revenue requirements for AEPCO's member cooperatives of 12.7 percent under the scenario that spreads the incremental SCR cost across all kWh produced at Apache, both Member Co-ops and off-system or non-Member sales. Under the alternative scenario that the incremental cost for SCR is covered exclusively by member cooperatives, the incremental revenue

[122] BART Guidelines, 40 CFR Part 51, Appendix Y, section IV.E.3.

[123] 77 FR 42866–42867; see also 13 CFR 121.201, footnote 1.

[124] Annual Report for year ending December 31, 2011, from AEPCO to Arizona Corporation Commission.

[125] See Docket Item H–1 Arizona Electric Power Cooperative, Inc. Annual Report Electric for Year Ending December 31, 2011 submitted to Arizona Corporation Commission Utilities Division, available at *http://www.azcc.gov/Divisions/Utilities/Annualpercent20Reports/2011/Electric/Arizona_Electric_Power_Cooperative_Inc.pdf.*

[126] Docket Item C–16, Letter from Michelle Freeark (AEPCO) to Deborah Jordan (EPA), AEPCO's Comments on BART for Apache Generating Station, June 29, 2012.

[127] *Union Electric Co.*, v. *EPA*, 427 U.S. 246, 255–66 (1976); 42 U.S.C. 7410(a) (2).

[128] Arizona Regional Haze SIP, Appendix D, Table 10.3; see also Comments of Arizona Electric Power Cooperative, Inc., Proposed Disapproval of AZ RH SIP and EPA's Proposed RH BART FIP (September 18, 2012) page 9. In our proposal, we noted that these control cost calculations include costs that are disallowed by EPA's Control Cost Manual, such as owner's costs and AFUDC. Both of these elements have the effect of inflating cost calculations and thus the cost-effectiveness of the various control options considered. See 77 FR 4284.

[129] Exceptions include EPA's Regional Haze FIP for Hawaii, where we analyzed potential rate impacts due to the unique energy situation in Hawaii, 77 FR 61478, 61488, and EPA's BART FIP for Four Corners Power Plant, where we examined potential rate impacts as part of tribal consultation, 77 FR 51620, 51625–51626.

requirement was 15.4 percent.[130] As explained in the preceding responses, this analysis is based on a capital cost for the installation of SCR with LNB and OFA of $164.9 million, which matches the costs claimed by AEPCO in their comment letter minus certain charges excluded by EPA CCM. This difference in the estimated capital cost for SCR also accounts for much of the discrepancy between AEPCO's and Earthjustice's estimates of electricity rate increases, since Earthjustice's estimate was based on the capital cost estimates originally published in our NPRM.

AEPCO sells electricity through its member cooperatives, and not directly to residential and business customers, but EC/R also analyzed the impact of an increase in the cost of electricity generation on the monthly bills of electricity users serviced by AEPCO's Member Co-ops. Table 6 indicates the incremental retail costs of electricity to end users under the two scenarios mentioned above. The potential rate increases for residential users in 2019, the first full year of incremental capital expenditures for pollution controls installed in 2017 (and the year with the largest incremental cost impact), range from 4.5 percent, or $5.75 per month over 2011 rates, to 10.6 percent, or $10.75 per month over 2011 rates.[131] EC/R noted that the assumptions it made in constructing its model may cause the impact to rates to be conservatively overstated.

TABLE 6—INCREMENTAL RETAIL COSTS DUE TO SCR

[As 2019 costs would impact 2011 retail rates]

Scenario	Range of outcomes	Residential class only			Combined residential, commercial & industrial		
		Percent Increase (percent)	Average $ per year per customer	Average $ per month per customer	Percent Increase (percent)	Average $ per year per customer	Average $ per month per customer
A: Members Pay all SCR Costs.	Low	5.4	$83	$6.92	5.8	$125	$10.42
	High	10.6	129	10.75	12.0	220	18.33
B: Members Pay Portion of SCR Costs.	Low	4.5	69	5.75	4.8	103	8.58
	High	8.8	107	8.92	9.9	182	15.17

While these projected rate increases are not trivial, they are comparable to average historical rate increases for AEPCO, Arizona, and U.S. ratepayers.[132] They are also projected to occur seven years in the future. Again, in discussing the limitations of this retail rate analysis, EC/R noted that the results of the retail rate assessment should be considered conservative by design.

Regarding the comment that utilities in similarly economically disadvantaged areas have successfully installed modern pollution controls costing significantly more than the cost of SCR at Apache, we note that none of the installed controls listed in Earthjustice's comment letter were installed under the RHR. Accordingly, EPA cannot rely on them as precedents for the Apache Generating Station BART analysis.

Regarding the comment on the economic vulnerability of AEPCO's ratepayer population, EPA reviewed the supplemental information on per capita and median household incomes. Because electric utility bills are likely paid at the household and not individual, or per capita, level, we believe that median household income is an appropriate metric for assessment. We used census data to compare household income levels in the areas served by AEPCO's Class A member cooperatives to average household incomes in the United States. In 2011 the median income for U.S. households was $50,502. Using the supplemental information provided by AEPCO, we calculated that the median income for AEPCO's Member Co-ops' ratepayers was $49,303. In addition, we aggregated the data on median household income by zip code into four incomes ranges. Seventy-one percent of the median household incomes by zip code were in the $40,000 and above income ranges and twenty-nine percent were in the median household income range of $20,000 to $39,999. We found that the household incomes in AEPCO's Member Co-ops' service area are in the same range as average U.S. household income, so an increase in AEPCO's electricity rates should not cause greater hardship than a similar increase elsewhere in the country.[133] EPA's responsibility under the CAA and the RHR is to implement BART at Apache Generating Station. As discussed elsewhere in this document, the five-factor analysis indicates SCR with LNB and OFA represents BART for NO_X at Apache Units 2 and 3. While the analyses conducted by EPA and the commenters attempted to project the revenue requirements and possible rate increases that would be required if SCR with LNB and OFA are required at Apache, BART and other environmental regulatory requirements form only one part of the complex business conditions under which utility rate decisions take place, especially over extended time periods. It is the responsibility of utility companies to work with the appropriate regulatory agencies to implement any necessary rate changes in a manageable fashion.

Accordingly, because neither these projected rate increases nor any submitted information or analysis indicate that a requirement to install SCR with LNB and OFA will affect the viability of Apache Generating Station, EPA is finalizing its determination that this level of control represents BART. However, we are also taking into account AEPCO's status as a small entity as part of our determination. In particular, in its comments on our proposal, AEPCO requested that "EPA set the final BART limits in terms of lb/MMBtu only and not as a specified technology" to provide AEPCO with

[130] Apache Plant: Report on SCR Incremental Cost Assessment. Prepared by Energy Strategies, LLC for EC/R, Inc. (November 2012).

[131] *Id.*

[132] Energy Information Administration (EIA) State Historical Tables for 2011, Released: October 1, 2012. Average Price by State by Provider, 1990–2011. *http://www.eia.gov/electricity/data/state/avgprice_annual.xls*, last accessed November 5, 2012.

[133] Arizona Regional Haze SIP, BART Determination for Apache Generating Station, Supplemental Economic Analysis. Memorandum from Larry Sorrels and Robin Langdon, EPA Office of Air Quality Planning and Standards (November 5, 2012).

"maximum flexibility." [134] AEPCO also requested that if EPA decided to finalize emission limits consistent with SCR that the limits be set at 0.07 lb/MMBtu.[135] Given the unusual status of AEPCO as a small entity and a rural electric cooperative, we believe that it is consistent with EPA policy to minimize adverse impact to this small entity to the extent that such action is feasible and consistent with our BART analysis. To allow this small entity the maximum flexibility that is consistent with our analysis of the five factors, we have determined that it is appropriate to set the BART limit as a 30-day rolling average 0.070 lb/MMBtu limit, with a five year compliance deadline. As AEPCO noted, this approach may allow minor changes in configuration of the optimal system to allow AEPCO's compliance at somewhat lower cost. This 30-day rolling average 0.070 lb/MMBtu limit is also applied as a "bubble" across Units 2 and 3. This approach allows for short term emission spikes from startups and provides this small entity with additional operational flexibility within the constraints of the BART emissions limit.

Comment: One commenter (AEPCO) stated that EPA should not consider fuel switching from the current mix to all natural gas at Apache Unit 1 to be costless. AEPCO states that if it loses the ability to use multiple fuels, its negotiating leverage with natural gas suppliers will be greatly reduced, and it will not be able to obtain gas at reasonably competitive rates. AEPCO argued that this cost at Apache Unit 1 should be considered by EPA in its overall evaluation of the affordability of controls at Apache.

Response: EPA is approving ADEQ's emissions limit for Apache Unit 1. As noted by the commenter, Tables 6 and 7 of our proposed action (77 FR 42844) listed "fuel switch to PNG" as a control option in the context of the PM_{10} and SO_2 BART analyses, in addition to "fuel switch to low-sulfur fuel oil." The annualized costs for both options were listed as zero in both analyses. The information contained in Tables 6 and 7 does not represent our analysis for Apache Unit 1, but reflects the information contained in ADEQ's PM_{10} and SO_2 BART analyses. ADEQ's BART analyses for Apache 1 eliminated more stringent control technologies such as fabric filters and wet FGD, and determined that a fuel switch to natural gas was BART. Natural gas is a commodity, and its price fluctuates due to factors beyond the constraints on AEPCO's ability to use multiple fuels. However, the BART emissions limit we are establishing for Apache Units 2 and 3 will still allow AEPCO a choice of using multiple fuels across the units at the Apache facility.

b. Visibility Improvement

Comment: One commenter (NPS) agreed with EPA's analysis of the visibility impacts of the alternative NO_X control options for Apache Units 2 and 3 at the various impacted Class I areas, as presented in EPA's TSD, including EPA's conclusions that "the improvements from SCR are substantially greater than for the other candidate controls" and that "the modeled degree of visibility improvement supports SCR as BART for Apache." The commenter also indicated that it compiled BART analyses data from across the United States, which revealed that the average cost per deciview proposed by either a state or a BART source is $14 to $18 million. The commenter pointed out that for all of the NO_X control options at the Apache plant, including SCR, both the $/max deciview and the $/cumulative deciview are well below this range.

Response: We acknowledge the commenter's agreement with our analysis. Our supplemental analysis, discussed in more detail above, was conducted using a capital cost for the installation of SCR with LNB and OFA of $164.9 million. For the 0.070 limit on Apache Units 2 and 3 that we are finalizing in this action, this supplemental analysis found an average cost per deciview ($/max deciview) of $12.7 million and a cumulative average cost per deciview ($/cumulative deciview) of $3.1 million.

c. Other Comments

Comment: One commenter noted that EPA is required by the Executive Order on Environmental Justice to consider all potential economic and environmental impacts on minorities and low-income populations that its decisions on BART, in this case, will have on AEPCO and its customers. The commenter stated that over four in ten of AEPCO's customers are minorities. In similar remarks, another commenter cautioned EPA that such increases would impact at-risk populations.

Response: In establishing BART requirements for the facilities in this final rulemaking, EPA is increasing the level of environmental protection for all affected populations by requiring substantial NO_X emission reductions. Thus, EPA does not expect any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population from our final action. Disadvantaged populations also will be able to enjoy the visibility improvements in Class I areas anticipated from the emissions reductions required by this final rulemaking.

EPA took several steps to ensure transparency and meaningful participation in the rule development process for this BART FIP. In response to numerous requests, we extended the public comment period on our proposal and increased the number of public hearings in Arizona from one to three. In addition, all three hearings had Spanish language interpretation services and the hearing on August 14 in Holbrook, Arizona, also offered interpretation in Diné.

We disagree that Executive Order 12898 requires EPA to consider the economic effects of our proposed action on disadvantaged populations. As EPA's Environmental Appeals Board (EAB) has explained:

> Executive Order 12898 instructs federal agencies to address, as appropriate, "disproportionately high and adverse human health or environmental effects of [their] programs, policies, and activities on minority and low-income populations * * *." The Executive Order, thus, speaks to human health and environmental effects; it does not require federal agencies to consider issues regarding cost or rate changes.[136]

Therefore, Executive Order 12898 does not require us to consider potential economic effects. Nonetheless, as explained elsewhere in this document, in consideration of AEPCO's status as a small entity and consistent with EPA policy encouraging consideration of the potential social and economic impacts of EPA actions,[137] we have conducted an analysis of the affordability of installing SCR at Apache Units 2 and 3. This analysis indicates that installation of SCR would not affect the viability of continued plant operations at Apache and would result in an average rate increase for residential member utility customers of (at most) $11 per month in 2019 compared to 2011 rates.

Comment: One commenter indicated that because AEPCO is a small electric cooperative, EPA is required by the Regulatory Flexibility Act to prepare a regulatory flexibility analysis for this rulemaking.

[134] AEPCO Comments page 18.

[135] *Id.*

[136] In re: Upper Blackstone Water Pollution Abatement District, Order Denying Review In Part and Remanding In Part, NPDES Appeal Nos. 08–11 to 08–18 & 09–06. (May 28, 2010) slip op at 105. (internal citation omitted).

[137] See, e.g., Interim Guidance on Considering Environmental Justice During the Development of an Action page 4, footnote 4.

Response: We agree that AEPCO is considered small entity for purposes of the Regulatory Flexibility Act (RFA). However, the RFA does not require a regulatory flexibility analysis when a rule has an impact on only *one* small entity (as opposed to a significant impact on a substantial number of small entities). Nonetheless, EPA policy is to assess the direct adverse impact of every rule on small entities and minimize any adverse impact to the extent feasible, regardless of the magnitude of the impact or number of small entities affected. Therefore, we gave AEPCO additional opportunities to participate in the rulemaking process. Specifically, prior to issuing our proposed rule, we informed AEPCO that our proposed action would address BART requirements for units at AEPCO's Apache facility. We also requested information from AEPCO on the economics of operating Apache Generating Station and what impact the installation of SCR may have on the economics of operating Apache Generating Station. We have considered the comments we received concerning AEPCO's status as a small entity and the potential economic impact of our proposed action on AEPCO. Our discussion of affordability above includes our response to these comments and delineates the changes we made from our initial proposal in order to give AEPCO flexibility as a small entity. We have also taken into consideration the potential impact of the reporting, recordkeeping, and other compliance requirements of this rule, as set forth in the regulatory text. Because AEPCO is an electric utility that is already subject to reporting, recordkeeping and other compliance requirements under the CAA, AEPCO already has access to the professional skills necessary for the preparation of the reports and records necessary for compliance with the FIP.

2. Cholla Units 2, 3 and 4

a. Selection of Baseline Period

Comment: Several commenters asserted that EPA incorrectly and inappropriately changed the control baseline period in its NO_X BART analysis for Cholla. APS and PacifiCorp contend that the 2011 NO_X emissions were already controlled by LNB and OFA at Cholla Units 2, 3 and 4, which penalized APS and PacifiCorp for their voluntary use of these controls. In addition, since LNB and OFA were already in use, EPA inappropriately only considered higher cost post-combustion controls (SCR and SNCR) in its BART analysis. If the baseline remained 2001–2006, LNB and OFA would also have been considered in the analysis. APS noted that EPA concurred with ADEQ's BART determination for SO_2 and PM_{10} emissions for these same units using a baseline of 2001–2006. In addition, one commenter (Earthjustice) asserted the baseline period (2008–2011) understates NO_X emissions reductions compared to the baseline period of 2001–2004.

In contrast, one commenter (NPS) concurred with EPA's use of 2011 as the baseline period for Cholla units 2, 3 and 4 since it represents the first complete calendar year at which it is certain that the Cholla plant operated using the full quantity of a higher NO_X-emitting coal that the plant is committed to purchase under its current coal contract. The commenter submitted a graph of annual NO_X emission rates for the units at the Cholla plant, which the commenter believes to show the impact of recently added combustion controls and higher-NO_X coal.

Response: As explained in a previous response, we do not agree that use of the updated baseline for Cholla was incorrect or inappropriate. Moreover, updating the baseline did not eliminate LNB and OFA from consideration as BART, since existing controls can constitute BART if additional controls are not warranted based on the five-factor analysis. For example, EPA recently approved a determination by Colorado that existing LNB at Comanche Units 1 and 2 constituted BART where "the State determined that the added expense of achieving lower limits through different controls was not reasonable based on the high cost-effectiveness [$9,900/ton] coupled with the low visibility improvement (under 0.2 dv) afforded." [138] In this case, by contrast, the cost-effectiveness of post combustion controls is reasonable and the expected visibility improvements are substantial, as explained below. Nonetheless, in order to address the commenter's concerns that we did not properly consider LNB and OFA as a potential control option and therefore precluded a BART determination of LNB and OFA, we have used a baseline period of 2001–2003, which corresponds to the period used in APS's original BART analysis. Our supplemental cost analysis for Cholla is summarized in Table 10.[139]

[138] 77 FR 18052, 18066 (March 15, 2012) (Proposed Rule); pre-publication version of Final Rule, signed September 10, 2012, available at: *http://www.epa.gov/region8/air/FinalActionOnColoradoRegionalHazePlanSep2012.pdf.*

[139] A spreadsheet titled "Supplemental Cost Analysis 2012–11–15.xls" is in the docket.

b. Control Efficiencies

Comment: In arguing against the achievability of EPA's proposed limit, one commenter (APS) noted that according to the study that EPA placed in the docket (IPM Model—Revisions to Cost and Performance for APC Technologies, 2010, Sargent & Lundy), the Agency's minimum emissions limit of 0.05 lb/MMBtu is specific to Powder River Basin coal and the minimum level for bituminous coal is 0.07 lb/MMBtu. The commenter also stated that because this is a minimum emissions level, it is probably too aggressive even for a BART determination based on bituminous coal. The commenter also stated that these rates may be appropriate for new units under ideal conditions as BACT are not appropriate for BART.

Another commenter (AUG) stated that EPA's record in support of the putative achievability of a 0.050 lb/MMBtu emission limit at Apache, Cholla, and Coronado is extremely thin and unpersuasive. AUG states that EPA has not, for instance, demonstrated through the development of an SCR conceptual design or some other, similar site specific analysis that SCR can achieve this emission rate at any of these particular facilities, and that EPA must affirmatively establish that its selected BART rate is in fact achievable at these facilities.

In addition, AUG asserted that EPA's proposed limit of 0.050 lb/MMBtu is inconsistent with the following EPA actions:

- As part of CSAPR, EPA concluded that a NO_X limit below 0.06 lb/MMBtu is not achievable through retrofit of SCR on coal-fired electric generating units.[140]
- In EPA's proposed rule for North Dakota, EPA based its BART analysis on a 0.05 lb/MMBtu emission rate, but then proposed to adopt a 0.07 lb/MMBtu limit because EPA concluded the more stringent rate would not allow a sufficient margin of compliance (citing 76 FR 58570, 58610, September 21, 2011).
- In its final rule for South Dakota, EPA set a NO_X limit of 0.10 lb/MMBtu for an electric generating plant to allow for an adequate margin of compliance (citing 77 FR 24845, 24848, 24849, April 26, 2012).
- In Colorado's recently approved regional haze SIP, the NO_X BART for Craig Station is an emission rate of 0.27 lb/MMBtu based on SNCR and SCR for their units and the NO_X BART for

[140] Citing 76 FR 1109, 1115, January 7, 2011; EPA, Transport Rule Engineering Feasibility Response to Comments, Docket ID No. EPA-HQ-OAR-2009-0491-4529, at 13, July 6, 2011.

Hayden Station is an emission rate of 0.07 lb/MMBtu for one unit and 0.08 lb/MMBtu at another unit based on SCR.

Response: We disagree that the SCR emission rate for the Cholla units should be established at 0.07 lb/MMBtu per IPM guidance for bituminous coal. Based on the coal information provided in the original Cholla BART analyses,[141] the Lee Ranch/El Segundo Mine coal being used at Cholla does exhibit some properties that would fall in the range of bituminous coal (nitrogen and moisture content), but also exhibits properties that fall in the range of sub-bituminous coal (fixed carbon, heat value). As a result, we do not agree that the Lee Ranch/El Segundo coal can clearly be classified as a bituminous coal.

More broadly, we disagree with commenters' assertion that 0.05 lb/MMBtu (rolling 30-day average) is an inappropriate SCR emission limit for the Cholla units. Although BART determinations are performed on a site-specific basis, the process for establishing the technical feasibility of a control technology and its associated emission performance level are described in the BART Guidelines as follows:

> It is important, however, that in analyzing the technology you take into account the most stringent emission control level that the technology is capable of achieving. You should consider recent regulatory decisions and performance data (e.g., manufacturer's data, engineering estimates and the experience of other sources) when identifying an emissions performance level or levels to evaluate.
>
> In assessing the capability of the control alternative, latitude exists to consider special circumstances pertinent to the specific source under review, or regarding the prior application of the control alternative. However, you should explain the basis for choosing the alternate level (or range) of control in the BART analysis. Without a showing of differences between the source and other sources that have achieved more stringent emissions limits, you should conclude that the level being achieved by those other sources is representative of the achievable level for the source being analyzed.[142]

We therefore disagree with commenters' assertion that the BART Guidelines require a SCR conceptual design or other site specific engineering analysis in order to demonstrate a level of performance. The BART Guidelines indicate that one should take into account the most stringent emission control level that the *technology* is capable of achieving and then document any special circumstances for selecting an alternate level or range of control in the BART analysis.

In our proposal, we explained that SCR, as a technology, can achieve a level of performance between 80 to 90 percent reduction, even on a retrofit basis, and especially when combined with LNB and OFA. Although the commenters indicate that they do not consider our support for this position persuasive, they have not specifically disputed the claim that SCR can, as a technology, achieve this level of performance. We have included additional documents, including vendor experience lists of SCR projects, which indicate that SCR has been capable of achieving this level of performance.[143] In determining whether special circumstances exist at the Cholla units that may justify using a different range of control, we examined the Clean Air Markets Database (CAMD) for tangential coal-fired units operating with SCR, either stand alone or in conjunction with LNB and OFA, and on a retrofit basis. We identified the 10 best such performing units, and have listed them in Table 7. In addition, we have listed their best-performing annual average emission rate as well as the percent reduction associated with that emission rate by comparing it to annual average emission rates from its pre-SCR period of operation.[144]

TABLE 7—BEST PERFORMING TANGENTIAL COAL-FIRED EGUS WITH RETROFIT SCRS

State	Facility name	Unit ID	SCR Emission rate		Control efficiency (percent)	Control technology
			(lb/MMBtu)	Year		
TX	W A Parish	WAP7	0.038	2007	73	SCR [1]
TX	W A Parish	WAP8	0.038	2006	77	SCR [1]
VA	Chesterfield Power Station	6	0.041	2009	89	SCR+LNB+COFA/SOFA
NC	Marshall	3	0.045	2011	85	SCR+LNB+SOFA
TN	Kingston	6	0.051	2009	88	SCR+LNB+SOFA
TN	Kingston	8	0.052	2009	88	SCR+LNB+SOFA
TN	Kingston	9	0.052	2009	89	SCR
TN	Kingston	7	0.054	2009	88	SCR+LNB+SOFA
MN	Boswell Energy Center	3	0.054	2009	86	SCR+LNB+SOFA
TX	Sandow	4	0.059	2011	83	SCR+LNB+SOFA

[1] In the case of the Parish units, we note that their <80 percent control efficiency is the result of low pre-SCR emission rates.

In the case of the Cholla units, which are also tangential coal-fired EGUs, our estimate of the level of performance of the SCR with LNB and OFA control option corresponds to 80 to 85 percent control efficiency, which is in the low- to mid-range of SCR performance. We used these control efficiencies in our cost calculations on an annual average basis, and in our visibility modeling on a 24-hour average basis.[145] Although the commenters have stated that they disagree with this level of control efficiency and the emission rate associated with it, they have not submitted information for the Cholla units documenting special circumstances that would justify a lower effective range of control efficiency for SCR. In fact, we note that certain aspects of APS's own BART analyses for the Cholla units are based upon control efficiencies in a similar range. The original BART analyses performed by APS and submitted to ADEQ included visibility modeling indicating that SCR with LNB and OFA can achieve in the range of 83 to 86 percent control efficiency for Cholla Units 2, 3 and 4. APS calculated these control

[141] "Additional APS Cholla BART response", Appendix B.

[142] BART Guidelines, 40 CFR Part 51, Appendix Y, section IV.D.3.

[143] Kurtides, Ted "Lessons Learned from SCR Reactor Retrofit", Presented at COAL-GEN (August 6–8, 2003); Hitachi SCR/NO_X catalyst experience (February 2010); Haldor Topsoe SCR catalyst reference list (October 2009); Institute of Clean Air Companies, "White Paper—Selective Catalytic Reduction Control of NO_X emissions from Fossil Fuel-fired Electric Power Plants" (May 2009).

[144] "Tangentially-fired coal unit SCR retrofit emission data."

[145] See 77 FR 42859, Table 18.

efficiencies based upon the difference between the highest 24-hour average emission rate observed over a 2001–2003 baseline period and a 24-hour average SCR emission rate of 0.07 lb/MMBtu. This information is summarized in Table 8.

TABLE 8—SCR WITH LNB AND OFA CONTROL EFFICIENCY ESTIMATE

[APS estimate]

Unit	Baseline NO_X emissions (24-hour average)			SCR+LNB+OFA Emission rate	
	(lb/MMBtu) [1]	Control tech	Period	(lb/MMBtu)	Control efficiency [2] (percent)
Cholla 2	0.503	CCOFA	2001–03	0.07	86
Cholla 3	0.410	CCOFA	2001–03	0.07	83
Cholla 4	0.415	CCOFA	2001–03	0.07	83

[1] Per Table 2–1 of the original BART analysis for each unit, Docket Items B–06 through B–08.
[2] Per Appendix A of the original BART analysis for each unit, Docket Items B–06 through B–08.

APS submitted updated visibility modeling to us as part of comments on our proposal, and with the exception of Cholla Unit 2, the baseline emissions and associated SCR control efficiencies do not differ from the original analysis.[146] We note that APS did not use SCR emission rates consistent with these control efficiencies in other aspects of its BART analysis, such as on an annual average basis in cost calculations. If the control efficiencies calculated by APS are applied to baseline annual average emission rates, the Cholla units can achieve the values in Table 9. These values are consistent with our own estimates of SCR with LNB and OFA performance, and support the use of a 0.05 lb/MMBtu emission rate, on an annual average basis, in our cost calculations.[147]

TABLE 9—SCR WITH LNB AND OFA EMISSION RATE

[Per APS Control Efficiency Estimate]

Unit	Baseline NO_X emissions (Annual ave)			SCR+LNB+OFA emission rate	
	(lb/MMBtu)	Ctrl tech	Period	Control efficiency (percent)	(lb/MMBtu)
Cholla 2	0.326	CCOFA	2001–03	86	0.045
Cholla 3	0.304	CCOFA	2001–03	83	0.052
Cholla 4	0.296	CCOFA	2001–03	83	0.050

With regard to establishing the BART emission limit of 0.05 lb/MMBtu on a rolling 30-day average, the commenters note that in the proposed Regional Haze FIP for North Dakota, we stated the following for the Milton R Young Station Unit 1, a coal-fired boiler for which we also proposed a NO_X BART determination based on the use of SCR technology:

> In proposing a BART emission limit of 0.07 lb/MMBtu, we adjusted the annual design rate of 0.05 lb/MMBtu upwards to allow for a sufficient margin of compliance for a 30-day rolling average limit that would apply at all times, including startup, shutdown, and malfunction.[148]

The commenter also notes that we approved South Dakota's Regional Haze SIP that established a BART emission limit of 0.10 lb/MMBtu (30-day rolling) for Big Stone I, based on the use of SCR technology, also citing a need for compliance margin for BART limits that must apply at all times including startup, shutdown, and malfunction (77 FR 24849). We agree with the commenter that it is appropriate to accommodate startup and shutdown events when establishing a rolling 30-day BART emission limit. Since these events, particularly startup, generate elevated levels of emissions, the particular day during which such an event occurs will appear as a short-term "spike." On an annual average basis, such short-term spikes can be averaged with 365 other values that allow them to be "smoothed out." [149] Since the limit was established on a shorter averaging period than the design basis (from 365 days to 30 days), there are fewer days (i.e., data values) with which such short-term spikes can be "smoothed out." In the instances noted by the commenter, a less stringent value (from 0.05 to 0.07 for MR Young 1) was established for the shorter averaging period.

In order to accommodate emissions from startup and shutdown events, we are finalizing two revisions to our proposed emission limit of 0.050 lb/MMBtu (rolling 30-day average). First, we are finalizing the limit as a "bubble" limit across Cholla Units 2, 3 and 4. By establishing the rolling 30-day limit

[146] In the visibility modeling submitted a part of their comments, APS apparently identified a higher maximum 24-hour average value rom the 2001–2003 baseline period than the one identified in Table 8 for Cholla Unit 2. This results in an estimated SCR with LNB and OFA control efficiency of 87 percent.

[147] In addition, APS's comments also included an SNCR design estimate based upon LNB performance of 0.22 lb/MMBtu. Achieving an SCR emission rate of 0.05 lb/MMBtu from this emission rate would represent only 77 percent control efficiency. This is well within the range of what SCR can achieve, even with a lower inlet NO_X emission rate.

[148] 76 FR 58610.

[149] The precise method by which such short term spikes will be 'smoothed out' over the period of a year will vary based upon the precise compliance determination methodology. The suggestion that it would be averaged with the other 364 days' values is just a generic description of one type of averaging process.

across all three units, this allows the spike in emissions associated with a startup/shutdown event at one unit to be smoothed with the emission values from the other operating units. Second, we are also finalizing a less stringent value in order to establish an emission limit that accommodates the startup and shutdown events associated with the operating profile of the Cholla units. In determining what magnitude of revision is appropriate, we examined the emissions of the Cholla units, as reported to CAMD, over a 2001–2003 baseline period.[150] We calculated annual average emission rates and 30-day rolling average emission rates using a calculation methodology corresponding to a bubble limit across all three units.[151] Based on this methodology, we determined that the maximum annual average emission rate for these units was approximately 0.32 lb/MMBtu, while the maximum 30-day rolling average emission rate was approximately 0.35 lb/MMBtu. This represents an 8 percent difference between the highest rates observed on an annual and 30-day rolling average. We recognize that this variability between annual average and 24-hour average emission rates is based on operation of the Cholla units with LNB and OFA, and may not be directly representative of the variability associated with operation of SCR. We are therefore finalizing an emission rate of 0.055 lb/MMBtu as a bubble limit across Cholla Units 2, 3 and 4, which represents a 10 percent upward revision from the annual average design value. When combined with the 3-unit bubble, this represents an emission limit that we consider appropriate to ensure design and operation of the emission control system to provide the best available retrofit control.

Comment: EPA based LNB/SOFA emission rates on 2011 NO_X emissions rates, which is not an accurate assessment of the capability of the installed LNB and SOFA. Arizona set the BART limit for Cholla Units 2, 3 and 4 at 0.22 lb/MMBtu. All three units were able to meet this limit in their acceptance test after LNB and SOFA were retrofitted, and APS believes they can meet it long term. In addition, an SNCR design study performed by Black and Veatch indicated that an SNCR system could obtain a control efficiency of approximately 25 percent, which would correspond to an emission rate of 0.17 lb/MMBtu. EPA's cost and visibility estimates must be updated to reflect these levels.

Response: We partially agree with this comment. In submitted comments, APS provided a conceptual design estimate for SNCR which was based upon 25 percent control efficiency (incremental from LNB) and a resulting emission rate of 0.17 lb/MMBtu. While this control efficiency is less than the 30 percent control efficiency used by our contractor, we consider it to be a reasonable estimate based upon the vendor quotes provided by APS.[152]

We disagree with the use of an LNB emission rate of 0.22 lb/MMBtu, as the Cholla units have not demonstrated a consistent ability to operate at this emission rate under the current coal contract for Lee Ranch/El Segundo coal. Based upon a review of CAMD emission data since the installation of LNB, we acknowledge that the Cholla units have, to varying degrees, operated with LNB at emission rates consistent with APS's assertion of 0.22 lb/MMBtu during this period. However, as noted in our proposal, calendar year 2011 represented the first year at which the Cholla plant operated at the "full" minimum purchase quantity under its new contract for Lee Ranch/El Segundo coal, which is a higher NO_X-emitting coal than what was previously used. Since the beginning of 2011 to September 2012, Cholla Units 3 and 4 have operated at or below an emission rate of 0.22 lb/MMBtu for only five to six months of this 21 month period, and Cholla Unit 2 has not operated at or below this emission rate in any month during this period.[153] Therefore, an LNB emission rate of 0.22 lb/MMBtu is not supported by the actual recent operation of the Cholla units, so it is unlikely to be an appropriate representation of anticipated future emissions.

c. Costs of Compliance

Comment: One commenter (APS) stated that, for EPA's capital costs estimate, no back-up material was provided, even when directly requested by APS. This lack of information makes it impossible for APS to comment on the validity of EPA's cost estimates. The commenter also stated that EPA has not established its contractor or subcontractor responsible for the costs estimates as experienced in the engineering, procurement and construction of utility-scale air quality control systems.

Response: We disagree with the commenter's assertion that we have not provided sufficient information regarding our cost calculations. In the docket for our proposal, we included the raw cost calculation spreadsheets that contain the cost calculation equations, corresponding variable values, selected notes regarding assumptions and variable ranges, as well as selected tables from the IPM Base Case v4.10.[154] In addition, web links were also provided (both in the raw cost calculation spreadsheet and in our proposal) to the location on the publicly available EPA Web site that contains full IPM documentation. We note that both SRP and AEPCO were able to locate this spreadsheet, as both utilities submitted control cost estimates as part of their comments that revised certain variable values and assumptions in our contractor's raw calculation spreadsheet. This information was initially developed by EPA contractors[155] and was reviewed by EPA staff. Following the close of the public comment period on our proposed rulemaking, APS provided additional information concerning its own cost estimates. We have placed this information to the docket and taken it into account as part of this final rulemaking, as explained below.

Comment: One commenter (APS) stated that EPA's cost-effectiveness numbers in the proposed FIP are incorrect. The commenter stated that EPA used a capital recovery factor of 9.4 percent, assuming an interest rate of 7 percent, but APS states that a capital recovery factor of 13.4 percent should be used to account for income and property taxes and the cost of capital authorized by ACC in the last rate case. The commenter also stated that EPA analysis uses emissions factors for SCR that are not appropriate for the type of coal used, the units, or the averaging period. In addition, APS noted the cost values used in the IPM model and EPA's CCM may be outdated, which may also lead to underestimation of the true costs. APS estimates cost-effectiveness ranging from $7,719/ton to $8,894/ton, with incremental costs ranging from

[150] "Cholla CAMD emission data (daily) 2001–03"

[151] Please consult the regulatory language in our final action for the NO_X compliance determination methodology associated with the bubble limit.

[152] Black and Veatch's report cites lower inlet NO_X concentrations to the SNCR system. A lower inlet NO_X emission rate makes it more difficult to reduce NO_X emissions, which makes a lower removal efficiency reasonable.

[153] "Cholla CAMD emission data (monthly) 2010–12."

[154] Document ID: EPA–R09–OAR–2012–0021–0008, File name: G–15_MODELING_FILES_EGU_BART_Costs_Apache_Cholla_Coronado_FINAL2

[155] Specifically, the initial cost estimates were developed by Jim Staudt of Andover Technology Partners. While there is no requirement for EPA to establish that its contractors are "experienced in the engineering, procurement, and construction of utility-scale air quality control systems," Dr. Staudt has extensive expertise and experience in the field of air pollution control at power plants. See: *www.andovertechnology.com/staudt.html.*

$8,759/ton to $10,329/ton compared to EPA's estimates of $3,115/ton to $3,473/ton, with incremental costs ranging from $3,257/ton to $3,813/ton. APS included costs for surcharges, current AFUDC and fixed charge rates, and emissions factors based on the capability of the existing LNB and OFA at the plant, typical SNCR removal rates, and minimum SCR emissions for bituminous coal.

In contrast, one commenter (Earthjustice) stated that SCR at Cholla is more cost-effective than EPA's calculations suggest, in that EPA overestimated the costs by (1) using an unjustifiably high 7 percent interest rate; (2) amortizing costs over a 20-year life of the SCR system, rather than a more realistic life of 30 years or more; and (3) overestimating the costs of the SCR catalyst, reagent, auxiliary power and property taxes and insurance. In addition, the commenter asserted that EPA baseline period understates NO_X emissions reductions compared to the baseline period of 2001–2004. According to the commenter, when the cost-effectiveness of SCR is calculated using more accurate costs, proper baselines and appropriate emission rates, the result is an even more cost-effective SCR investment that reduces NO_X at a cost of $1,901/ton at Unit 2, $1,940/ton at Unit 3 and $2,076/ton at Unit 4.

Response: Although we do not agree that our cost-effectiveness estimates were incorrect, we have performed a supplemental analysis using portions of the updated cost estimates provided by APS in its comments. In this supplemental analysis, we have generally relied upon APS's estimates of capital costs and operating costs. While we do not find that these estimates were sufficiently supported with detailed site-specific information in all instances, we are using them as a conservative assumption (i.e., an assumption that would tend to overestimate rather underestimate the annualized cost of controls). As discussed in a previous response, we consider it appropriate to observe the broader cost methodology used in EPA's CCM, and have adjusted or eliminated certain cost items not allowed by the CCM. A line-by-line comparison of APS's cost estimate and our revisions can be found in the docket for this rulemaking action.[156] A summary of cost estimates based on this supplemental analysis is in Table 10, and includes the following:

- Inclusion of APS's updated cost estimates: We have adopted a 'hybrid' approach in which we have used APS's capital cost and O&M cost estimates, while excluding those cost items not allowed by CCM methodology. As discussed in a previous comment, we have included owner's costs up to the amount provided for "Engineering and Home Office Fees" as described by the CCM. We have excluded surcharge as well as AFUDC, which is inconsistent with CCM methodology.
- Use of a 7 percent interest rate: We have retained the use of a 7 percent interest rate in calculating the capital recovery factor, and disagree with APS's assertion that a 13.4 percent interest rate is appropriate. For cost analyses related to government regulations, an appropriate "social" interest (discount) rate should be used. EPA calculated capital recoveries using 3 percent and 7 percent interest rates in determining cost-effectiveness for the Regulatory Impact Analysis (RIA) for the BART Guidelines.[157] [158] We consider our use of an interest rate of 7 percent to calculate capital recovery to be a conservative approach.
- Use of original baseline period: As discussed elsewhere in our responses, we consider our use of a more recent baseline as consistent with BART Guidelines. However, in order to address commenter's concerns that we did not properly consider LNB and OFA as a potential control option and therefore precluded a BART determination of LNB and OFA, we have used a baseline period of 2001–2003, which corresponds to the period used in APS's original BART analysis. This represents a time period prior to the installation of LNB, during which the control technology in place on the Cholla units was only OFA.

TABLE 10—CHOLLA CONTROL COST ESTIMATES (PER APS COMMENTS, WITH EPA REVISIONS)

Control options	Capital cost ($)	Annualized capital cost ($/yr)	Annual O&M cost ($/yr)	Total annual cost ($/yr)
Cholla 2:				
LNB+OFA	$4,482,254	$423,093	$120,000	$543,093
SNCR w/LNB+OFA	16,617,408	1,568,566	1,254,500	2,823,066
SCR w/LNB+OFA	87,713,386	8,279,523	1,626,683	9,906,206
Cholla 3:				
LNB+OFA	3,848,807	363,300	120,000	483,300
SNCR w/LNB+OFA	19,238,125	1,815,943	1,254,500	3,070,443
SCR w/LNB+OFA	83,461,195	7,878,146	1,570,766	9,448,912
Cholla 4:				
LNB+OFA	5,334,618	503,550	170,000	673,550
SNCR w/LNB+OFA	24,885,052	2,348,973	1,737,393	4,086,366
SCR w/LNB+OFA	119,083,832	11,240,671	2,350,182	13,590,853

A summary of emission rates and emission reductions associated with each control option is in Table 11. As noted previously, these emission estimates are based on a 2001–2003 baseline period, during which the Cholla units operated only with OFA. We note that while APS has provided emission estimates for this baseline period, the values provided, both in the original BART analysis and in submitted comments, appear to represent the highest 24-hour average value for modeling purposes. Since control cost estimates are based on an annual average ($/year), we have calculated annual emission rates for the OFA baseline using the annual average emission data reported to CAMD over this 2001–2003 baseline period. Comparing a baseline value on a 24-

[156] Docket ID No. EPA–R09–OAR–2012–0021.

[157] Regulatory Impact Analysis for the Final Clean Air Visibility Rule or the Guidelines for Best Available Retrofit Technology (BART) Determinations Under the Regional Haze Regulations, EPA–0452/R–05–004 (June 2005).

[158] A 7 percent interest rate is recommended by Office of Management and Budget, Circular A–4, Regulatory Analysis, *http://www.whitehouse.gov/omb/circulars-a004-a-4/*.

hour average basis (as provided by APS) to a control option value on an annual average basis is not an "apples-to-apples" comparison, as some portion of the emission reduction in such a comparison would be attributable to the differences between moving from a 24-hour average to an annual average basis.

TABLE 11—CHOLLA EMISSION ESTIMATES

Control options	Emission factor (lb/MMBtu)	Heat rate (MMBtu/hr)	Annual capacity factor	Emission rate		Emissions removed (tpy)
				(lb/hr)	(tpy)	
Cholla 2:						
OFA (only)	0.326	3,022	0.91	985	3,927	.....
LNB+OFA	0.295	3,022	0.91	892	3,554	373
SNCR w/LNB+OFA	0.207	3,022	0.91	624	2,488	1,440
SCR w/LNB+OFA	0.050	3,022	0.91	151	602	3,325
Cholla 3:						
OFA (only)	0.304	3,480	0.86	1058	3,985	.....
LNB+OFA	0.254	3,480	0.86	885	3,335	650
SNCR w/LNB+OFA	0.178	3,480	0.86	620	2,334	1,651
SCR w/LNB+OFA	0.050	3,480	0.86	174	655	3,330
Cholla 4:						
OFA (only)	0.296	4,399	0.93	1302	5,304	.....
LNB+OFA	0.260	4,399	0.93	1144	4,661	643
SNCR w/LNB+OFA	0.182	4,399	0.93	801	3,263	2,042
SCR w/LNB+OFA	0.050	4,399	0.93	220	896	4,408

Cost-effectiveness values for each control technology are summarized in Table 12, based on the total annual costs and annual emissions removed listed in the previous tables.

TABLE 12—CHOLLA CONTROL OPTION COST-EFFECTIVENESS

Control options	Total annual cost ($/yr)	Emissions removed (tpy)	Cost-effectiveness ($/ton)	
			Average	Increment
Cholla 2:				
OFA (only)	.....	.....	.....	.....
LNB+OFA	543,093	373	1,454	.....
SNCR w/LNB+OFA	2,823,066	1,440	1,961	2,138
SCR w/LNB+OFA	9,906,206	3,325	2,979	3,757
Cholla 3:				
OFA (only)	.....	.....	.....	.....
LNB+OFA	483,300	650	743	.....
SNCR w/LNB+OFA	3,070,443	1,651	1,860	2,586
SCR w/LNB+OFA	9,448,912	3,330	2,838	3,799
Cholla 4:				
OFA (only)	.....	.....	.....	.....
LNB+OFA	673,550	643	1,047	.....
SNCR w/LNB+OFA	4,086,366	2,042	2,001	2,441
SCR w/LNB+OFA	13,590,853	4,408	3,083	4,016

Even based on cost estimates revised to use APS's capital and O&M cost estimates, we still consider the cost-effectiveness values of SCR, on an average ($2,838 to $3,083/ton) and incremental ($3,757 to $4,016/ton) basis, to not be cost-prohibitive. We consider these results supportive of our proposed determination that SCR with LNB and OFA is cost-effective. We note that while the LNB and OFA option is the least expensive (i.e., lowest annual cost) and is the most cost-effective of the control technologies (i.e., has the lowest $/ton value), it is also the least effective control option. It removes substantially fewer emissions than either of the other two control options, the SNCR- and SCR-based systems. As discussed in our proposed action, and in other responses in this document, we have not identified any energy or non-air quality impacts that warrant eliminating SCR from consideration for the Cholla units. Combined with the modeled visibility improvement associated with this control option, these cost estimates continue to support the selection of SCR with LNB and OFA as BART for NO_X at the Cholla units.

d. Visibility Improvement

Comment: One commenter (NPS) agreed with EPA's analysis of the visibility impacts of the alternative NO_X control options for Cholla Units 2, 3 and 4 at the various impacted Class I areas, as presented in EPA's TSD. The commenter also indicated that its estimates of the two $/deciview measures of cost-effectiveness were similar to those of EPA. Specifically, the commenter's analysis yielded values of $19.9 million for the "$/max deciview" metric and $3.7 million for "$/cumulative deciview."

Response: We acknowledge the comment.

Comment: One commenter (APS) hired a contractor to perform modeling with CALPUFF version 5.8 and the

updated version of 6.42 to measure the sensitivity of various emission control scenarios at Cholla Units 2, 3 and 4 including two different background ammonia concentrations. The contractor found that regardless of which model version or background ammonia value was used, the highest predicted visibility improvement of SNCR or SCR, compared to LNB and OFA, is lower than the threshold for human perceptibility of 1.0 deciview. Moreover, retrofitting SNCR or SCR at Cholla will not lead to any perceptible improvement in visibility at any of the 13 Class I areas within 300 km of the Cholla facility.

Response: EPA disagrees with the ammonia concentration and CALPUFF model version used by the commenter for reasons discussed above. Further, we do not agree that the consideration of visibility improvement must directly reflect human perception. The CAA and the RHR require, as part of each BART analysis, consideration of "the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology." [159] The regulations do not require that the improvement anticipated to result from a particular technology at a particular source be perceptible by a single human being in order to be relevant as part of a BART determination. As EPA explained in the preamble to the BART Guidelines:

> Even though the visibility improvement from an individual source may not be perceptible, it should still be considered in setting BART because the contribution to haze may be significant relative to other source contributions in the Class I area. Thus, we disagree that the degree of improvement should be contingent upon perceptibility.[160]

Thus, in our visibility improvement analysis, we have not considered perceptibility as a threshold criterion for considering improvements in visibility. Rather, we have considered visibility improvement in a holistic manner, taking into account all reasonably anticipated improvements in visibility expected to result at all Class I areas within 300 kilometers of each source. Improvements smaller than 0.5 dv may be warranted considering the number of Class I areas involved, and the fact that in the aggregate, small improvements from controls on multiple BART and other sources will contribute to visibility progress.[161]

In addition, EPA is not obligated to focus on incremental costs and benefits to the exclusion of absolute costs and benefits. The BART Guidelines recommend consideration of both average and incremental cost-effectiveness,[162] but do not expressly require or recommend consideration of incremental visibility improvement. Rather, they provide for consideration of net visibility improvement (i.e., "the visibility improvement based on the modeled change in visibility impacts for the pre-control and post-control emission scenarios" as opposed to the change between different control scenarios).[163]

Comment: One commenter (APS) noted that Cholla Units 2 and 3 have separate flues but share a single stack, which EPA failed to recognize in its visibility modeling. The commenter also noted that EPA failed to use the appropriate Good Engineering Practice (GEP) stack height correction required by EPA's own rules for modeling. Because these errors result in visibility impacts in opposite directions, the net effect is less than 5 percent, based on modeling that APS has conducted.

Response: If the commenter is correct that there were two errors that nearly cancel out, then this would appear to have little effect on EPA's decision. The maximum area benefit of SCR was modeled by EPA to be 1.34 dv at Petrified Forest National Park, and 1.06 dv at Grand Canyon National Park; a 5 percent reduction in these would still result in substantial visibility benefits. EPA's modeling was based on stack parameters provided by APS in a letter [164] that did not mention the merged stack, although it was mentioned in APS's BART analysis [165] submitted to ADEQ. Stack parameters for Unit 4 provided in the commenter's modeling do not match either of those documents (exit velocity of 77.1 feet/second versus 52 feet/second in APS's letter). In addition, it is unclear how parameters for the merged stack in the commenter's modeling were derived (except that the area of the merged stack used is equal to the sum of the areas of the individual stacks cited in the APS letter). Nevertheless EPA acknowledges that Units 2 and 3 should have been modeled together as a single stack. EPA conducted additional modeling to assess this affect, assuming the same total stack exit area and volume flow rate as for the individual stacks, and a volume-weighted average of the individual stacks' absolute exit temperatures. EPA found that impacts and improvements decreased by some 11 percent when merged stacks are used. The improvement from SCR at Petrified Forest remains over 1.0 dv, with continued substantial benefit at Grand Canyon. A merged stack for Units 2 and 3 was also assumed in additional modeling EPA performed to address H_2SO_4 emissions for Cholla, as described below.

EPA's *Guideline on Air Quality Models* (40 CFR part 51, Appendix W) at section 6.2.2 requires that facilities be modeled using a stack height consistent with GEP, rather than a higher actual stack height, in order to prohibit "stack height credit" from being used in developing emission limits.[166] By building very tall stacks instead of applying emission controls, facilities could avoid violating the NAAQS locally, but would contribute to higher levels of emissions regionally, and cause higher total pollutant levels downwind. In short, the requirement to use GEP stack height generally results in conservative modeling, thereby removing the incentive to build artificially tall stacks to evade controls. Choosing a stack height or taking credit for a stack height increase is not at issue in a BART determination. The visibility impacts and improvements shown in EPA's BART modeling are closer to the actual values if actual stack heights are used. Insofar as GEP is relevant, using shorter GEP heights would tend to increase both pre- and post-control impacts, and to scale up the estimated visibility improvements. The overall effect would be to strengthen the case for EPA's proposed controls.

Comment: Based on a report submitted with the comments, one commenter (Earthjustice) stated that had EPA's BART analysis included lower emission rates and proper baselines, the visibility benefits of SCR at Cholla Units 2, 3 and 4 would be even greater than the 7.21 dv cumulative visibility benefit discussed in the proposed rule.

Response: As explained in the general discussion regarding selection of baseline periods above, we do not agree that we used an improper baseline. However, we agree that higher baselines and lower post-control emissions would show greater benefits than our modeling showed, and would further support our proposal for SCR.

---

[159] CAA section 169A(g)(2), 40 CFR 51.308(e)(1)(ii)(A).

[160] 70 FR 39129.

[162] BART Guidelines, 40 CFR Part 51, Appendix Y, Section IV.d.4.b.

[163] *Id.* Section IV.D.5.

[164] "Request for Information Relating to Cholla Power Plant", letter from Sue Kidd, Director, Corporate Environmental Policy and Programs, to Francisco Doñez, EPA, (February 3, 2012).

[165] "BART Analysis for Cholla Unit 2," Prepared for APS by CH2MHill (January 2008).

[166] Guideline on Air Quality Models 6.2.2.a. "The use of stack height credit in excess of Good Engineering Practice (GEP) stack height or credit resulting from any other dispersion technique is prohibited in the development of emission limitations by 40 CFR 51.118 and 40 CFR 51.164."

Comment: One commenter (APS) stated that EPA incorrectly applied H_2SO_4 mitigation factors from an Electric Power Institute (EPRI) report [167] in reaching its conclusion that H_2SO_4 production is not a problem with SCR at Cholla. The commenter stated that this factor is actually 90 percent rather than 99 percent in the report, but that this factor only applies to sub-bituminous coal because of the high calcium content in the ash of these coals. The commenter stated that testing at the Four Corners Power Plant (FCPP), which has similar coal ash calcium content to that at Cholla, indicates that 15 percent removal by the fabric filters would be likely. The commenter stated that the H_2SO_4 emissions created by the SCR will exceed the NSR significance level, will result in costs associated with the H_2SO_4 emissions, and will reduce the improvement in visibility anticipated by the retrofitting with SCR.

Another commenter (ADEQ) also stated that EPA discounts the impact of sulfuric acid mist that will be generated by SCR and overestimates the acid mist removal rate. The commenter indicated that testing at another facility shows H_2SO_4 removal to be closer to 57 percent rather than EPA's assumed 99 percent removal. The commenter noted that if H_2SO_4 emissions increase above the PSD significance threshold, a PSD permit and BACT analysis would be required. EPA's BART analysis fails to consider the costs associated with likely BACT requirements of low oxidation catalyst, fuel additives or sorbent injection with a polishing baghouse.

Response: EPA's decision to discount the increase of H_2SO_4 caused by oxidation from the SCR catalyst was actually based on the 90 percent control figure; we erroneously wrote 99 percent (which applies to ammonia reduction from a wet scrubber). This figure is from the 0.10 percent penetration for baghouses, the only one available for baghouses in the EPRI report. It is not clear that results from the testing at FCPP referenced by the commenter may be applied directly to Cholla given the differences between the facilities. In addition, the full test results were not provided, so we cannot rely on the commenter's figures.

In any case, EPA does not believe that BART is the appropriate context for addressing this issue. Actual measurements of baseline sulfuric acid emissions have not yet been determined at Cholla. Moreover, the calculation of projected sulfuric acid emissions after installation and operation of SCR using the EPRI methodology is dependent on future decisions made by the facility on the type of SCR catalyst and number of layers used, as well as numerous assumptions about loss to downstream components (i.e., air preheaters and baghouses), the true values of which are currently not yet defined or known for Cholla. An increase in sulfuric acid emissions from the installation of SCR may trigger major modification PSD permit requirements at a low threshold of seven tons per year.[168] Preconstruction permitting review may also be triggered from significant emissions increases of $PM_{2.5}$ from SCR installation at Cholla. If one of these pollutants triggers PSD, the permitting authority must provide an Additional Impact Analysis under the PSD program. The PSD program also requires the permitting authority to determine BACT for pollutants that triggered PSD. For these reasons, Region 9 has determined that for Cholla, emission limits and monitoring requirements for sulfuric acid are more appropriately reviewed in the preconstruction permitting process.

Nevertheless, EPA conducted additional CALPUFF modeling to assess the visibility effect of increased sulfuric acid due to the SCR catalyst. One scenario used the existing modeling for Cholla, but added in SCR sulfate calculated by the method in the EPRI document. Since the existing modeling used sulfate calculated using PM speciation spreadsheets provided by the National Park Service, this scenario mixes two calculation methods and may not be reliable. The sulfate in the existing modeling is so large that the additional SCR sulfate from the EPRI method increases total sulfate by only about 5 percent. Visibility benefits only decreased by about three percent at Petrified Forest, and by an even smaller fraction at other areas. To assess the SCR sulfate effect in a more consistent manner, EPA calculated sulfate using the EPRI method throughout the base case for SCNR, and for SCR. All cases used a merged stack for Units 2 and 3 and consistent speciation for all units (formerly the speciation for Unit 2 differed from the others). The sulfate emissions from the EPRI method are much lower than from the NPS spreadsheets, but SCR increases that amount by a factor of six (even with the increase the total is still far lower than used in the original modeling). The visibility impacts for all cases are substantially lower than in the former modeling; the maximum area base case impact is 3.51 dv at Petrified Forest compared to 4.53 dv previously. But for some areas the impacts from controls declined more than the impacts from the base case, leading to the somewhat surprising result that the improvement due to controls actually increased relative to the original modeling. The maximum area benefit of SCR in the new modeling is 1.55 dv compared to 1.34 dv in the original. The cumulative area benefit decreased very slightly to 7.19 dv compared to 7.21 in the original. Based on this improved estimate of sulfate emission based on the EPRI method, the case for SCR appears to be strengthened, since the maximum visibility improvement is larger than originally estimated.

e. Other Comments

Comment: One commenter (NPS) agreed with EPA's conclusions on Cholla that the visibility improvement associated with the most stringent option (SCR with LNB and OFA) is substantial; that SCR with LNB and OFA is cost-effective on an average basis as well as on an incremental basis when compared to the next most stringent option (SNCR with LNB and OFA); and that NO_X BART for Cholla Units 2, 3 and 4 is SCR with LNB and OFA, with an associated emission limit for NO_X on each of the units of 0.050 lb/MMBtu, based on a rolling 30-boiler-operating-day average.

Response: We acknowledge the comment.

Comment: One commenter (APS) estimated that EPA's proposed controls on Cholla Units 2 and 3 will cost $248 million and $103 million, respectively, and increase the costs of electricity from those units by over 25 percent. The commenter stated that given the current market price for natural gas, the proposed BART requirements, expected coal ash regulations, and potential future carbon legislation could jeopardize the long-term economic viability of the entire plant. The commenter also stated that EPA did not consider the impacts of requiring SCR on ratepayers' monthly bills, which would be about 2 percent to accommodate SCR alone. In addition, the commenter is concerned about potential impacts on the transmission grid in Arizona, the local economy due to lost jobs, and a reduced diversity in APS's fuel mix if Cholla was to close.

Response: It is not EPA's intention to endanger the economic viability of Cholla or to place an undue burden on APS's customers. Neither the CAA nor the RHR requires states or EPA to consider the affordability of controls,

[167] *Estimating Total Sulfuric Acid Emissions from Stationary Power Plants*, Version 2010a, 1020636, Technical Update, Electric Power Research Institute, April 2010).

[168] See 40 CFR 52.21(b)(23)(i).

ratepayer impacts or potential job losses as part of a BART analysis. Rather, they require consideration of "the costs of compliance, the energy and non-air quality environmental impacts of compliance, any existing pollution control technology in use at the source, the remaining useful life of the source, and the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology." [169]

APS's comments appear to be based in part on a misunderstanding that an analysis of "non-air quality environmental impacts" must include economic effects. In fact, the plain language of the statute, as well as the RHR, makes clear that this factor is limited to non-air quality environmental impacts.[170] The BART Guidelines note that examples of such impacts would include "solid or hazardous waste generation and discharges of polluted water from a control device." [171]

The BART Guidelines do allow for (but do not require) the consideration of "significant economic disruption or unemployment" as part of "energy impacts." Specifically, the Guidelines provide that:

> * * * the energy impacts analysis may consider * * * whether a given alternative would result in significant economic disruption or unemployment. For example, where two options are equally cost effective and achieve equivalent or similar emissions reductions, one option may be preferred if the other alternative results in significant disruption or unemployment.[172]

The Guidelines also allow for consideration of "affordability" as part of the "costs of compliance" under certain circumstances:

> 1. Even if the control technology is cost effective, there may be cases where the installation of controls would affect the viability of continued plant operations.
>
> 2. There may be unusual circumstances that justify taking into consideration the conditions of the plant and the economic effects of requiring the use of a given control technology. These effects would include effects on product prices, the market share, and profitability of the source. Where there are such unusual circumstances that are judged to affect plant operations, you may take into consideration the conditions of the plant and the economic effects of requiring the use of a control technology. Where these effects are judged to have a severe impact on plant operations you may consider them in the selection process, but you may wish to provide an economic analysis that demonstrates, in sufficient detail for public review, the specific economic effects, parameters, and reasoning.[173]

Thus, only under "unusual circumstances" where a potential control option is expected to have a "severe impact on plant operations" or "result in significant economic disruption or unemployment" can we consider economic effects as part of a BART determination. In this case, APS has provided no evidence to support its assertions that our proposed FIP would result in significant rate increases, jeopardize the plant's operations, or result in any other economic effects. In the absence of such evidence, APS's assertions regarding plant shutdown, rate increases and job losses are speculative, and we cannot consider them as part of our BART determination.

Comment: One commenter (PacifiCorp) stated that because the regional haze actions in Arizona, Wyoming, Colorado and elsewhere will have an impact of $100 million or more on the company and its customers, EPA must conduct the regulatory analyses required by the Unfunded Mandates Reform Act (UMRA) and Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use (Executive Order 13211) before reaching conclusions regarding BART controls or imposing a regional haze FIP.

Response: The commenter is combining separate regulatory actions. The commenter is not correct in aggregating the potential private sector mandate of separate rules to evaluate whether UMRA applies. UMRA defines the term 'Federal private sector mandate' to mean any provision in regulation that would impose an enforceable duty upon the private sector. Under UMRA, the term "regulation" or "rule" means any rule for which the agency publishes a general notice of proposed rulemaking. The rule being finalized today is limited to addressing the obligations of three facilities in Arizona and does not include other regional haze actions occurring in separate rulemakings, such as for Wyoming and Colorado.

Under section 202 of UMRA, before promulgating any final rule for which a general notice of proposed rulemaking was published, EPA must prepare a written statement, including a cost-benefit analysis, if that rule includes any "Federal mandates" that may result in expenditures to State, local, and Tribal governments, in the aggregate, or to the private sector, of $100 million or more (adjusted for inflation) in any 1 year. Under Title II of UMRA, EPA has determined that this rule does not contain a Federal mandate that may result in expenditures that exceed the inflation-adjusted UMRA threshold of $100 million (in 1996 dollars) by State, local, or Tribal governments or the private sector in any one year. Even using the higher cost estimates in our supplemental analysis for the FIP we are finalizing today, we estimate that the total annual costs in the aggregate will not exceed $65 million.[174] Finally, this rule is not subject to Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not a significant regulatory action under Executive Order 12866.

Comment: One commenter (APS) disagreed with EPA's conclusion that the use of anhydrous ammonia does not pose significant additional safety concerns compared to aqueous ammonia and urea. The commenter contends that while anhydrous ammonia would be transported by rail, safety concerns are not eliminated because the severity of damage in an accident can be much greater, if less frequent than truck accidents, and constitutes a much higher risk after delivery. Due to the hazards of moving and storing anhydrous ammonia, the Department of Homeland Security and EPA have additional requirements for anhydrous ammonia that result in additional costs to use it. Urea costs more than anhydrous ammonia, but it is safer and less expensive to use and store. Due to these factors the commenter stated that SNCR and SCR costs should include the use of urea rather than anhydrous ammonia.

Response: The BART analyses submitted by APS indicate that the annualized cost of urea at each of the Cholla units would be less than the annualized cost of anhydrous ammonia.[175] In addition, the cost estimates provided by APS in comments are based on the use of urea as a reagent. Accordingly, we have used the cost for urea in our supplemental cost analysis.

Comment: One commenter (APS) noted that Cholla has a long history of installing pollution control equipment,

---

[169] CAA section 169A(g)(2). 42 U.S.C. 7491(g)(2); 40 CFR 51.308(e)(1)(ii)(A).

[170] *Id.*

[171] BART Guidelines section IV.D.4.h

[172] *Id.* section IV.E.2.

[173] *Id.* section IV.E.3.

[174] Using total annual costs from our supplemental analysis, annual aggregate cost equals $64,378,422. This amount consists of: $9,906,206 for Cholla Unit 2, $9,448,912 for Cholla Unit 3, and $13,590,853 for Cholla Unit 4 (See Table 10 of this NFRM); $12,103,941 for Coronado Unit 1 and $235,982 for Coronado Unit 2 (See Tables 15 and 13 of this NFRM); and $9,546,264 for each of Apache Units 2 and 3 (See Table 5 of this NFRM).

[175] *See* BART Analysis for Cholla Unit 2, Appendix A, Economic Analysis, Input Calculations; BART Analysis for Cholla Unit 3, Appendix A, Economic Analysis, Input Calculations; BART Analysis for Cholla Unit 4, Appendix A, Economic Analysis, Input Calculations.

has participated in a voluntary emissions reduction project, and has spent over $473 million to reduce emissions. While Unit 1 at Cholla is not BART-eligible, it is equipped with a wet-tray absorber to control SO_2, a fabric filter to control particulates, and LNB with OFA to control NO_X emissions. Unit 2 is BART-eligible and has a mechanical dust collector for particulate control, a wet flooded-disk venturi scrubber and absorbers to control SO_2, additional particulate controls, and LNB with OFA to control NO_X emissions. Units 3 and 4 have wet open-spray FGD absorber to control SO_2, fabric filters to control particulates, and LNB with OFA to control NO_X emissions. Unit 2 is scheduled to upgrade its SO_2 and particulate controls to be identical to Units 3 and 4 by January 1, 2016.

Response: We appreciate that APS has installed various controls on the Cholla units over the last several years and we have taken these existing controls into account as part of our BART analysis for NO_X.[176] However, we note that, even with all of these new controls, emissions from Cholla still cause visibility impairment at nine Class I areas and contribute to impairment at an additional two areas.[177]

Comment: One commenter (APS) requested that EPA allow the flexibility of averaging NO_X emissions across all the BART-eligible units at the plant. The commenter stated that allowing for this flexibility would make no difference from a visibility improvement perspective.

Response: We agree with the commenter, and have finalized a single NO_X emission limit across Cholla Units 2, 3 and 4.

3. Comments on Coronado Units 1 and 2

a. Selection of Baseline Period

Comment: Two commenters (ADEQ and SRP) stated that EPA's selected baseline emissions period inappropriately eliminated consideration of LNB with OFA as a viable BART control strategy. SRP asserted that EPA's decision to include LNB with OFA in its baseline NO_X emissions estimate cannot, consistent with the BART rules, foreclose consideration of those controls as BART for Coronado, and that EPA's failure to consider these controls in its BART assessment makes the proposed rule invalid. The commenter added that emission reductions already achieved at the facility using LNB with OFA should not be ignored in EPA's analysis simply because EPA delayed review of ADEQ's SIP until 2012. The commenter concluded that EPA should give deference to the baseline emissions period selected by the State in its SIP analysis and fully consider LNB with OFA as an appropriate basis for BART emission limitations for Coronado.

Another commenter (NPS) preferred the use of a baseline period before the installation of LNB with OFA instead of the post-installation period (May 16, 2009 to December 31, 2010) used by EPA. For Unit 2, the commenter stated that the federally enforceable limit of 0.080 lb/MMBtu is a realistic depiction of future emissions even though the required SCR system has not yet been installed.

Response: As explained in the general discussion regarding selection of baseline periods above, we disagree that our use of updated baseline periods for BART determinations is inappropriate or inconsistent with the CAA or the RHR. Moreover, updating the baseline did not eliminate LNB with OFA from consideration as BART for Coronado Unit 1, since existing controls can constitute BART, if additional controls are not warranted based on the five-factor analysis. For example, EPA recently approved a determination by Colorado that existing LNB at Comanche Units 1 and 2 constituted BART where "the State determined that the added expense of achieving lower limits through different controls was not reasonable based on the high cost-effectiveness [$9,900/ton] coupled with the low visibility improvement (under 0.2 dv) afforded."[178] In the case of Coronado, by contrast, the cost-effectiveness of post combustion controls is reasonable and the expected visibility improvements are substantial, as explained below. Nonetheless, in order to address the commenter's concerns that we did not properly consider LNB with OFA as a potential control option, and therefore precluded a BART determination of LNB with OFA, we have used a baseline period of 2001–2003, which corresponds to the period used in SRP's original BART analysis. Our supplemental cost analysis for Coronado is summarized in Table 15.[179]

b. Control Efficiencies

Comment: One commenter (SRP) stated that the SNCR NO_X emission rate evaluated by EPA is incorrect. The commenter cited an SNCR conceptual design estimate prepared by S&L (attached to the submission) asserting that, based on an initial review of SNCR implementation at Coronado, the expected NO_X reductions would be 25 percent and notes that additional studies would be needed to guarantee this performance. According to the commenter, this estimate also was verified by an independent vendor, FuelTech, whose assessment was also attached to the submission.

The commenter (SRP) assumed that EPA evaluated an emission limit that is based on a higher reduction efficiency (i.e., 30 percent) applied to a starting NO_X emission limit of 0.30 lb/MMBtu. According to the commenter, given Coronado's current NO_X emissions limit of 0.320 lb/MMBtu following the installation of LNB with OFA on each of the units and an SNCR control efficiency of 25 percent, the appropriate NO_X emission rate to use in the BART analysis would be 0.24 lb/MMBtu, rather than EPA's assumed value of 0.21 lb/MMBtu. The commenter contended that this NO_X emission rate (i.e., 0.24 lb/MMBtu) represents a level that can likely be achieved on a consistent basis based on input from SRP's vendors who have specific SNCR implementation experience.

Response: We partially agree with this comment. Coronado Unit 1 currently operates with a federally-enforceable NO_X emission limit of 0.320 lb/MMBtu.[180] A review of recent emission data in CAMD indicates NO_X emission levels below this limit. As noted in our response to SRP's comments regarding SCR, we agree that when using an annual average design emission rate to establish a rolling 30-day limit that will apply during periods of startup, shutdown, and malfunction events, it is appropriate to include some type of measure that provides a compliance margin.

In submitted comments, SRP provided a conceptual design estimate for SNCR which was based upon 25 percent control efficiency (incremental from LNB) and a resulting emission rate of 0.24 lb/MMBtu. While this control efficiency is less than the 30 percent

[176] 77 FR 42854, July 20, 2012 (noting that "[t]he baseline emissions used by EPA reflect current fuels and control technologies in place at the facilities, as well as regulatory requirements the facilities will be required to meet independent of EPA's BART determination.").

[177] See 77 FR 42861, July 20, 2012, Table 20 (showing baseline impacts from Cholla of over 1 dv at nine Class I areas, and impacts of over 0.5 dv at eleven areas).

[178] 77 FR 18052, 18066 (March 15, 2012) (Proposed Rule); pre-publication version of Final Rule, signed September 10, 2012, available at: *http://www.epa.gov/region8/air/FinalActionOnColoradoRegionalHazePlanSep2012.pdf.*

[179] A spreadsheet titled "Supplemental Cost Analysis 2012–11–15.xls" is in the docket.

[180] See Coronado Title V Permit, Attachment B, section II.E.1.a.ii.

control efficiency used by our contractor, we consider it to be a reasonable estimate based upon the vendor quotes provided by SRP.[181] When using a control efficiency of 25 percent and our baseline period of LNB performance for Coronado Unit 1, we estimate an annual average SNCR emission rate of 0.22 lb/MMBtu.

For the purposes of our cost calculations and visibility modeling, however, we have retained the use of our original SNCR emission rate (0.21 lb/MMBtu). A less stringent SNCR emission rate, by itself, would primarily make the next most stringent control option, SCR, appear to remove a greater amount of emissions. This in turn would make the SCR control option appear more incrementally cost-effective by removing a greater amount of emissions, relative to SNCR, for the same cost. As discussed in our proposal and in response to comments, we already consider SCR to be cost-effective. It is not determinative to our decision to find that SCR is "even more" incrementally cost-effective.

In the context of establishing a BART emission limit consistent with the use of SNCR technology, however, we would use the annual average SNCR emission rate of 0.22 lb/MMBtu as our basis, rather than our original estimate based on 30 percent SNCR control efficiency. As noted in a separate response, when using an annual average design emission rate to establish a rolling 30-day limit that would apply during periods of startup, shutdown, and malfunction, we consider it appropriate to provide some type of measure that provides a compliance margin for such events. A 0.24 lb/MMBtu emission limit, as requested by SRP, established on a rolling 30-day average represents about a 10 percent increase from the 0.22 lb/MMBtu annual average emission rate. We would consider this magnitude of upward revision appropriate to accommodate startup, shutdown, and malfunction events as well as the unit cycling nature of Coronado Unit 1. As a result, we would consider the BART emission limit corresponding to the SNCR with LNB and OFA option to be 0.24 lb/MMBtu.

Comment: One commenter (SRP) stated that EPA improperly ignored the Coronado consent decree in its selection of the proposed BART controls for NO_X. The commenter noted that ADEQ determined that NO_X BART for Coronado Units 1 and 2 is LNB with OFA and a corresponding emission limit of 0.320 lb/MMBtu, making Units 1 and 2 currently subject to a 0.320 lb/MMBtu NO_X limit. The commenter added that Unit 2 will be subject to a 0.080 lb/MMBtu NO_X emission limit as soon as the SCR for that unit is installed and operational (i.e., by June 1, 2014), pursuant to the consent decree, a limit that is significantly more stringent than what the state determined to be BART for Coronado.

The commenter (SRP) asserted that the consent decree controls are better than BART. The commenter pointed out that once SCR is installed on Unit 2, the facility will be subject to a plant-wide emission limit of 7,300 tons of NO_X per year under the consent decree which, according to the commenter, translates to an effective emission rate of 0.20 lb/MMBtu for Coronado as a whole, and is more stringent than the state's NO_X BART determination and EPA's presumptive NO_X limits.

The commenter (SRP) also contended that EPA's BART rules support the conclusion that the existing and currently planned controls are better than NO_X BART because those controls and emission rates were agreed to by SRP and EPA to resolve allegations of violations of certain requirements of the PSD program for both units. According to the commenter, those limits are intended to reflect compliance with the PSD program's BACT requirements. The commenter noted that BACT, by definition, reflects the maximum degree of control for new facilities or existing facilities undergoing a major modification while BART is to apply to unmodified existing sources. So BACT would be expected to be more stringent, and certainly not less stringent, than BART. The commenter quoted a recent EPA statement about the Four Corners Power Plant indicating that BART need not be equivalent to BACT (citing 77 FR 51620, 51636, August 24, 2012).

The commenter (SRP) asserted that the BART rules reflect this understanding, providing that PSD settlement agreements generally satisfy BART requirements (citing 70 FR 39164). According to the commenter, EPA recently recognized this principle in its final regional haze rule for North Dakota in which EPA concluded that it was appropriate to rely on North Dakota's BACT determination for the two units at the Milton R. Young Station (0.36 lb/MMBtu and 0.35 lb/MMBtu) to satisfy BART because emissions control technology had not changed appreciably since that BACT determination (citing 77 FR 20897, April 6, 2012). The commenter stated that a similar situation is present in the case of Coronado, and the recent PSD consent decree should, pursuant to the BART Guidelines, be deemed to satisfy BART.

Response: We do not agree that we improperly ignored the existing consent decree in our proposed BART determination for NO_X at Coronado, since we specifically took the consent decree into account throughout our NO_X BART analysis.[182] We also do not agree that the Coronado consent decree represents BACT or BART for NO_X. While the consent decree concerned alleged violations of the PSD provisions of the CAA, it does not indicate that its provisions represent either BACT or BART. Rather, it specifically provides that:

> Compliance with the terms of this Consent Decree does not guarantee compliance with all applicable federal, state, or local laws or regulations. The emission rates and removal efficiencies set forth herein do not relieve SRP from any obligation to comply with other state and federal requirements under the Clean Air Act * * *[183]

While the BART Guidelines provide that NSR/PSD settlement agreements may represent BART in some instances, they do not establish a presumption that such settlements represent BART, nor do they indicate that a BART analysis is unnecessary where such a settlement exists.[184] In Coronado's case, we do not agree that the consent decree represents BART for NO_X for either unit or for the facility as a whole. Nonetheless, we are taking the consent decree into account in our BART determination for NO_X at Coronado, as described below.

Comment: In arguing against the achievability of EPA's proposed limit, two commenters (AUG and SRP) cited a report prepared by RMB Consulting & Research, Inc. (RMB) for the San Juan Generating Station in New Mexico, which reportedly states that the 0.05 lb/MMBtu limit imposed on that facility does not represent a consistently achievable level of emissions for the units at the facility. In addition, SRP contracted with RMB and Sargent and Lundy (S&L) to review the ability of the Coronado units to achieve the 0.050 lb/MMBtu emission limit proposed by EPA

[181] Although the report cites lower NO_X concentrations, due to the lower inlet NO_X emission rate, removal efficiency is also reduced making it more difficult to reduce NO_X emissions.

[182] See 77 FR 42849–42850, July 20, 2012, (summarizing terms of consent decree), 42861–42862 (describing consideration of consent decree requirements in baseline for Coronado analyses), 42863 (noting potential effect of consent decree activities on cost analysis), 42864 (proposing emission limit of 0.080 lb/MMBtu and compliance deadline of June 1, 2014 at Coronado Unit 2, consistent with the emission limit in the consent decree).

[183] Consent Decree in *United States* v. *Salt River Project*, CV 08–1479–PHX–JAT (entered December 19, 2008).

[184] BART Guidelines, 40 CFR Part 51, Appendix Y, section IV.C.

using SCR control technology. Their reports were submitted as attachments to the commenter's submission. According to the commenter, both consultants concluded that a NO_X BART limit of 0.050 lb/MMBtu is not achievable at Coronado on a 30-day rolling average that includes periods of startup, shutdown, and malfunction. The commenter made the following arguments against the achievability of a limit of 0.050 lb/MMBtu relying first on RMB's analysis and then on S&L's analysis.

RMB's analysis stated that EPA did not adequately consider the impact of startup and shutdown emissions or the ability to measure such emissions in its BART determination. RMB examined operating data from 2001 to 2011 in order to identify the number of startup events (both "cold" and "warm" starts) and shutdown events associated with each unit. RMB's analysis shows that the average number of startup/shutdown events for Coronado Units 1 and 2 is one per month (each), and that the maximum number of startup/shutdown events is five per month (Coronado Unit 1) and six per month (Coronado Unit 2). RMB then developed a computer model to estimate the 30-day rolling average the Coronado units could achieve based upon the emissions profile of these startup/shutdown events, the maximum number of startup/shutdown events, and an assumption of a NO_X emission rate of 0.04 lb/MMBtu over the life of the catalyst. RMB's analysis indicates that the maximum 30-day average the units could achieve is well above 0.050 lb/MMBtu.

S&L's analysis focused on the ability of Coronado Unit 2, which has been designed to achieve a 0.08 lb/MMBtu emission rate, to achieve a lower 0.05 lb/MMBtu emission rate. S&L's analysis considered multiple design changes and examined their potential impact on reducing the design emission rate, as well as the costs and design/construction time associated with these options. S&L concluded that, at a minimum, SRP would be required to install a low load temperature control system designed to increase flue gas temperatures at the SCR inlet during periods of low load cycling to achieve any additional reduction in average NO_X emissions. S&L's analysis concluded that even with a low-load temperature control system, Unit 2 could not consistently achieve the proposed limit when periods of low-load cycling, startup and shutdown are taken into account, and could only achieve within the range of 0.053 to 0.072 lb/MMBtu.

Finally, both AUG and SRP noted that the BART Guidelines authorize application of BART emission limits on a plant-wide basis, rather than a unit-by-unit basis, and that use of plant-wide limits would not affect the expected visibility benefits of controls. Therefore, they requested that EPA allow for plant-wide averaging at Coronado.

Response: We partially agree with this comment. As noted by the commenters, the BART Guidelines recommend that states "consider allowing sources to 'average' emissions across any set of BART-eligible emission units within a fenceline * * *" [185] Given that such a "bubbling" approach would not diminish the visibility benefits of controls, we have decided to finalize a single plant-wide limit across the two Coronado units.

In analyzing what emission limit would represent BART for NO_X on a plant-wide basis, we have taken a number of factors into consideration. In our proposal, we used an annual average design value for SCR of 0.050 lb/MMBtu at Coronado Unit 1 and proposed an emission limit for this same value on a rolling 30-day average. At Coronado Unit 2, we proposed an emission limit of 0.080 lb/MMBtu, but solicited comment on whether a more stringent limit would be feasible and cost-effective for Unit 2. SRP submitted comments stating that an emission rate of 0.05 lb/MMBtu was not achievable by either unit, due to the startup/shutdown operating profile of the Coronado units. As noted in other responses, BART limits apply at all times including periods of startup, shutdown, and malfunction. As a result, we agree with commenters that when establishing a rolling 30-day BART emission limit that is based upon an annual average design value, it is appropriate to provide a compliance margin for periods of startup and shutdown. Therefore, we have taken into consideration the startup/shutdown operating profile of the Coronado units.

In submitted comments, SRP included reports prepared by S&L and RMB Consulting summarizing an analysis performed to determine the rolling 30-day emission rates the units could achieve when accounting for startup and shutdown events, as well as the load cycling operating profile of the plant.[186] The analyses in the two reports were based on slightly different assumptions. RMB's analysis, which examined both Coronado Units 1 and 2, included the following assumptions:

- Five to six startups (1 cold/remainder warm) per month (which is the maximum observed based on 2001 to 2011 historical performance);
- Startup emissions based on the maximum value observed during that startup period;
- Non-startup periods of operation based on historical load operation, which consists of a mixture of low load and high-load cycling operation;
- Inclusion of a low load temperature control system; and
- Maintaining the catalyst guarantee of 0.04 lb/MMBtu during full load, steady-state operations over the life of the catalyst.

The analysis performed by S&L examined only Coronado Unit 2, and was one element of S&L's broader analysis examining the ability of Coronado Unit 2 to meet a limit more stringent than the 0.080 lb/MMBtu limit in the consent decree. The analysis performed by S&L was based on the following assumptions:

- One to three startup events per month;
- Non-startup periods of operation based entirely on low load cycling scenario (40–100 percent gross load cycling);
- Inclusion of a low load temperature control system; [187] and
- Maintaining the catalyst guarantee of 0.04 lb/MMBtu during full load, steady-state operations over the life of the catalyst.

The results of both of these analyses indicates that the Coronado units could achieve a rolling 30-day emission rate in the range of 0.053 to 0.072 lb/MMBtu based on all the assumptions listed above. We acknowledge that different assumptions, such as using fewer startups per month, or using a load operating profile during non-startup periods that corresponded to a greater fraction of high-load cycling operations, could produce a lower range of emission values. However, we find that the assumptions used in both analyses are reasonable based on the historic performance data supplied by SRP and its consultants. Therefore, we have concluded that a 0.050 lb/MMBtu emission rate is not achievable on a rolling 30-day average at either of the Coronado units.[188] Nonetheless, we note

[185] BART Guidelines, 40 CFR Part 51, Appendix Y, section V.

[186] In addition to the final reports, SRP provided certain supporting spreadsheets upon request. We have placed these spreadsheets in the docket.

[187] S&L's analysis also included emission modeling of Coronado Unit 2 without the low load temperature control system, which, as discussed in further detail below, is not part of the current SCR design.

[188] Nonetheless, we note that the emission modeling results (particularly those produced by

that the results of these analyses (particularly those produced by the RMB report) indicate that Coronado Unit 1 could meet a 0.050 lb/MMBtu limit on an annual average basis. As a result, we conclude that 0.050 lb/MMBtu is appropriate as an annual average design value, but not as 30-day rolling average emission limit at the Coronado units.

With respect to Coronado Unit 2, we have also taken into account the fact that Unit 2 is already subject to a consent decree limit of 0.080 lb/MMBtu with a compliance deadline of June 1, 2014. We consider the SCR system that SRP has designed to meet this limit to constitute "pollution control equipment in use at the source." Therefore, consistent with the BART Guidelines, we have considered various ways in which the performance of the current SCR design for Unit 2 could be improved.[189] In its analysis examining whether the SCR system for Unit 2 could achieve an emission rate more stringent than the 0.080 lb/MMBtu limit in the consent decree for which the SCR was designed, S&L examined a number of different potential measures. One of these measures was the installation of a low load temperature control system, which the current SCR design for Unit 2 does not include.

As described in the S&L report, periods of low load operation generally consist of operation between loads of 138 MW to 270 MW (operation above 270 MW can be considered "high" load). Broadly speaking, the temperature in the SCR system will fall below 599 degrees F during these periods of low load operation, which is the minimum temperature required for effective NO_X control. A low load temperature control system increases the temperature at the SCR inlet in order to maintain 599 degrees F, allowing operation of the SCR system during periods of low load.[190] Without this control system, the Coronado Unit 2 SCR system will not operate during periods of low load. Under EPA's visibility regulations, "BART means an emission limitation based on the degree of reduction achievable through the application of the best system of continuous emission reduction * * *"[191] While SCR represents the most stringent technology for NO_X control, an SCR system that is designed not to function during a period of operation that represents a substantial fraction of the unit's overall operating profile cannot be considered continuous. In examining the installation of a low load temperature control system as an upgrade option to Coronado Unit 2, we note that the S&L report estimated the costs for the low load temperature control system as shown in Table 13.

TABLE 13—S&L'S COST ESTIMATES FOR LOW LOAD TEMPERATURE CONTROL SYSTEM

Measure	Capital cost [1] ($)	Annualized capital cost [2] ($/yr)	Annual O&M costs ($/yr)	Total annual costs ($/yr)
Low load temperature control system	$2,500,000	$235,982	.....	$235,982

[1] Represents the mid-range value of S&L's estimate of capital costs.
[2] Capital costs annualized using a 7 percent interest rate over a 20 year lifetime.

Although it is not clear what annual average emission rate can be achieved by Coronado Unit 2 with installation of a low load temperature control system, the upper range of rolling 30-day emission rates modeled for Coronado Unit 2 is 0.072 lb/MMBtu. We consider this a conservative estimate (i.e., a high estimate in this case, as the annual average number will certainly be lower than the 30-day value), and have used this emission rate with the cost information contained in the S&L report, to calculate the cost-effectiveness value shown in Table 14. Installation of a low load temperature controller results in a cost-effectiveness of $1,900/ton, which is in a range that we consider cost-effective.

In addition, SRP stated that it considered the incremental visibility benefit of an emission limit more stringent than 0.080 lb/MMBtu to be insignificant. In relation to installation of a low load temperature controller, we disagree. Specifically, SRP bases this comment on the visibility improvement associated with a 0.080 lb/MMBtu limit and a lower value such as 0.07 or 0.05. Visibility modeling, however, is based on the highest emission rate observed on a 24-hour average, not on a 30-day or annual average basis. Since Coronado Unit 2 is not equipped with a low load temperature controller and therefore cannot operate the SCR during periods of low load operation, emissions from Coronado Unit 2 during these periods correspond to operation of LNB with OFA. A review of Coronado Unit 2's operating history since June 2011, which is approximately when LNB was installed, indicates several instances in which it operates at low load for periods that can exceed a 24-hour calendar day. Based on the Acid Rain Program data provided by SRP and included in CAMD, the longest such period of continuous low load operation extended from May 20 to May 22, 2012.[192] As a result, although equipped with an SCR system, the maximum 24-hour average emission rate for Coronado is more accurately represented by an emission rate corresponding to LNB and OFA, and not SCR.

We consider this distinction crucial. In our base case modeling runs, the maximum 24-hour average emission rate modeled for Coronado Unit 2 was represented by a NO_X emission rate of 0.08 lb/MMBtu, corresponding to the emission limit for SCR in the consent decree. However, the highest 24-hour average emission rate is more accurately represented by a 24-hour period of low load operation, where the SCR system would not be operating. Based on Acid Rain Program data reported to CAMD, this corresponds to a NO_X emission rate of 0.23 lb/MMBtu and 13,684 lb/day.[193] By allowing the SCR system to run during all loading periods, the installation of a low load temperature control system would result in a

the RMB report) indicate that Coronado Unit 1 could meet a 0.050 lb/MMBtu limit on an annual average basis. As a result, we conclude that the use of a 0.050 lb/MMBtu as annual average design value in our proposal was appropriate.

[189] BART Guidelines, 40 CFR Part 51, Appendix Y, section IV.D.3.

[190] We note that this is not an unusual control system, and is commonly included in typical SCR systems. If SCR were to be installed on Coronado 1, for example, the information SRP has provided indicates that such a system would include a low load temperature control system.

[191] 40 CFR 51.301.

[192] We have identified these dates in both sets of data, per "SRP 2 NO_X analysis (EPA edits).xls" and "Coronado 2 2011–12Q3 NO_X Emission Data (daily).xls".

[193] This represents the emission rate on April 1, 2012, which is the highest emitting day that consisted of 24 consecutive hours of low-load operation, as identified in "SRP 2 NO_X analysis (EPA edits).xls" and "Coronado 2 2011–12Q3 NO_X Emission Data (daily).xls".

decrease in the maximum 24-hour erage emission rate from 0.21 lb/MMBtu to 0.080 lb/MMBtu. The visibility improvement associated with this emission decrease at the single most affected Class I area is 0.52 (Gila Wilderness). Cumulatively, across all of the affected Class I areas, this results in visibility improvement of 2.64 deciviews. We consider this degree of visibility improvement substantial, especially when taking into consideration the cost-effectiveness of installing a low load temperature control system.

TABLE 14—CORONADO UNIT 2: COST-EFFECTIVENESS

	Emission factor (lb/MMBtu)	Emission rate [1]		Removed (tpy)	Annual cost ($/yr)	Cost-effectiveness ($/ton)
		(lb/hr)	(tpy)			
SCR+LNB+OFA (no low load temp ctrl sys)	0.080	319	1,242			
SCR+LNB+OFA (with low load temp ctrl sys)	0.072	287	1,118	124	235,982	1,900

[1] Emissions calculated based on 3,984 MMBtu/hr and 0.89 capacity factor, as used in the TSD for our proposal.

In recognition of the work already performed by SRP to meet the consent decree emission limit of 0.080 lb/MMBtu for Unit 2, and to avoid interfering with SRP's ability to meet that requirement by the deadline of June 1, 2014, we have decided not to require a BART emission limit for Coronado 2 more stringent than 0.080 lb/MMBtu. Instead, we are finalizing a plant-wide NO_X emission limit for Coronado of 0.065 lb/MMBtu on a rolling 30-day average, which will provide a sufficient compliance margin for startup and shutdown events. We are also structuring the compliance determination method so that, when one of the two units is not operating, its emissions from the preceding thirty boiler-operating-days will continue to be included in the two-unit average. We expect that SRP can meet this limit by installing a low load temperature control system on Unit 2 and an SCR system including a low load temperature control system on Unit 1. We are setting a compliance deadline for achieving this limit of five years from publication of this final rule, which will ensure that SRP has adequate time to design and install these controls without interfering with the consent decree deadline of June 1, 2014 for operation of SCR on Unit 2. Finally, we are including in the regulatory text of the FIP a requirement that pollution control equipment be designed and capable of operating properly to minimize emissions during all expected operating conditions, consistent with the regulatory definition of BART as "an emission limitation based on the degree of reduction achievable through the application of the best system of continuous emission reduction for each pollutant which is emitted by an existing stationary facility." [194]

Comment: While supporting EPA's determination that SCR is BART for Coronado Unit 1, one commenter (Earthjustice) stated that lower NO_X emission limits are cost-effective and achievable. For Unit 1, the commenter made the following two points based on a report (the "Sahu report") submitted with the comments. First, SCR can achieve even greater NO_X reductions at less cost than EPA's calculations. EPA failed to analyze whether an emission limit lower than 0.05 lb/MMBtu is achievable and cost-effective with SCR at Unit 1 as required under the BART Guidelines. Second, the NO_X emissions exiting Coronado Unit 1's boiler could be reduced significantly from the current rate of approximately 0.3 lb/MMBtu to a rate of 0.15 to 0.20 lb/MMBtu, which would result in a lower achievable emission rate. Neither ADEQ nor EPA analyzed the various methods of reducing these NO_X emissions.

The commenter (Earthjustice) noted that SRP submitted comments to EPA shortly before EPA issued the proposed rule arguing that SCR with a 0.05 lb/MMBtu NO_X emission limit is unachievable at Unit 1 (and Unit 2).[195] According to the commenter, SRP argued that EPA's proposal is not achievable by pointing to BART proposals in other states that required SCR with an emission limit less stringent than 0.05 lb/MMBtu. The commenter countered that these BART determinations for other sources in other states do not show that EPA's BART proposal is unachievable at Coronado Unit 1, as BART determinations are source-specific. The commenter added that SRP's comments provide no source-specific data explaining why SCR at Unit 1 could not achieve a 0.05 lb/MMBtu NO_X emission limit. The commenter asserted that, in contrast, the Sahu report explains why an even lower 0.04 lb/MMBtu emission limit is achievable at Unit 1. Accordingly, the commenter believes that EPA should not weaken its BART proposal as SRP requested.

Response: We disagree with the commenter's assertion that our BART analysis should have examined the potential for lower "boiler-out" NO_X emission rates.[196] The commenter cites several examples of other coal-fired boilers using PRB coal achieving boiler-out NO_X emission rates in the range of 0.096 to 0.154 lb/MMBtu, and points to these examples as evidence that the Apache and Coronado units could attain lower emission rates through the use of combustion controls. We note that the best performing units on this list are primarily tangential- or wall-fired units, and that none of the units appear to be Riley turbo-fired boilers. Particularly in the case of the Apache and Coronado units, which are turbo-fired boilers, we consider this distinction crucial when determining the appropriate unit with which to compare emission performance. The Riley-turbo boiler is a unique wall-fired boiler design that is characterized by a venturi-shaped lower section (often described as a "pinch" in the boiler wall) with burners located on the underside of the pinched wall, tilted slightly downwards.[197] It is a relatively uncommon design, with only two dozen such units currently in operation.[198]

[194] 40 CFR 51.301. *See also,* CAA section 302(k), 42 U.S.C. 7602 (defining "emission limitation" as "a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction * * *").

[195] Citing Docket Item C–16 (SRP Letter to DJordan 06–26–2012).

[196] As described by the commenter, the "boiler-out" NO_X emission rate refers to the emission rate after including the effects of combustion controls such as low NO_X burners, over-fire air, neural networks, adaptive controls, etc.

[197] See "Design and Operation of Coal-fired TURBO furnaces for NO_X control", Riley Stoker Corporation, November 1978.

[198] Acid Rain Program data indicates 22 turbo units were in operation in 2011.

The turbo boiler was developed in the 1960s and, unlike many other wall-fired boilers, was generally able to meet the NO_X emission limits contained in the 1971 New Source Performance Standards for fossil fuel fired steam generators.[199] While Babcock Power, which acquired Riley Stoker, has developed new burner upgrades to meet more stringent NO_X emission standards, the combustion control designs available for turbo-fired boilers have not been through the same number of design iterations, and are therefore not as effective as those for other boiler types.[200] We therefore do not consider it appropriate to compare the "boiler-out" emission rates of the Riley turbo design with those achieved by tangential and more traditional wall-fired units.

More specifically, combustion controls on Coronado 1 (LNB) were installed in 2009, and the commenter has not indicated any design improvements or upgrades that would achieve improved performance. We note that the baseline period for our analysis represented the use of combustion controls (in the form of LNB with OFA) and that our emission estimate of LNB is based on past actual emission data, as reported to CAMD, over the baseline period. As part of the supplemental cost analysis we performed, we used a baseline period that predated installation of LNB, and consisted of emission rates corresponding to OFA only.[201] Comparing annual average emission rates during the periods prior to and following LNB installation, we note that Coronado Unit 1 has achieved approximately 25 percent reduction from installing LNB at an emission rate of approximately 0.30 lb/MMBtu. We consider these values reasonable, as it is supported by actual emission data and represents a control efficiency similar to the 30 percent control efficiency assumed by our contractor.

In addition, we disagree with the commenter's assertion that 0.04 lb/MMBtu is an appropriate SCR emission limit to consider for Coronado Unit 1. As discussed in the previous response to SRP's comments, we have examined the analysis performed by SRP and determined that a 0.050 lb/MMBtu emission rate is not achievable by Coronado Unit 1 on a rolling 30-day average. Although we note that SRP's analysis is based on a 0.04 lb/MMBtu emission rate at full load, steady state conditions, and that SRP's analysis indicates Coronado Unit 1 could achieve 0.050 lb/MMBtu on an annual average basis, we do not consider this emission rate achievable as a rolling 30-day limit based on the number of startup and shutdown events associated with its operating profile.

Comment: While supporting EPA's determination that SCR is BART for Coronado Unit 2, one commenter (Earthjustice) stated that lower NO_X emission limits are cost-effective and achievable. For Unit 2, the commenter made four major points. First, the NSR consent decree does not exempt Coronado Unit 2 from a NO_X BART determination based on a valid five-factor BART analysis. Second, contrary to the argument that the 0.08 lb/MMBtu limit on Coronado Unit 2 under the consent decree was developed to address BACT obligations, that emission limit is not BACT, which requires a top-down analysis that selects the "maximum degree of reduction." There is no BACT analysis in the consent decree and no explanation of how the 0.08 lb/MMBtu emission limit was selected. In addition, while BACT requires case-by-case analysis, the consent decree limit was not specific to Unit 2; it simply required installation of SCR on one of the two units. Third, the negotiated limit contained in the NSR consent decree cannot replace the required five-factor BART analysis for Coronado Unit 2 because BART is more stringent than the consent decree's emission limit. The Sahu report shows that an emissions limit lower than 0.08 lb/MMBtu is cost-effective and achievable at Unit 2. Fourth, the NO_X emissions exiting Coronado Unit 2's boiler could be reduced significantly from the current rate of approximately 0.33 lb/MMBtu to a rate of 0.15 to 0.20 lb/MMBtu, which would result in a lower achievable emission rate. Neither ADEQ nor EPA analyzed the various methods of reducing these NO_X emissions. SCR with a 0.04 lb/MMBtu emission limit at Coronado Unit 2 is achievable with various control methods and is even more cost-effective than EPA's calculations suggest. Because of this, the commenter requested that EPA revise its BART determination to reflect this lower level.

The commenter (Earthjustice) stated that SRP has claimed that a NO_X emission limit of 0.05 lb/MMBtu is unachievable based on its progress in constructing the SCR unit required by the NSR consent decree, but does not explain how construction progress to date would prevent it from calibrating the SCR to achieve a 0.05 lb/MMBtu emission limit (or a 0.04 lb/MMBtu limit). The commenter noted that EPA requested information concerning whether the amount and management of catalyst could be altered to meet a 0.05 lb/MMBtu NO_X limit at Unit 2, but according to the commenter SRP did not provide any such information. As a result, the commenter urged EPA to revise its BART determination to require SCR with an emission limit lower than 0.08 lb/MMBtu.

Response: We disagree with the commenter's assertion that it is appropriate to consider lower "boiler-out" NO_X emissions for Coronado Unit 2, for the same reasons we noted in the previous response for Coronado Unit 1 on this issue. We also disagree with the commenter's assertion that 0.04 lb/MMBtu is an appropriate SCR emission rate to consider for Coronado Unit 2, also for the same reasons we noted in the previous response for Coronado Unit 1 on this issue.

We agree with the commenter's assertions that the consent decree is not a replacement for a five-factor BART analysis. We also agree that while the consent decree resolved NSR/PSD obligations such as BACT, a "top-down" BACT analysis was not performed as part of the consent decree negotiations. Based on our review of SRP's August 24, 2012 letter and submitted comments, we do not consider the SCR system for Coronado Unit 2, as currently designed, to constitute BART. As noted in the analysis contained in our response to SRP's comments, we consider the installation of a low-load temperature controller to be both cost-effective and to result in substantial visibility improvement. We are not, however, finalizing a more stringent emission limit for Coronado Unit 2. Instead, we are finalizing a requirement that pollution control equipment be designed and capable of operating properly to minimize emissions during all expected operating conditions, consistent with the regulatory definition of BART as "an emission limitation based on the degree of reduction achievable through the application of the best system of continuous emission reduction for each pollutant which is emitted by an existing stationary facility." [202]

[199] "An Overview of Riley Stoker's Burner Development Efforts for NO_X Control", Riley Stoker Corporation, April 7, 1983.

[200] "Low NO_X Combustion System Solutions for Wall Fired,T-Fired, and Turbo Fired Boilers." Babcock Power, August 28–31, 2006.

[201] Supplemental Cost Analysis 2012~11~15.xls.

[202] 40 CFR 51.301. *See also*, CAA section 302(k), 42 U.S.C. 7602 (defining "emission limitation" as "a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction * * *").

c. Costs of Compliance

Comment: One commenter (NPS) agreed with EPA that SRP did not provide ADEQ with control cost calculations at a level of detail that allowed for a comprehensive review. The commenter conducted analysis of the cost and cost-effectiveness of adding SCR to reduce emissions of NO_X at Coronado Unit 1 using the cost methodologies of the CCM and relying on the IPM to reflect the most recent SCR cost levels; and submitted the detailed calculations as Appendix E to its comments. The commenter's analysis yielded a cost-effectiveness value of $2,540/ton. The commenter noted that EPA's analysis yielded a cost-effectiveness value of $2,405/ton, which EPA considers cost-effective. Another commenter (Earthjustice) also asserted that SCR at Coronado 1 is cost-effective. When calculated based on an SCR emission rate of 0.04 lb/MMBtu, and when accurate cost figures and proper baselines are used, the commenter asserts that SCR would reduce NO_X emissions at a cost of just $2,024/ton of NO_X removed.

NPS commented that it was not able to conduct a cost analysis for Coronado Unit 2, on which SRP is installing SCR to meet an emission limit of 0.080 lb/MMBtu under a consent decree with EPA. However, the commenter used the CCM to evaluate the differences between an SCR on this unit at 0.050 lb/MMBtu versus 0.080 lb/MMBtu. According to the commenter, an SCR meeting the more stringent limit would have essentially the same footprint as the less effective unit, but would require an additional layer of catalyst and would be seven feet taller. The commenter presented basic design parameters for SCR units achieving the two levels of control.

Response: We agree with NPS's assertion that SRP's cost figures, as provided in their original BART analysis and in the subsequent response to ADEQ's information request, were not sufficiently documented. While we also agree with the commenters' assertion that SCR with LNB and OFA is cost-effective, we decline to modify our estimates of cost- effectiveness to reflect the cost items noted in these comments, as it is not in any way determinative to our decision to find that SCR is "even more" cost-effective, or that the incremental cost-effectiveness value between SCR and SNCR is "even more" incrementally cost-effective.

Comment: One commenter (SRP) argued that EPA's cost of compliance analysis for Coronado is flawed and must be replaced with site-specific costs. The commenter asserted that EPA improperly ignored site-specific cost estimates for Coronado BART control options by substituting its own estimates, and ignored the fact that Arizona has "the lead role in designing and implementing [its] regional haze program" and "broad authority over BART determinations" (citing *Corn Growers*, 291 F.3d at 3, 8). The commenter stated that ADEQ fully complied with the BART Guidelines and was justified in any deviation from the specific terms of the CCM because ADEQ engaged in a reasoned, site-specific cost analysis. The commenter added that ADEQ has discretion to conduct and document its cost assessment at a level that it deems appropriate, and that the documentation that supports ADEQ's BART determination is reasonable by any objective standard.

The commenter (SRP) asserted that EPA improperly ignored site-specific cost estimates for Coronado BART control options, instead using the IPM to calculate the capital costs and annual operating costs associated with the various NO_X control options that EPA considered. Moreover, the commenter added that no cost estimate derived from a model designed to produce generalized information about utilities throughout the nation could satisfy the CAA requirement that BART be determined based on a site-specific analysis. SRP provided adjusted inputs for use in IPM for unit size, gross heat rate, NO_X removal factor, NO_X removal efficiency, ammonia cost, operating labor rate, bare module costs, urea costs and property taxes and insurance. SRP asserted that when these values are used in the model, the IPM outputs validate the site-specific costs provided by SRP (based on detailed SCR and SNCR cost comparisons provided in the comments), although the adjusted IPM results still under-predict the costs based on site-specific considerations.

The commenter (SRP) stated that its site-specific costs for SCR are based on the actual cost projections associated with the current SCR installation at Unit 2. The commenter stated that SRP has already made substantial progress on the Unit 2 SCR installation with more than 40 percent of the project already complete, with the engineering design effort more than 90 percent complete, and the overall procurement efforts more than 75 percent complete. As such, the commenter believes that the site-specific costs are appropriate for use in any evaluation of BART controls.

In addition, the commenter (SRP) indicated that its cost estimates for Unit 1 are conservative since they are based on actual costs experienced for Unit 2 for which SCR has been designed to achieve an emission limit of 0.080 lb/MMBtu, rather than the 0.050 lb/MMBtu assumed by EPA for Unit 1. According to the commenter, there could be additional costs for Unit 1 of as much as $117 million for additional catalyst and an increased ammonia emission rate, a dry sorbent injection control system to address increased sulfuric acid mist and condensable PM emissions, and a fabric filter baghouse and induced draft fans to address increased filterable PM emissions. The commenter stated that even without these additional costs, the site-specific cost estimate for an SCR system on Unit 1 is almost twice the value used by EPA in its BART determination, and for the SCR system on Unit 2, the actual cost incurred by SRP is likewise almost twice the value used by EPA in its BART determination. The commenter concluded that this documentation demonstrates the importance of using available site-specific cost estimates when conducting a BART determination for Coronado.

Response: We disagree with the commenter's assertion that the cost calculations SRP provided to ADEQ as part of the original BART analysis, or in the subsequent response to ADEQ's information request, were supported by sufficient documentation. For example, the annual O&M costs associated with an SCR system will involve such costs as reagent usage, catalyst replacement costs, and labor costs, among others. SRP provided no breakdown of annual O&M costs beyond the total annual O&M value. Similarly, SRP's capital cost estimates consist of only a total value, accompanied by a capital recovery factor to determine the corresponding annualized cost. This level of detail does not allow us, and could not have allowed ADEQ, to evaluate the reasonableness of SRP's cost estimates for Coronado. As noted in a previous response, we have identified several issues with the cost calculations performed for the Apache and Cholla units that are inconsistent with the methodology established by EPA's CCM. SRP's cost estimates do not provide sufficient detail for us to evaluate if they are consistent with CCM methodology.

Although we do not agree that our cost-effectiveness estimates were incorrect, we have performed a supplemental analysis for Coronado 1 using portions of the updated cost estimates provided by SRP in its comments. Our use of these cost estimates in this supplemental analysis should not be construed to represent an acceptance of SRP's revision to our IPM

assumptions. Rather, this supplemental analysis represents a conservative estimate of costs (i.e., an assumption that would tend to overestimate rather than underestimate the annualized cost of controls). A summary of cost estimates based on this supplemental analysis is displayed in Table 15.

• SRP's revised SNCR cost estimates: SRP also submitted a conceptual capital cost estimate for an SNCR system as part of its comments. This estimate has excluded cost items not allowed by the CCM, such as AFUDC, escalation, and owner's costs, and have been included in the supplemental analysis.

• Original baseline period: As discussed elsewhere in our responses, we consider our use of a more recent baseline as consistent with BART Guidelines. However, in order to address commenter's concerns that we did not properly consider LNB and OFA as a potential control option and therefore precluded a BART determination of LNB and OFA, we have used a baseline period of 2001–2003, which corresponds to the period used in SRP's original BART analysis. This represents a time period prior to the installation of LNB, during which the control technology in place on Coronado 1 was OFA-only.

TABLE 15—CORONADO UNIT 1: CONTROL COST ESTIMATES

[Per SRP with EPA revisions]

Coronado 1 control technology	Capital cost ($)	Annualized capital cost ($/yr)	Annual O&M cost ($/yr)	Total annual cost ($/yr)
LNB+OFA	$6,500,000	$613,554	$0	$613,554
SNCR w/LNB+OFA	14,164,000	1,336,981	5,829,800	7,166,781
SCR w/LNB+OFA	80,633,219	7,611,205	4,492,736	12,103,941

Regarding SRP's concern that its own costs for Coronado Unit 1 are conservative (i.e., underestimated in this context) because they are based on a Coronado Unit 2 design that achieves 0.080 lb/MMBtu instead of 0.050 lb/MMBtu, we partially agree. For Coronado Unit 2, SRP identified certain additional costs that would be associated with design changes necessary to meet an emission rate more stringent than the consent decree limit of 0.080 lb/MMBtu. The two most important changes would be increased levels of ammonia injection and additional SCR catalyst (in the form of an additional fourth catalyst layer at the time of initial catalyst fill). The SCR catalyst is responsible for a certain amount of SO_2 to SO_3 conversion, which can then form sulfuric acid (H_2SO_4). SRP notes that the additional fourth catalyst layer can be expected to result in a collateral increase in sulfuric acid (H_2SO_4) emissions. A dry sorbent injection (DSI) system may be needed to address this increase in sulfuric acid, which itself has the potential to increase filterable particulate emissions. Addressing this increase in filterable particulate emissions may in turn require installation of a fabric filter baghouse. Of the $117 million in capital costs identified by SRP, the majority of these costs ($113 million) are associated with construction of the DSI and fabric filter.

While we agree that designing Coronado Unit 1 to meet an annual average emission limit of 0.050 lb/MMBtu will involve greater costs than a system designed to meet 0.080 lb/MMBtu, we disagree that the costs for Coronado Unit 1 are of the magnitude of those described above for Coronado Unit 2. Based on SRP's comments, we note that the SCR reactor box for Unit 2 has been designed for a "3+1" configuration (i.e., an initial three catalyst layers, with space for a fourth layer to be added later in the system's lifetime to maintain the same level of effectiveness) and has perhaps already been fabricated. As a result, accommodating additional catalyst cannot be achieved by increasing the volume of the initial three layers, but must be achieved by including the fourth catalyst layer (or some portion of it) during the initial fill. Since each catalyst layer is designed for a certain amount of SO_2 to SO_3 conversion, inclusion of an additional layer unavoidably results in an increase in the overall conversion rate. However, since an SCR system for Coronado Unit 1 has not been designed, we consider it feasible for SRP to specify a design at the outset that accommodates additional volume in the initial catalyst layers, thereby achieving a more stringent emission rate without the higher SO_2 to SO_3 conversion rate associated with a fourth catalyst layer. Moreover, even if SRP were required to install a DSI system or DSI and a fabric filter, EPA does not agree that these costs should be considered part of the cost of compliance for the purposes of a BART determination. EPA cannot anticipate what control technology might be required in the future for sulfuric acid mist under PSD or minor NSR. The BART Guidelines do not require the inclusion of potential future costs that might be associated with permit requirements as part of the cost estimates for a BART determination.

Therefore, while we acknowledge that there are costs associated with additional catalyst and increased ammonia injection, they represent a small fraction ($4 million) of the $117 million total identified by SRP. We have used certain elements from SRP's estimates in preparing our supplemental cost analysis for Unit 1, but we have not adjusted SRP's estimates to reflect these factors since the cost estimates provided by SRP do not include a level of detail that would allow us to properly make such adjustments.

A summary of emission rates and emission reductions associated with each control option is in Table 16. As noted previously, these emission estimates are based on a 2001–2003 baseline period, during which the Coronado units operated only with OFA. We have calculated annual emission rates for the OFA baseline using the annual average emission data (lb/MMBtu) reported to CAMD over this 2001–2003 baseline period.

TABLE 16—CORONADO 1: ANNUAL EMISSION ESTIMATES

Coronado 1 control technology	Emission factor (lb/MMBtu) [1]	Heat rate (MMBtu/hr)	Annual capacity factor	Emission rate		Emissions removed (tpy)
				(lb/hr)	(tpy)	
OFA (only)	0.407	4,316	0.84	1,756	6,462	
LNB+OFA	0.303	4,316	0.84	1,308	4,811	1,651
SNCR w/LNB+OFA	0.212	4,316	0.84	915	3,368	3,095
SCR w/LNB+OFA	0.050	4,316	0.84	216	794	5,669

[1] Annual average basis.

Cost-effectiveness values for each control technology are summarized in Table 17, and are based on the total annual costs and annual emissions removed listed in the previous tables.

TABLE 17—CORONADO 1: CONTROL OPTION COST-EFFECTIVENESS

Coronado 1 control technology	Total annual cost ($/yr)	Emissions removed (tpy)	Cost-effectiveness ($/ton)	
			Avg.	Incr.
OFA (only)				
LNB+OFA	$613,554	1,651	$372	
SNCR w/LNB+OFA	7,166,781	3,095	2,316	4,540
SCR w/LNB+OFA	12,103,941	5,669	2,135	1,918

Based on SRP's capital and O&M cost estimates, we still consider the cost-effectiveness values of SCR, on an average ($2,135/ton) and incremental ($1,918/ton) basis, to not be cost-prohibitive. We consider these results supportive of our proposed determination that SCR with LNB and OFA is cost-effective. We note that while the LNB and OFA option is the least expensive (i.e., lowest annual cost) and is the most cost-effective of the control technologies (i.e., has the lowest $/ton value), it is also the least effective control option (i.e., removes smallest quantity of NO_X). It removes substantially fewer emissions than either of the other two control options, the SNCR- and SCR-based systems. As discussed in our proposed action, and in other responses in this document, we have not identified any energy or non-air quality impacts that warrant eliminating SCR from consideration for Coronado Unit 1. Combined with the modeled visibility improvement associated with the SCR control option, SRP's cost estimates continue to support the selection of SCR with LNB and OFA as BART for Coronado 1.

Comment: One commenter (SRP) stated that the proposed rule and the TSD say almost nothing about how IPM was used to calculate costs, instead directing the public to an EPA contractor report for more information. The commenter asserted that no contractor report in the docket for the rulemaking supplies additional detail on precisely how IPM was used. The commenter added that this failing renders EPA's proposed rule inconsistent with the CAA's public notice requirements.

Response: We disagree with the commenter's assertion that we have not provided sufficient information regarding our cost calculations. In the e-docket for our proposal, we included the raw cost calculation spreadsheets from our contractor that contain the IPM equations, corresponding variable values, selected notes regarding assumptions and variable ranges, as well as selected tables from the IPM Base Case v4.10.[203] In addition, Web links were provided (both in the raw cost calculation spreadsheet and in our proposal) to the location on the publicly available EPA Web site that contains full IPM documentation.

Comment: One commenter (SRP) stated that EPA failed to follow the BART Guidelines by not conducting an incremental cost analysis for Coronado. According to the commenter, the proposed rule and TSD both provide a single entry for incremental costs for each of the Coronado units that reflect the incremental cost of the most stringent NO_X BART control option compared to the baseline. The commenter asserted that this is not a complete incremental analysis because it ignores incremental comparisons between identified control options. SRP contended that in the absence of a proper NO_X BART assessment, the proposed rule lacks an adequate foundation. The commenter stated that the high incremental costs of post-combustion NO_X control technologies when compared to combustion control technologies reinforces the conclusion that post-combustion control technologies cannot be the basis for BART for the units at Coronado.

Response: We disagree with the commenter's assertion that we did not perform a sufficient incremental cost analysis for the Coronado units. In our control cost summaries (Table 22 in the proposed rule and Table 32 in the TSD), the column labeled "incremental cost-effectiveness" represents the $/ton of the control option when compared to the preceding control option. The column labeled "average cost-effectiveness", represents the $/ton of the control option when compared to the baseline control. In the case of Coronado Unit 1, we considered two control options beyond the baseline: SNCR with LNB and OFA, and SCR with LNB and OFA. The "single entry for incremental costs", as described in the comment, represents the incremental cost between the SNCR- and SCR-based options. An incremental cost value was not calculated between LNB with OFA (which is the option preceding the SNCR-based option) and SNCR because LNB with OFA represented the baseline control in our analysis. The cost-effectiveness of moving from LNB with OFA to SNCR with LNB and OFA is therefore

[203] Document ID: EPA–R09–OAR–2012–0021–0008, File name: G–15_MODELING_FILES_EGU_BART_Costs_Apache_Cholla_Coronado_FINAL2.

adequately captured in the "average cost-effectiveness" column. We do note that, in our supplemental cost analysis, we have used OFA as the baseline control, and have therefore calculated an incremental cost-effectiveness value for moving from LNB with OFA to SNCR with LNB and OFA. These results are described in a previous comment and, as noted in that comment, we disagree with the commenter's assertion that the incremental cost of post-combustion controls is cost-prohibitive.

d. Visibility Improvement

Comment: One commenter (SRP) asserted that EPA is without basis for establishing in the proposed rule a 0.5 deciview comparison threshold as a touchstone for analyzing impacts from Coronado BART controls, citing the BART Guidelines and associated preamble. According to the commenter, even if EPA could impose a 0.5 deciview comparison threshold, it is only by substituting its own preferred modeling methodology (which the commenters argued is something EPA cannot lawfully do) that EPA can project that requiring SCR at Unit 1 would barely yield a projected improvement of more than 0.5 deciview at one area. The commenter also noted that 0.5 deciview is below the level of human perceptibility.

Response: As explained above, we have not used 0.5 dv as a threshold, but as one point of comparison such as a "benchmark" or "yardstick" to gauge the magnitude of impacts under various control scenarios.

e. Other Comments

Comment: The commenter (NPS) agreed with EPA's determination that NO_X BART for Coronado Units 1 and 2 is SCR with LNB and OFA. The commenter noted that EPA proposed on Unit 1 an emission limit for NO_X of 0.050 lb/MMBtu, based on a rolling 30-boiler-operating-day average, and on Unit 2 an emission limit of 0.080 lb/MMBtu, which is consistent with the emission limit in the consent decree. The commenter stated that EPA acknowledged that the emission limit for Unit 2 established in the consent decree was not the result of a BART five-factor analysis, and that the consent decree does not indicate that SCR at 0.080 lb/MMBtu represents BART. The commenter commended EPA for soliciting additional information on the feasibility of achieving a more stringent limit.

Response: We acknowledge the comment.

Comment: In response to EPA's proposed BART determination in the proposed FIP, one commenter (SRP) performed and submitted an assessment of the critical components of a BART analysis for Coronado, including control costs and the visibility improvements associated with the control options. The commenter indicated that this analysis shows that even without considering other energy and non-air quality environmental impacts associated with the implementation of SNCR or SCR, it is clear that the visibility benefits realized from implementation of post-combustion controls are not justified by the cost. The commenter also submitted the results of this analysis using CALPUFF version 6.42 in place of version 5.8. The commenter stated that this analysis provides even stronger evidence that selection of post-combustion controls as BART for Coronado is inappropriate.

Response: We disagree with this comment. As noted in a separate response, we have performed a supplemental cost analysis that relies upon many elements of the cost analysis provided by the commenter. Even with the higher cost estimates provided by the commenter, we consider the costs of post-combustion controls such as SNCR and SCR to be cost-effective on a $/ton basis. In addition, as noted in a separate response, we disagree with several assumptions used in the commenter's visibility modeling, such as the use of an unapproved CALPUFF model version and treatment of ammonia background concentrations. We therefore disagree that the visibility benefits modeled by the commenter are representative of the benefits that will accrue with the use of post-combustion controls. The modeling results performed in support of our proposal indicate substantial visibility benefits, especially with the SCR control option. As a result, we do not consider it appropriate to eliminate either of the post-combustion controls from consideration as BART. Although SCR is the most stringent control option, its associated visibility benefits and cost-effectiveness justify this technology as BART.

E. Comments on Enforceability Requirements in EPA's BART FIP

Comment: One commenter (SRP) made the following points concerning the proposed enforceability requirements:

- EPA must modify the monitoring requirements to be consistent with existing requirements. If EPA proceeds to impose additional controls at Coronado beyond those specified in the consent decree and already included in the Coronado permit, it must align these requirements to eliminate unnecessary and unreasonable compliance burdens.
- The commenter supports and appreciates the use of the monitoring system certification and quality assurance (QA) procedures in 40 CFR Part 75. However, EPA's proposed definition of "valid" data is broader than 40 CFR Part 75, and EPA also should make clear that the "bias" adjustment procedures in 40 CFR Part 75 do not apply to data used to calculate the 30-day rolling averages.
- The commenter objects to the proposed additional relative accuracy requirements. Imposing additional relative accuracy test audit (RATA) specifications will not increase the accuracy of any monitoring system, but would increase the difficulty and cost of testing. It also could result in additional missing data if tests must be repeated to meet the specifications. To proceed with combined RATA specifications, EPA also would need to either propose (and solicit comment on) alternative low-emitter combined specifications that have been demonstrated to be consistently achievable, or exempt units meeting any of the applicable 40 CFR Part 75 low-emitter thresholds from those specifications.
- The commenter stated that the proposed data availability requirements are unnecessary and too stringent. Source owners and operators already have sufficient incentive to obtain valid data in order to avoid the increasingly conservative (and ultimately punitive) missing data substitution procedures that apply under 40 CFR Part 75. Regarding stringency, if a unit has a significant missing data event during a calendar quarter in which it also has a significant period of unit downtime (e.g., as a result of an outage), the percent of operating hours during the quarter with valid data could easily be less than 90 percent. It is in part for this reason that 40 CFR Part 75 measures data availability over each 8,760-operating-hour period. EPA should either eliminate the unnecessary requirement or provide data to justify its proposed requirement that take into account the differences described above.
- EPA must modify the quarterly reporting requirements to be consistent with existing requirements.
- EPA must modify the notification requirements in the proposed rule because they are overly broad and overly prescriptive. First, EPA should clarify the proposed provision by requiring notice only of new controls that will be required to meet the FIP or regional haze SIP. Second, because installation of controls is a complex process, and the point at which that

process is "complete" may not be immediately clear, EPA must revise the requirement to use a more objective term and allow sufficient time for owners and operators to comply. Third, because the proposed requirement duplicates reporting already required for a new add-on NO_X emission control under 40 CFR Part 75, EPA should rely on (and if necessary refer to) the notice required under Part 75.

Response: We partially agree with this comment and are adjusting the enforceability requirements of the final FIP accordingly. EPA agrees that the Part 75 bias adjustment should not be applied to the compliance data for the BART rules in this action and is making changes to the final rule to address this comment. However, EPA does not agree that only the incentives under the Acid Rain Part 75 rules are sufficient to assure adequate valid data for this rule. Part 75 relies on progressively punitive data substitution procedures to promote good valid data availability for its program. Our rule does not substitute data, so the incentives of the Part 75 rules do not exist. Therefore, EPA is requiring that each unit subject to this rule obtain 90 percent valid data, as determined under Part 75, for each calendar year.

It should be noted that the commenter did not submit any data specific to its EGUs indicating the difficulty of meeting the proposed valid data availability requirements. Also, the other two utility companies affected by this rule did not make any objection to the proposed data requirements. However, EPA, as a result of this comment, has reconsidered the additional quality assurance and valid data requirements from the proposal. As indicated by the commenter, measurement and QA requirements for NO_X lb/hour are not currently required by Part 75. In addition, EPA recognizes that the calculation of heat input requires the combination of the flow and diluent (O_2 or CO_2) CEMS along with measurements of temperature and estimation of moisture. In addition in the final rule, EPA is providing for a multi-unit determination of compliance. This would compound the valid data concerns of the commenter. EPA requires monitoring data used for compliance determinations to be of known quality as demonstrated through Quality Assurance/Quality Control (QA/QC) procedures.[204] In place of the requirement to validate through RATA testing of the NO_X lb/hour measurement and heat input, EPA will require that all of the CEMS required by Part 75 and used for the compliance demonstrations for this action obtain 90 percent valid data (per Part 75 specifications) for each unit over each calendar year. In addition, the rule will require the affected units to conduct RATA evaluations and calculate the quarterly valid data hours for NO_X lb/hour and heat input. EPA will not finalize the minimum data requirements in the proposal, but will require these data to be calculated (all data for determining the relative accuracy in these units are available when Part 75 RATAs are performed) and reported to both EPA and ADEQ to determine if these data are capable of meeting more rigorous QA/QC requirements in the future. We also note that the final rule will add QA/QC and minimum valid data requirements for the inlet SO_2 CEMS that are needed to calculate the SO_2 removal efficiencies for the Cholla EGUs. Finally, EPA agrees that semiannual reporting will be sufficient for this rule, and the final rule will reflect this.

Comment: One commenter (AEPCO) requested that EPA clarify that AEPCO has longer than 180 days to comply with the non-SCR limits. The commenter is particularly concerned about the time needed for the ESP and scrubber upgrades and believes a five-year period for all BART implementation would be appropriate. ADEQ also commented that the facility will need more than 180 days to complete the upgrades needed to meet the SO_2 BART limits, and stated that a five-year compliance time frame from the time the BART limit is finalized, as specified in RHR Appendix Y, is most appropriate.

Response: EPA agrees that AEPCO would need more than the 180 days in the proposed rule. However, we do not agree that five years is necessary to perform the necessary upgrades. The final rule will require AEPCO's two units to meet the SO_2 and PM_{10} limits within four years of the effective date of this rule. This time frame will allow AEPCO to perform the upgrades to the two units during regularly scheduled maintenance outages.

Comment: Several commenters (ADEQ, AEPCO, APS, EarthJustice, NPS, SRP) provided feedback on test methods. AEPCO supported maintaining the use of EPA Method 201A to comply with the proposed BART PM_{10} limits. In contrast, ADEQ and APS only supported the use of Methods 201A and 202 if SCR controls are not used. These commenters stated that SCR causes an increase in sulfuric acid aerosol mist, which results in an increase in condensable particulate matter. APS suggested Methods 1–4 and Method 5 or 5e are appropriate where SCR is used. ADEQ suggested Method 5 or 5e where SCR is used, and states that any collateral increase in acid mist should be addressed through a permitting process. SRP stated that wet scrubbers also render Methods 201 and 201A inapplicable, and requested that EPA specify the use of Method 5, 5B, 5I or an approved alternative.

One commenter (NPS) pointed out that use of SCR at these units is expected to result in increased condensable particulate matter in the form of sulfuric acid mist (H_2SO_4), which would have the effect of making the emission limit more stringent than intended by ADEQ, and likely not be achievable in practice. To address EPA's request for comment on whether to allow compliance with the PM_{10} limit to be demonstrated using test methods that do not capture condensable particulate matter, namely EPA Methods 1 through 4 and Method 5 or Method 5e, the commenter conducted and submitted an analysis of H_2SO_4 emissions. According to the commenter, H_2SO_4 emissions will not be significant, contributing less than 10 percent to the PM_{10} limit. The commenter suggested that the 0.030 lb/MMBtu limit proposed by ADEQ for the Apache and Coronado units be adjusted to 0.033 lb/MMBtu to reflect the increase in total PM_{10} attributable to SCR, and that PM_{10} emissions would be measured by conducting EPA Method 201A/202 tests consistent with the ADEQ's SIP.

In contrast to the previous commenters, one commenter (Earthjustice) stated that EPA should approve the test methods in the ADEQ RH SIP (i.e., EPA Methods 201 and 202) and ensure that the BART limit includes both filterable and condensable PM fractions. The commenter asserted that if EPA allows or requires a test method other than Method 201 and 202, the PM_{10} BART emission limit would effectively be less stringent because it would only apply to filterable PM, and not total PM. The commenter indicated that requiring different test methods would in effect be proposing an even less-stringent PM_{10} BART limit, which would require EPA to undertake an independent BART analysis that demonstrates that the less-stringent emission limit is BART. Consequently, according to the commenter, if EPA requires or allows a different test method, it must lower the emission limit to reflect only the filterable PM_{10} fraction. The commenter added that in this case, EPA should ensure that compliance with the filterable PM_{10} limit is demonstrated with use of CEMS

[204] See, e.g., 40 CFR 60.13(a) and 40 CFR Appendix F.

for filterable PM, which is currently available.

Response: ADEQ selected test methods 201 and 202 for determining compliance with this limit. EPA noted in the proposal that the proposed addition of SCR for NO_X control would likely increase the quantity of PM collected as condensable PM by method 202 due to an increase in H_2SO_4 from the oxidation of SO_2 to SO_3. EPA requested comment on changing the test method from methods 201 and 202 to EPA Method 5 which measures only the filterable PM. Method 5 measures all sizes of filterable PM which results in a higher filterable PM value than Methods 201 or Method 201A, which only measure filterable PM_{10}.

In its comments concerning the proposal for Coronado, SRP noted that Method 201A cannot be used in a wet exhaust gas stream. We agree with this comment. In promulgating amendments to Method 201A and Method 202 in 2010, EPA explained that:

> Method 201A cannot be used to measure emissions from stacks that have entrained moisture droplets (e.g., from a wet scrubber stack) since these stacks may have water droplets that are larger than the cut size of the PM_{10} sizing device. The presence of moisture would prevent an accurate measurement of total PM_{10} since any PM_{10} dissolved in larger water droplets would not be collected by the sizing device and would consequently be excluded in determining total PM_{10} mass. To measure PM_{10} in stacks where water droplets are known to exist, EPA's Technical Information Document 09 (Methods 201 and 201A in Presence of Water Droplets) recommends use of Method 5 of appendix A–3 to 40 CFR part 60 (or a comparable method) and consideration of the total particulate catch as PM_{10} emissions.[205]

It is also true that the rarely used Method 201 cannot be used in a wet exhaust stream (also known as a "wet stack").[206]

At this time, the three facilities subject to this BART rule have a mix of wet and dry stacks. EPA anticipates that the SO_2 BART limits set by ADEQ will result in 100 percent of the exhaust gas undergoing SO_2 scrubbing. Neither ADEQ nor EPA is requiring reheat of the exhaust gas stream. Therefore, it is likely that all of the coal-fired units covered by this action will have wet stacks. So it is doubtful that any filterable PM_{10} method would work as the compliance method.[207] Therefore, EPA is finalizing a decision to allow either Method 5 or Methods 201A and 202 for demonstrating compliance with the BART PM_{10} limits set by ADEQ.

As noted above, the addition of the SCR to these EGUs for NO_X control will likely increase the condensable PM that will be measured by Method 202. By offering the option of Method 5 or Methods 201A and 202, the facilities can determine which methods are compatible with their units' stack conditions and will best demonstrate the proper operation of their PM controls. Any significant increase in H_2SO_4 and the appropriate control of this visibility impairing pollutant will be addressed through the PSD permitting process with a BACT determination for H_2SO_4 control. The significance level that triggers permitting for H_2SO_4 is an increase of seven tons per year of this pollutant.[208] Coronado has already received a PSD permit for H_2SO_4 that is likely to result from the increase in H_2SO_4 resulting from the SCR required under the consent decree.

EPA's AP–42 indicates that approximately one third of the filterable PM emissions from EGUs are larger than PM_{10}. This means that the change from Method 201 (or 201A) to Method 5 as the compliance method will result in this increased measurement of PM. This is offset by the elimination of the condensable measurement of Method 202 and as noted above, the utilities will have the option of using either testing approach.

Comment: One commenter (APS) requests that EPA change the compliance date for the PM_{10} limit at Cholla Unit 2 to January 1, 2016, rather than January 1, 2015. The commenter explained that EPA misunderstood the language of the ADEQ SIP, which refers to APS's commitment to install a fabric filter by 2015, to mean installment and operation by the first of the year, whereas this commitment actually meant by the end of 2015, or December 31, 2015. The commenter further requested that this date be extended to April 16, 2016, if the ADEQ approves APS's request for a one-year extension to comply with the Mercury and Air Toxics Standards (MATS) before EPA finalizes this BART determination.

The commenter also requested that EPA change the compliance date with the 0.15 lb/MMBtu SO_2 emissions standard from 180 days after promulgation to January 1, 2016, or April 16, 2016, to allow sufficient time to do the necessary upgrades for Unit 2. This unit will require scrubber upgrades that need to be done concurrent with the fabric filter installation to accommodate the increase in pressure drop that a new fabric filter will impose. ADEQ also stated a compliance date of April 1, 2016, would be more appropriate than January 1, 2015, for both the PM_{10} and SO_2 limits at Cholla Unit 2.

Response: EPA agrees with this comment and has changed the compliance date in the final rule to April 1, 2016.[209] In addition, as explained above, in order to ensure that the wet FGD (i.e. scrubbers) on all three units at Cholla are properly operated and maintained, consistent with 40 CFR 51.308(e)(1)(v), we are finalizing a removal efficiency requirement for SO_2 of 95 percent on a 30-day rolling basis for Cholla Units 2, 3 and 4. Compliance with the efficiency requirement will be determined by SO_2 continuous emission monitoring systems (CEMS) operated at the inlets and outlets of the scrubbers. Units 3 and 4 already have SO_2 and CO_2 CEMS installed after the scrubbers, and Unit 2 has SO_2 and CO_2 CEMS installed before the scrubbers.[210] Therefore, SO_2 and diluent CEMS will need to be installed at the inlets to the scrubbers on Units 3 and 4. We estimate that the total annualized cost for this installation (including ongoing operation and maintenance costs) will be approximately $51.000 per unit.[211] We also note that this efficiency requirement will probably result in a slight increase in operation and maintenance costs in the form of additional limestone and scrubber waste disposal expenses. Even considered collectively, these additional costs are *de minimis* in comparison to the annualized cost of SCR (i.e., $9,906,206 to $13,590,853 per unit at Cholla, according to our supplemental cost analysis) or the total cost of installing a new wet FGD system, which APS has estimated to be $67.0 to $70.9 million.[212] In order to allow sufficient

[205] 75 FR 80118, 80121.

[206] See EPA's Technical Information Document 09, "Methods 201 and 201A in Presence of Water Droplets" (September 9, 1991).

[207] See, e.g. 75 FR 80126 ("Monitoring the emission of PM_{10} or $PM_{2.5}$ from a wet gas stream is a challenging problem that has not been addressed successfully despite considerable effort. A consensus method to provide this information has not emerged.")

[208] See 40 CFR 52.21(b)(23)(i).

[209] Although APS requested a deadline of April 16, 2016, this request was contingent upon ADEQ's approval of APS's August 7, 2012 request for a one-year extension to comply with the MATS. ADEQ's comments indicate that April 1, 2016 is the appropriate deadline for this requirement, so we have modified the final compliance deadline to April 1, 2016.

[210] See Cholla Title V Permit (2012), Table C–3: Continuous Emission Monitors.

[211] We used EPA's CEMS Cost Model (available at *http://www.epa.gov/ttn/emc/cem.html*) to estimate the total annualized cost of adding inlet CEMS for SO_2 and CO_2. See "CEMS Cost Calculation."

[212] APS Comments, Table 3–8. No annualized cost was provided.

time for installation of the CEMS, the compliance deadline for this removal efficiency requirement at these units will be one year after publication of this final rule for Units 3 and 4. The removal efficiency compliance deadline for Unit 2 will coincide with the compliance date for the lb/MMBtu SO_2 emission limit for this unit (i.e., April 1, 2016).

Comment: Two commenters requested that EPA implement SCR installation in three rather than five years. Earthjustice claimed that the proposed five-year compliance deadline is unreasonable and inconsistent with the CAA and RHR requirements, noting that compliance before the "outside date" is required whenever earlier compliance is possible. This commenter contended that average SCR installations have required 37 to 43 months to implement, and EPA has provided no site-specific factors for these plants to require a longer-than-average installation time. The commenter notes that ADEQ has an "accelerated permit processing" program, so that any PSD permits needed to address sulfuric acid mist increases should not require an extension of the compliance deadline to five years. The commenter also requested that EPA obtain and post to the docket the outage schedule for these plants, which may provide additional justification for a compliance deadline shorter than five years. In contrast, SRP commented that, if EPA finalizes a requirement for SCR at Unit 1 "a five-year compliance period is certainly warranted." SRP noted that it estimated it would require 48 months to install SCR at Coronado Unit 2, and that installing SCR on Unit 1 would be even more complicated due to the reduced amount of space following the installation on Unit 2.

Response: We are finalizing a compliance deadline of five years from final publication of this notice for all SCR-based emission limits. As explained in our proposal, five years is a reasonable time frame for SCR design and installation, particularly where retrofits of multiple units at a single facility are required. Granting the full five years for SCR design and installation will allow the facilities to tie in the SCR systems during routinely scheduled maintenance outages, which are typically scheduled for every three years. With respect to Coronado in particular, the five-year compliance schedule will allow SRP sufficient time to design and install the SCR system on Unit 1 and to design and install a low-load temperature controller on Unit 2, which likely must be done in the period after the SCR for Unit 2 is placed into operation (June 1, 2014).

Comment: One commenter (Earthjustice) stated that EPA should set BART limits for $PM_{2.5}$ and PM_{10}, rather than just PM_{10}. The commenter indicated that the BART Guidelines specify that BART should be evaluated and defined for both $PM_{2.5}$ and PM_{10} (citing 40 CFR part 51, Appendix Y, section II.A.3).

Response: The BART Guidelines do not require states to set BART limits for $PM_{2.5}$ in addition to limits for PM_{10}. The portions of the BART Guidelines cited by commenters (i.e. sections II.A.3 and III.A.2) pertain to the identification of sources that are BART-eligible and sources that are subject-to-BART, not the actual five-factor analysis or determination of BART for a given source, which is described in section IV of the Guidelines. With respect to the five-factor analysis, the Guidelines provide that, "[m]odeling should be conducted for SO_2, NO_X and direct PM emissions ($PM_{2.5}$ and/or PM_{10})." [213] The Guidelines thus provide states with the flexibility to consider *either* $PM_{2.5}$ or PM_{10} emissions or both, as part of their five-factor analysis. Likewise, the Guidelines do not require that the emission limits reflecting BART should include separate limits for $PM_{2.5}$ and PM_{10}.[214] Thus, we are not required by the RHR to set separate BART limits for $PM_{2.5}$.

F. Comments on Legal Issues

Comment: A number of commenters asserted that EPA has acted in a manner contrary to the CAA, under which states are to play the lead role in designing and implementing the regional haze program. These commenters typically indicated that EPA is required to defer to the states' judgment regarding BART where the state has considered the five statutory BART factors, and has no authority to override a state's BART determination simply because it disagrees with the state's conclusions. The commenters often stated that the states are empowered by the CAA to determine how best to weigh each of the statutory BART factors and that EPA's only legal role in SIP review is to determine whether the state's plan is consistent with the CAA. The commenters generally stated the belief that ADEQ's BART determinations fully complied with the CAA, the Regional Haze Rule and the BART Guidelines. The commenters frequently cited *American Corn Growers Ass'n.* v. *EPA*, 291 F.3d (D.C. Cir. 2002); *EME Homer City Generation, L.P.* v. *EPA*, No. 11-1302, slip op. at 42 (D.C. Cir. Aug. 21, 2012) ("CSAPR decision"); *Luminant Generation Co.* v. *EPA*, 675 F.3d 917, 921 (5th Cir. 2012); and *State of Texas, et al.*, v *EPA*. 690 F.3d 670 (5th Cir. 2012).

Several commenters stated that EPA made no finding that Arizona failed to satisfy its statutory obligation to consider and weigh the BART factors, and asserted that EPA conceded that the state had done so in its FIP proposal (citing 77 FR 42851). Some commenters (AEPCO, SRP) stated that EPA proposed to disapprove the SIP, in part, because it is not consistent with BART decisions that other states have made (citing 77 FR 42836), and contended that this finding is irrelevant to the approvability of ADEQ's SIP. One commenter (SRP) added that ADEQ's BART determinations are entirely legal and reasonable and, to the extent that other states' BART determinations may be relevant, consistent not only with the action of other states, but with action that EPA has approved or proposed to approve for those states (i.e., combustion controls as BART for NO_X).

Two commenters added that EPA purported to defer to ADEQ's BART determinations by indicating that it would prefer to act on a SIP revised to address the deficiencies perceived by EPA (citing 77 FR 42839), but the commenters asserted that it is not deference to invite the State to submit a SIP that conforms to EPA's policy choices. The commenters contended that in any case, with the court ordered deadline of November 15, 2012, for EPA to finalize the proposed FIP, it would be impossible for Arizona to prepare and adopt a revised SIP in time.

Response: We do not agree that our partial disapproval of the Arizona Regional Haze SIP is contrary to the CAA. As noted by several commenters, States have the lead role in determining BART for individual sources through SIPs. However, EPA also has a crucial role in reviewing SIPs for compliance with the requirements of the CAA and its implementing regulations. Pursuant to CAA section 110, States must submit SIPs to EPA for review and EPA must review SIPs for consistency with the Act's requirements and disapprove any SIP revision that "would interfere with any applicable requirement" of the Act.[215] The CAA also empowers EPA to call for SIP revisions "[w]henever [EPA] finds that the applicable implementation plan for any area is substantially inadequate to * * * comply with any requirement of this

[213] BART Guidelines, 40 CFR Part 51, Appendix Y, section IV.D.5.

[214] *Id.* Section V.

[215] CAA section 110(a)(1), (k)(3) and (*l*), 42 U.S.C. 7410(a)(1), (k)(3) and (*l*).

chapter," and impose sanctions when EPA determines they are "reasonable and appropriate for the purpose of ensuring that the requirements [of the Act] * * * are met." [216] Furthermore, the Act mandates that EPA promulgate a FIP when EPA finds that a State has failed to submit a required SIP to the Agency, failed to submit a complete SIP, or where EPA disapproves a SIP.[217] Thus, the CAA provides EPA with a critical oversight role in ensuring that SIPs meet the requirements of the CAA.

Nothing in the CAA indicates that EPA's role is less important in the context of the Regional Haze program than under other CAA programs. On the contrary, CAA section 110(a)(2)(J) explicitly requires that SIPs "meet the applicable requirements" of Part C of Title I of the CAA including the requirements for visibility protection set forth in sections 169A and 169B.[218] Pursuant to section 169A(b), EPA is required to promulgate visibility protection regulations that apply to "each applicable implementation plan" (i.e., each SIP or FIP) [219] for each State containing one or more Class I areas and each State "emissions from which may reasonably be anticipated to cause or contribute to any impairment of visibility in any [Class I area]." [220] The CAA specifies that these regulations (including the RHR) must require each such SIP or FIP to "contain such emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress toward meeting the national goal," including implementation of BART, as determined by the State (or by EPA in the case of a FIP).[221] Moreover, the CAA requires that BART for each "fossil-fuel fired generating power plant having a total generating capacity in excess of 750 megawatts" must be determined pursuant to the guidelines promulgated by EPA (i.e., the BART Guidelines).[222] Thus, the statute provides EPA a key oversight role in reviewing SIPs for compliance with the RHR and BART requirements.

The cases cited by commenters do not support an argument that EPA's role as a reviewer is any less critical in the regional haze context than it is in reviewing other SIP components. In *American Corn Growers* v. *EPA*, the petitioners challenged the original RHR because, among other things, the RHR treated one of the five statutory factors differently than the others by requiring States to consider the degree of visibility improvement from imposing BART on a group of sources rather than on a source-specific basis.[223] The court concluded that such a requirement could force States to apply BART controls at sources without evidence that the individual sources contributed to visibility impairment at a Class I area, which encroached on States' primary authority under the regional haze provisions to determine which individual sources are subject to BART and what BART controls are appropriate for each source.[224] Therefore, the court vacated the visibility improvement part of the original RHR as contrary to the statute.[225] Contrary to some commenters' suggestions, however, the *American Corn Growers* decision did not address EPA's authority to reject a State's BART determinations for failure to conform to the CAA, the RHR or the BART Guidelines.

Commenters also cite *Luminant Generation* v. *EPA*, 675 F.3d 917, 921 (5th Cir. 2012) and *Texas* v. *EPA*, 690 F.3d 670 (5th Cir. 2012). Neither of these cases involves BART or the CAA's regional haze provisions at all. Rather, they involved EPA's disapprovals of SIP revisions involving Texas's minor new source review (NSR) program. As noted by the *Luminant* court, "because 'the Act includes no specifics regarding the structure or functioning of minor NSR programs' and because the implementing regulations are 'very general [,] * * * SIP-approved minor NSR programs can vary quite widely from State to State.'" [226] By contrast, Regional Haze SIPs and BART determinations are subject to detailed requirements set forth in CAA sections 169A, the RHR and the BART Guidelines. While in *Luminant* and *Texas*, the Fifth Circuit found that EPA had failed to tie its disapproval to any requirement of the CAA or EPA's implementing regulations,[227] in this case our disapproval is based on the SIP's failure to comply with CAA sections 110(a)(2) and 169A(b)(2)(A), as implemented through the RHR and the BART Guidelines.

As noted above, CAA section 110(a)(2)(J) requires all SIPs to "meet the applicable requirements" of Part C of Title I of the CAA, including the requirement that each source found subject-to-BART, "procure, install, and operate, as expeditiously as practicable (and maintain thereafter) the best available retrofit technology * * *" [228] Section 169A(g)(2) further provides that:

> In determining best available retrofit technology the State (or the Administrator in determining emission limitations which reflect such technology) shall take into consideration the costs of compliance, the energy and nonair quality environmental impacts of compliance, any existing pollution control technology in use at the source, the remaining useful life of the source, and the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology.[229]

Similarly, the RHR provides that:

> The determination of BART must be based on an analysis of the best system of continuous emission control technology available and associated emission reductions achievable for each BART-eligible source that is subject to BART within the State. In this analysis, the State must take into consideration the technology available, the costs of compliance, the energy and nonair quality environmental impacts of compliance, any pollution control equipment in use at the source, the remaining useful life of the source, and the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology.[230]

ADEQ's BART determinations for NO_X at Apache Units 2 and 3, Cholla Units 2, 3 and 4 and Coronado Units 1 and 2 fall short of these requirements in several respects.

First, ADEQ did not analyze the "best system of continuous emission control

[216] See *id.* 42 U.S.C. 7410(k)(5), (m).

[217] See *id.* section 7410(c)(1).

[218] CAA sections 110(a)(2)(J), 169A and 169B 42 U.S.C. 7410(a)(2)(J), 7491 and 7492.

[219] Under the CAA, "applicable implementation plan" is defined as "the portion (or portions) of the implementation plan, or most recent revision thereof, which has been approved under [CAA section 110], or promulgated under [CAA section 110](c) * * * and which implements the relevant requirements of [the CAA]." CAA section 302(q), 42 U.S.C. 7602(q). In other words, an "applicable implementation plan" is an EPA-approved SIP or Tribal Implementation Plan, or an EPA-promulgated FIP.

[220] 42 U.S.C. 7491(b)(2). In promulgating the RHR, EPA determined that "all States contain sources whose emissions are reasonably anticipated to contribute to regional haze in a Class I area and, therefore, must submit regional haze SIPs." 64 FR 35720; see also 40 CFR 51.300(b)(3).

[221] 42 U.S.C. 7491(b)(2).

[222] *Id.* In this case, Cholla and Coronado each have a total generating capacity in excess of 750 megawatts, while Apache has a total plant-wide generating capacity of 560 megawatts. Thus, the BART Guidelines are mandatory for BART determinations at Cholla and Coronado and serve as non-binding guidance with respect to Apache.

[223] 291 F.3d at 5–9.

[224] *Id.* at 7–8.

[225] EPA revised the RHR to address the court's decision in *American Corn Growers* at the same time as we promulgated the BART Guidelines. 70 FR 39104 (July 6, 2005). The revised RHR and the Guidelines were upheld by the D.C. Circuit in *Utility Air Regulatory Group* v. *EPA*, 471 F.3d 1333 (D.C. Cir. 2006).

[226] 675 F.3d at 922 (citing 74 FR 51418, 51421 (Oct. 6, 2009).

[227] 675 F.3d at 924, 929; 690 F.3d at 679, 682, 686.

[228] CAA section 169A(b)(2)(A)., 42 U.S.C. 7491(b)(2)(A).

[229] 42 U.S.C. 7491(g)(2).

[230] 40 CFR 51.308(e)(1)(ii)(A).

technology available and associated emission reductions achievable." Rather it accepted the source's own assertions about what emissions reductions were achievable with various control technologies. For example, in response to comments from the FLMs arguing that SCR could achieve lower rates on 30-day-rolling average, ADEQ stated that:

> ADEQ's BART evaluations were based on site-specific information provided by the applicants. It is the Department's understanding that such information was based partially on feedback received from vendors and plant personnel who are intimately familiar with the specific equipment that is being considered. In that regard, the Department based its BART computations on the emission rates proposed by the applicant for the different control technology options.[231]

While it is certainly reasonable to consider site-specific information provided by the sources as part of a BART analysis, it is not reasonable to assume, with no independent analysis, that the sources have appropriately identified the emissions reductions achievable with the best available controls. ADEQ provided no evidence that the sources' estimates were based on legitimate site-specific considerations or that ADEQ undertook any verification of these estimates. Therefore, ADEQ has not demonstrated that its BART determinations were "based on an analysis of the best system of continuous emission control technology available and associated emission reductions achievable."

Second, ADEQ has not demonstrated that it actually took into consideration the BART factors in making its determinations. In particular, while ADEQ provided information regarding each of the factors, it gave no explanation or rationale for how it reached a determination based on that information.

Finally, ADEQ did not appropriately consider the "degree of improvement in visibility which may reasonably be anticipated" from installation of BART because it did not consider visibility benefits at all of the affected Class I areas, nor did it consider the total visibility benefit expected to result from the entire BART-eligible source. Overlooking significant visibility benefits at additional areas and from multiple BART-eligible units considerably understates the overall benefit of controls to improve visibility and is contrary to the very purpose of BART, i.e., "eliminating or reducing" visibility impairment at all Class I areas.[232] Thus ADEQ's BART determinations for NO_X at Apache Units 2 and 3, Cholla Units 2, 3 and 4 and Coronado Units 1 and 2 do not meet the requirements of CAA section 169A(g)(2) or 40 CFR 51.308(e)(1)(ii)(A).

In addition, 40 CFR 51.308(e)(1)(ii)(B) provides that:

> The determination of BART for fossil-fuel fired power plants having a total generating capacity greater than 750 megawatts must be made pursuant to the guidelines in appendix Y of this part (Guidelines for BART Determinations under the Regional Haze Rule).

Cholla and Coronado each have a generating capacity greater than 750 megawatts. Therefore, the BART determinations for these BART sources must be made pursuant to the BART Guidelines. However, ADEQ's BART determinations for these sources did not fully comply with the BART Guidelines. In particular, as explained more fully above, contrary to the Guidelines' direction that "cost estimates should be based on the *OAQPS Control Cost Manual,* where possible," the control cost calculations supplied by the utilities and relied upon by ADEQ included line item costs not allowed by the Control Cost Manual, such as owner's costs, surcharge, and AFUDC. Thus, ADEQ's consideration of the "cost of compliance" for these units was not consistent with the Guidelines. Furthermore, as explained above, ADEQ's consideration of visibility benefits was inconsistent with the Guidelines because the State did not consider benefits at multiple Class I areas and multiple BART-eligible units at each source. In addition, ADEQ failed to provide "a justification for adopting the technology [the State selected] as the 'best' level of control, including an explanation of the CAA factors that led [the State] to choose that option over other control levels."[233] Therefore, ADEQ's BART determinations for NO_X at Cholla and Coronado do not comply with 40 CFR 51.308(e)(1)(ii)(B).

Finally, for all pollutants at all units covered by today's action, ADEQ's Regional Haze SIP does not meet the requirements of 40 CFR 51.308(e)(1)(iii) and (iv) because it lacks the following elements:

- A requirement that each source subject to BART be required to install and operate BART as expeditiously as practicable, but in no event later than 5 years after approval of the implementation plan revision.
- A requirement that each source subject to BART maintain the control equipment required by this subpart and establish procedures to ensure such equipment is properly operated and maintained.

These two requirements are mandatory elements of the RHR and are necessary to ensure that BART is procured, installed and operated, as expeditiously as practicable and maintained thereafter, as required under CAA section 169A(b)(2)(A). Moreover, CAA section 110(a)(2) requires that emissions limits such as BART be "enforceable" and section 302(k) requires emissions limits to be met on a continuous basis. Arizona's Regional Haze SIP lacks requirements for monitoring, recordkeeping and reporting sufficient to ensure that the BART limits are enforceable and are met on a continuous basis.

Therefore, Arizona's BART determinations for Apache, Cholla and Coronado do not meet several requirements of the CAA, the RHR and the BART Guidelines. Accordingly, we are compelled to partially disapprove Arizona's Regional Haze SIP.

Finally, several commenters cited *EME Homer City Generation* v. *EPA,* No. 11–1302 (D.C. Cir. Aug. 21, 2012). In *EME Homer City Generation,* the D.C. Circuit vacated EPA's "Transport Rule" (also known as the "Cross-State Air Pollution Rule" or "CSAPR"), which was promulgated by EPA to address interstate transport of SO_2 and NO_X under CAA section 110(a)(2)(D). The court found that the Transport Rule exceeded EPA's authority under section 110(a)(2)(D) because the rule had the potential to require upwind States to reduce emissions by more than their own significant contributions to downwind nonattainment and because EPA had not given states an opportunity to submit SIPs after it quantified their obligations for emissions reductions to address transport. Commenters here point to the D.C. Circuit's statements concerning state and federal roles under the CAA and argue that EPA has exceeded its statutorily mandated role in proposing to disapprove portions of Arizona's Regional Haze SIP and promulgate a FIP.

While we agree that the general principles concerning state and federal roles under Title I of the CAA apply to our action here, we do not agree that our action here is inconsistent with those principles. In this action, we are fulfilling our statutory duty to review Arizona's Regional Haze SIP, including its BART determinations, for compliance with the applicable requirements of the CAA and the RHR, and to disapprove any portions of the

[231] Arizona Regional Haze SIP, Appendix E, "Responsiveness Summary" at 13.

[232] CAA section 169A(b)(2)(A).

[233] BART Guidelines, 40 CFR Part 51, Appendix Y, section IV.E.2.

plan that do not meet those requirements. Based on our review of the SIP, we proposed to determine that certain elements of Arizona's Regional Haze SIP did meet the requirements of the CAA and the RHR, and we proposed to approve those elements. However, for the reasons explained in detail in our proposal and elsewhere in this document, we have concluded that Arizona's BART determinations for NO_X at several units did not comply with the requirements of the CAA and the RHR. Based on these findings, we are required to disapprove these portions of Arizona's Regional Haze SIP.

In some instances, we expressed our findings of non-compliance with the relevant requirements in terms of "disagreement" with the state's analysis. These statements were not intended to suggest that our proposed partial disapproval was simply based on policy disagreements with the state. Rather we used the term "disagree" as a short hand for our findings that specific elements of Arizona's analyses did not meet the requirements of the CAA and the RHR. For example, we noted that, "[w]e disagree with several aspects of the NO_X BART analysis for Apache Units 2 and 3." [234] We then went on to list the specific deficiencies in the state's analysis, and concluded that "we are proposing to disapprove ADEQ's BART determination for NO_X at Apache Units 2 and 3, since it does not comply with 40 CFR 51.308(e)(1)(ii)(A)." [235] We made similar findings with respect to ADEQ's BART determination for NO_X at Cholla Units 2, 3 and 4 and Coronado Units 1 and 2.[236] We have also described in detail, both in our proposal and in this document, the other aspects of the state's BART determinations that do not comply with the CAA and the RHR.

Finally, some commenters appear to have misunderstood our statement that ADEQ's "NO_X BART determinations for the coal-fired units are neither consistent with the requirements of the Act nor with BART decisions that other states have made." As noted by several commenters, the CAA and the RHR provide states with considerable discretion in deciding how to weigh the statutory factors as a part of a BART analysis. However, this discretion must be reasonably exercised in compliance with the applicable requirements. Consistency with other EPA-approved BART determinations is one marker of reasonableness, as well as compliance with the requirements of the RHR. Such consistency is particularly relevant for BART determinations at fossil-fuel fired power plants having a capacity in excess of 750 megawatts, which must be made pursuant to the BART Guidelines.[237] To the extent a BART determination for such a power plant is plainly inconsistent with EPA-approved determinations for similar sources, it is more likely to be inconsistent with the RHR and the BART Guidelines and therefore to warrant greater scrutiny for compliance with the applicable requirements.

Comment: Several commenters (ACCCE, ADEQ, APS, SRP) asserted that it is contrary to the CAA for EPA to propose action on only the portions of ADEQ's SIP that address the three power plants that are the subject of the proposed FIP. One commenter (APS) stated that EPA may not ignore all other sources of visibility-impairing pollutants in the state (nor may it ignore the other categories of visibility-impairing pollutants by focusing only on nitrates, sulfates and PM) and establish BART limitations for the three affected power plants outside the context of the long-term strategy and larger reasonable progress requirements of the regional haze program. Commenters ACCCE, ADEQ and SRP contended that CAA section 110(k)(3) requires EPA either to approve a SIP submittal "as a whole" or to approve that SIP submittal in part and disapprove it in part in a single rulemaking that addresses in its entirety "the plan revision." The commenters indicated that this requirement of the CAA is sensible because it is the plan *as a whole,* with all its elements working together, that must ensure that the CAA's regional haze-related goals are being reached; any other approach to SIP review and approval would fail to take into account the full array of regulatory choices that Arizona has made to address regional haze.

Response: We do not agree that we are required to act on Arizona's Regional Haze SIP as a whole. As noted by some commenters, our action on Arizona's Regional Haze SIP is governed by *inter alia,* CAA section 110(k)(3), which provides that in the case of any submittal on which the Administrator is required to act under section 110(k)(2), the Administrator shall approve such submittal as a whole if it meets all of the applicable requirements of this chapter. If a portion of the plan revision meets all the applicable requirements of this chapter, the Administrator may approve the plan revision in part and disapprove the plan revision in part. The plan revision shall not be treated as meeting the requirements of this chapter until the Administrator approves the entire plan revision as complying with the applicable requirements of this chapter.[238]

Some commenters have read this provision as requiring that EPA act on Arizona's Regional Haze SIP as a whole. We disagree that this language addresses the question of whether EPA may consider different elements of a State's plan in separate notice and comment rulemakings. However, even assuming that this provision of the Clean Air Act did limit EPA's ability to act sequentially on portions of a SIP submission, the requirement to act on a submittal "as a whole" applies only if the submittal meets all of the applicable requirements of the CAA. As explained in our proposal and elsewhere in this document, we have determined that the Arizona Regional Haze SIP does not meet all of the applicable requirements of the CAA. Specifically, we have determined that the submittal as a whole does not meet the requirements of CAA section 169A(b)(2)(A), as implemented through the RHR and the BART Guidelines. Under these circumstances, we are clearly not obligated to act on the plan as a whole, but are given discretion to act on distinct portions of the plan.[239]

While we agree that, as a matter of policy, it is generally preferable to act on plan submissions as a whole, we are currently subject to a court-ordered deadline of November 15, 2012 to act on the BART determinations for Apache Generating Station, Cholla Power Plant and Coronado Generating Station.[240] Although these BART determinations are part of the overall Regional Haze plan for Arizona, they are also severable from that plan, since BART determinations are made on a source-by-source basis and are not dependent upon other elements of the plan.[241]

[234] 77 FR 42846.

[235] *Id.*

[236] 77 FR 42849, 42851.

[237] CAA section 169A(b) and 40 CFR 51.308(e)(1)(ii)(B).

[238] 42 U.S.C. 7410(k)(3).

[239] See *Hall* v. *EPA,* 273 F.3d 1146, 1159 (9th Cir. 2001) (section 110(k)(3) "permits the EPA to issue 'partial approvals,' that is, to approve the States' SIP revisions in piecemeal fashion").

[240] EPA agreed to this deadline after concluding that litigation would most likely result in a shorter schedule than that to which Plaintiffs had agreed in negotiation. *See Sierra Club* v. *Johnson,* 444 F.Supp.2d 46, 58 (D.D.C. 2006) ("this case devolves to a single issue: whether defendant has met the 'heavy burden' of demonstrating that it would be impossible to comply with plaintiff's proposed * * *").

[241] See 40 CFR 51.308(e)(1)(ii)(A)("[t]he determination of BART must be based on an analysis of the best system of continuous emission control technology available and associated emission reductions achievable for each BART-

Continued

Therefore, we are taking action on these BART determinations first and we will act on the remainder of the Arizona Regional plan in accordance with the court-ordered deadlines for that action.

Comment: One commenter (ADEQ) asserts that EPA does not have the authority to adopt a FIP because none of the three triggering events for a FIP under CAA section 110(c)(1) has occurred. Specifically, the commenter states that:

> * * * for EPA to have authority to promulgate a regional haze FIP in Arizona, one of three events must have occurred: (1) a finding of failure to submit a regional haze SIP, (2) a finding of failure to satisfy the minimum criteria for a complete regional haze SIP under section 110(k)(1)(A) or (3) disapproval of a regional haze SIP submitted by Arizona. None of these three events has occurred.

With respect to EPA's January 2009 finding of failure to submit, the commenter argues that:

> Section 110(c)(1) * * * does not allow EPA to treat the omission of elements from a SIP submission as a failure to submit a SIP. Section 110(c)(1) is quite specific. If EPA believes SIP omissions render a SIP incomplete, the agency may make a finding under section 110(k)(1)(A) within the time period required by section 110(k)(1)(B) and start the FIP clock under the second clause of section 110(c)(1)(A). If EPA cannot make such a finding or, as in this case, fails to do so, the agency may disapprove the SIP, and start the FIP clock under section 110(c)(1)(B). By treating the alleged omission of elements from a SIP as the failure to make a required submission under the first clause of section 110(c)(1)(A), EPA is circumventing these procedures.

The commenter adds that if EPA did have the authority to promulgate a regional haze FIP, it would only have the authority to address those elements of the SIP that EPA identified as having not been submitted, and EPA has never found that Arizona failed to submit a SIP establishing BART.

Response: We do not agree that we lack authority to issue a FIP addressing BART requirements for the three sources covered by today's action. The commenter's arguments in this regard appear to be based on a misunderstanding of the requirements of the CAA and the RHR in relation to Arizona's Regional Haze submittals.

EPA promulgated the original RHR in 1999.[242] As relevant here, section 308 of the RHR requires states to submit SIPs that establish reasonable progress goals and long-term strategies for achieving those goals and provide for implementation of BART.[243] In addition to the general requirements of section 308, EPA also adopted specific provisions that gave a handful of states, including Arizona, the option of submitting a regional haze SIP based on the recommendations of the Grand Canyon Visibility Transport Commission (GCVTC). Under the RHR, a SIP approved by EPA as meeting all of the requirements of section 309 would be "deemed to comply with the requirements for reasonable progress with respect to the 16 Class I areas [on the Colorado Plateau] for the period from approval of the plan through 2018." [244]

Arizona made two submittals under section 309 in 2003 and 2004, but never submitted a complete 309 SIP.[245] Rather, on December 24, 2008, ADEQ sent a letter to EPA re-submitting its prior 309 SIP submissions and acknowledging that the submittal did not include provisions to address the requirements of 309(d)(4) or 309(g).[246] These were not minor omissions: 309(d)(4) required the submission of "better than BART" milestones and a trading program for SO_2, as well as BART requirements for stationary source PM and NO_X emissions, and 309(g) required implementation of any additional measures necessary to demonstrate reasonable progress for the additional Class I areas, in compliance with the provisions of § 51.308(d)(1) through (4).[247] Thus, as of 2008, ADEQ's Regional Haze SIP, by its own admission, did not include provisions addressing BART (or for an alternative to BART) for NO_X, PM or SO_2. On January 15, 2009 EPA found that 37 states, including Arizona, had failed to make all or part of the required SIP submissions to address regional haze.[248] We explained that:

> This finding starts the two year clock for the promulgation by EPA of a FIP. EPA is not required to promulgate a FIP if the state makes the required SIP submittal and EPA takes final action to approve the submittal within two years of EPA's finding.[249]

Under the CAA, any party seeking judicial review of EPA's finding of failure to submit ("2009 Finding") was required to file a petition for review with the appropriate United States Circuit Court of Appeals within 60 days of publication of the Finding in the **Federal Register**.[250] No party filed such a petition.

At the time of the 2009 Finding, EPA anticipated that ADEQ would submit a SIP revision covering 309(d)(4) and 309(g), which would enable EPA to fully approve ADEQ's 309 SIP as meeting all of the requirements of the Regional Haze Rule, thus ending the FIP clock. However, ADEQ did not submit a 309 SIP revision to address these two elements, but instead decided to develop a 308 SIP, which it submitted to EPA in February 2011.

In January 2011, EPA received a notice of intent to sue covering dozens of states, including Arizona, stating that we had not met the statutory deadline for promulgating Regional Haze FIPs and/or approving Regional Haze SIPs. This notice was followed by a lawsuit filed by several advocacy groups (Plaintiffs) in August 2011.[251] In order to resolve this lawsuit and avoid litigation, EPA entered into a Consent Decree with the Plaintiffs, which sets deadlines for action for all of the states covered by the lawsuit, including Arizona. This decree was entered and later amended by the Federal District Court for the District of Columbia over the opposition of Arizona.[252]

In opposing the entry of the consent decree, Arizona argued that the 2009 Finding did not give EPA authority to promulgate a Regional Haze FIP for Arizona. The court rejected this argument, explaining that:

> Arizona contends that the Finding did not constitute a disapproval of the SIPs that had previously been submitted because it only notes that Arizona did not submit two of Section 309's required elements. Ariz. Opp. [Dkt. # 24] at 6. The Court does not read the 2009 Finding so narrowly. In the Court's view, the 2009 Finding reaches a conclusion that Arizona 'has failed to make a required submission or finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria.' 42 U.S.C. 7410(c)(1). Under the CAA, this triggers the EPA's statutory obligation to promulgate a FIP.[253]

Under the terms of the Consent Decree, as amended, EPA is currently subject to two sets of deadlines for taking action on Arizona's Regional Haze SIP. Specifically, the CD requires that:

> By the "Proposed Promulgation Deadlines" set forth in Table A below EPA shall sign a notice(s) of proposed rulemaking in which it

---

eligible source that is subject to BART within the State."

[245] We have included a more detailed history of Arizona's submissions under 309 in the docket for this action (Docket No. EPA–R09–OAR–2012–0021).

[246] Letter from Stephen A. Owens, ADEQ, to Wayne Nastri, EPA (Dec. 14, 2008).

[247] 40 CFR 51.309(d)(4)(i) and (vii), (g)(2).

[248] 74 FR 2392.

[249] *Id.* at 2393

[250] CAA section 307(b). 42 U.S.C. 7607(b).

[251] National Parks Conservation Association v. Jackson (D.D.C. Case 1:11–cv–01548).

[252] National Parks Conservation Association v. Jackson (D.D.C. Case 1:11–cv–01548), Memorandum Order and Opinion (May 25, 2012) and Minute Order (July 2, 2012).

[253] See *NPCA* v. *EPA*, (D.D.C. Case 1:11–cv–01548). Dkt # 35, at 3, n. 1.

proposes approval of a SIP, promulgation of a FIP, partial approval of a SIP and promulgation of a partial FIP, or approval of a SIP or promulgation of a FIP in the alternative, for each State therein, that collectively meet the regional haze implementation plan requirements that were due by December 17, 2007 under EPA's regional haze regulations.

By the "Final Promulgation Deadlines" set forth in Table A below, EPA shall sign a notice(s) of final rulemaking promulgating a FIP for each State therein to meet the regional haze implementation plan requirements that were due by December 17, 2007 under EPA's regional haze regulations, except where, by such deadline EPA has for a State therein signed a notice of final rulemaking unconditionally approving a SIP, or promulgating a partial FIP and unconditional approval of a portion of a SIP, that collectively meet the regional haze implementation plan requirements that were due by December 17, 2007 under EPA's regional haze regulations.

Table A, as revised, sets a proposal deadline for BART determinations for Apache Generating Station, Cholla Power Plant and Coronado Generating Station of July 2, 2012 and the final action deadline for these three BART determinations of November 15, 2012. The deadline for EPA to propose action on the remainder of the Arizona Regional Haze SIP is December 8, 2012, and the deadline for final action is July 15, 2013.[254]

Thus, pursuant to CAA section 110(c)(1) and the court's orders entering and amending the Consent Decree, we are not only authorized, but are required to issue a FIP for any portion of the Arizona SIP that we cannot approve. For the reasons stated in our proposal and elsewhere in this document, we have determined that we cannot approve the state's BART determinations for NO_X at Apache, Cholla and Coronado, nor can we approve the compliance-related requirements that were omitted from the Arizona Regional Haze SIP. Therefore, we are obligated to promulgate a FIP to address these requirements.

Comment: Several commenters (AUG, EEI, PacifiCorp, SRP) stated that EPA cannot propose or finalize a NO_X BART FIP for these Arizona plants until it has taken final action (following notice-and-comment rulemaking) on ADEQ's Regional Haze SIP. According to the commenters, EPA's authority to propose and then take final action to promulgate a FIP comes into existence only when a state has not submitted a SIP or when EPA has made a final determination that a submitted SIP is not approvable (citing *Train* v. *NRDC,* 421 U.S. 60, 79 (1975)). The commenters believe this principle is confirmed by CAA sections 307(d)(1)(B), (3) and (6) because EPA cannot present the relevant factual, legal, and policy information and rationale necessary to justify a proposed or final FIP rule until it has properly taken final action on any relevant SIP before it.

One commenter (EEI) also states that EPA's assertion that it was compelled to propose a FIP at the same time that it disapproved a portion of the Arizona SIP, due to a two-year FIP clock that started with EPA's 2009 Finding of Failure to Submit, is inconsistent with the CSAPR decision. The commenter stated that EPA did not provide sufficient notice of the problems with the SIP to enable Arizona to remedy them, which is precisely the same problem identified by the CSAPR court. The commenter adds that EPA must provide the state a realistic opportunity to avoid being pulled into a FIP. Given that EPA has consent decree obligations to finalize BART requirements for the EGUs addressed by the proposed SIP by November 15, 2012, and EPA did not propose disapproval of the SIP until July 20, 2012, a reasonable opportunity to develop and receive approval of a revised SIP was not offered to the state.

Response: We do not agree that we are required to take final action on Arizona's Regional Haze SIP before promulgating a FIP. Commenters' arguments to this effect appear to conflate the procedural requirements for EPA's issuance of a FIP with procedural requirements for action on a SIP. In fact, these are two actions are governed by different provisions of the CAA.

As explained in the previous response, EPA's 2009 finding that Arizona failed to submit a complete Regional Haze SIP triggered a "FIP clock" under CAA section 110(c).[255] This FIP clock could only have been stopped if Arizona had submitted, and EPA had fully approved a Regional Haze SIP, before January 15, 2011. Neither of these two things occurred. Therefore, EPA remains subject to this "FIP duty." Our action today fulfills part of that duty.

As several commenters noted, Arizona submitted a Regional Haze SIP on February 28, 2011, and the SIP was deemed complete by operation of law on August 28, 2011, pursuant to CAA section 110(k)(1)(B).[256] This, in turn, triggered a deadline of August 28, 2012, for us to take final action on the SIP, pursuant to CAA section 110(k)(1)(B).[257] We acknowledge that this deadline has now passed and we intend to act as quickly as possible to fulfill our duty to act on those portions of the SIP not addressed in today's action. However, the fact that we have not acted on the entirety of the SIP submittal does not remove or otherwise alter our legal obligation to promulgate a FIP under CAA section 110(c). Our FIP duty does not terminate until we have actually approved the submitted SIP. As explained in our NPRM, TSD and elsewhere in this document, we cannot approve the State's BART determinations for NO_X at Apache, Cholla and Coronado, nor can we approve the compliance-related requirements that were omitted from the Arizona Regional Haze SIP. Therefore, we are obligated to promulgate a FIP to address these requirements, and we are doing so in today's action.

Furthermore, while we agree that the procedural requirements for promulgation of a FIP under 110(c) are set forth in CAA section 307(d),[258] we do not agree that our action violates that provision in any way. Consistent with the requirements of that section, our proposal included a summary of the factual data on which our proposed FIP was based, as well as the methodology used in obtaining the data and in analyzing the data and the major legal interpretations and policy considerations underlying the proposed FIP.[259] In addition, we provided a detailed evaluation of Arizona's BART analyses for the relevant units, which formed the basis for our proposed action on those portions of the Arizona Regional Haze SIP.[260] This final rulemaking includes similar information with respect to the SIP and the FIP, as well as "an explanation of the reasons for any major changes in the promulgated rule from the proposed rule" and "a response to each of the

[254] On November 13, 2012, the D.C. District Court granted a motion by EPA to modify the Consent Decree to extend the deadlines for promulgation of a FIP for any remaining elements of the SIP that are disapproved. Under the revised deadlines, EPA will propose any necessary FIP elements by March 8, 2013, and finalize such elements by October 15, 2013.

[255] 42 U.S.C. 7410(c). See also *Train,* 421 U.S. at 64, 79 (explaining that the 1970 CAA Amendments "sharply increased federal authority and responsibility in the continuing effort to combat air pollution," including giving EPA authority to devise a FIP if the State's plan fails to satisfy the standards of section 7410(a)(2)).

[256] 42 U.S.C. 7410(k)(1)(B).

[257] 42 U.S.C. 7410(k)(2).

[258] See CAA section 307(d)(1)(B), 42 U.S.C. 7607(d)(1)(B), ("This subsection applies to * * * the promulgation or revision of an implementation plan by the Administrator under [CAA section 110](c)")

[259] See CAA section 307(d)(3), 42 U.S.C. 7607(d)(3).

[260] The SIP portion of our action is subject to the procedural requirements of section 553(b) of Administrative Procedure Act (APA), 5 U.S.C. 553(b), rather than the requirements of CAA subsection 307(d), 42 U.S.C. 7607(d).

significant comments, criticisms, and new data submitted in written or oral presentations during the comment period."[261] Therefore, our action complies with the applicable procedural requirements of the CAA.

Finally, we do not agree with commenters' assertions that the D.C. Circuit's decision in *EME Homer City Generation* precludes us from promulgating a partial FIP concurrently with our partial disapproval of Arizona's Regional Haze SIP. In *EME Homer City Generation*, the court found that EPA had acted improperly in issuing the Transport Rule because we simultaneously defined states' "good neighbor obligations" under CAA section 110(a)(2)(D)(i)(I) and issued FIPs to address those obligations.[262] The court explained that:

> * * * the triggers for a FIP are EPA's finding that the SIP fails to contain a "required submission" or EPA's disapproving a SIP because of a "deficiency." But logically, a SIP cannot be deemed to lack a required submission or be deemed deficient for failing to implement the good neighbor obligation until after EPA has defined the State's good neighbor obligation. Once it defines the obligation, then States may be forced to revise SIPs under Section 110(k)(5) or to submit new SIPs under Section 110(a)(1). Only if that revised or new SIP is properly deemed to lack a required submission or is properly deemed deficient may EPA resort to a FIP for the State's good neighbor obligation.[263]

In essence, the D.C. Circuit found that EPA's findings of failure to submit and disapprovals of state transport SIPs did not trigger FIP obligations under CAA section 110(c) because these actions occurred "*before* [EPA] told the States what emissions reductions their SIPs were supposed to achieve under the good neighbor provision."[264]

In this case, by contrast, EPA defined states' obligations under the RHR and the BART Guidelines well in advance of its findings of failure to submit and subsequent SIP disapprovals. EPA promulgated the original RHR on July 1, 1999.[265] Following the D.C. Circuit's decision in *American Corn Growers*, EPA revised the RHR and issued the final BART Guidelines on July 6, 2005.[266] The revised RHR and the Guidelines were upheld by the DC Circuit in *Utility Air Regulatory Group* v. *EPA*, 471 F.3d 1333 (D.C. Cir. 2006).[267] As explained in our proposal and elsewhere in this document, the BART Guidelines provide detailed instructions to states on how to determine which sources are subject to BART and how to analyze the five statutory factors in order to set emissions limits representing BART for each subject-to-BART source.[268] In 2006, responding to specific questions from various States and Regional Planning Organizations (RPOs), EPA issued further guidance to help States implement the RHR and BART Guidelines.[269]

As noted in prior responses, EPA issued a finding of failure to submit for Regional Haze SIPs on January 15, 2009, thus triggering a FIP clock under CAA section 110(c).[270] By this time, states had already had more than three years since issuance of the final BART Guidelines (and more than two years since the final revisions to the RHR and the issuance of further guidance on the RHR and BART) to develop their Regional Haze SIPs. By the time the FIP clock actually ran out in January 2011, EPA had received Regional Haze SIPs from nearly every state. EPA has since proposed to approve, in part or in whole, the vast majority of these SIPs.[271] We have also has taken final action to approve, in part or in whole, many of these SIPs.[272] This stands in contrast to the situation in *EME Homer City Generation*, where, the court noted that, "every Transport Rule State that submitted a good neighbor SIP for the 2006 24-hour $PM_{2.5}$ NAAQS was disapproved."[273] Thus, it is clear that states had ample opportunity to submit approvable Regional Haze SIPs before EPA was obligated to promulgate Regional Haze FIPs under CAA section 110(c).

With respect to Arizona's Regional Haze SIP in particular, we note that Arizona first made public its proposed 308 SIP during a comment period beginning on October 28, 2010.[274] At that time, EPA, the National Park Service (NPS) (in consultation with the Fish and Wildlife Service) and the U.S. Forest Service all submitted comments expressing concern about the proposed SIP's compliance with the CAA, the RHR and the BART Guidelines.[275] Among other things, EPA noted that the SIP, "does not provide a sufficient level of information and analysis to support its conclusions."[276] NPS provided extensive comments on the proposed SIP, including detailed evaluations of ADEQ's BART analyses for each of the three sources at issue in today's action.[277] In each instance, NPS concluded that ADEQ had not conducted a valid BART analysis for NO_X.[278] The Forest Service concurred with the initial comments provided by NPS on Arizona's BART exclusion process and "strongly disagree[d] with the adequacy of the Arizona reasonable progress analysis."[279] Therefore, ADEQ had the benefit not only of the generally applicable requirements of the RHR, the

---

[261] CAA section 307(d)(6)(A) & (B), 42 U.S.C. 7607(d)(6)(A) & (B).

[262] *EME Homer City Generation*, slip op. at 7.

[263] *Id.* at 46.

[264] *Id.* at 47 (emphasis in original).

[265] 64 FR 35714.

[266] 70 FR 39104. This finding covered 37 states, the District of Columbia and the Virgin Islands.

[267] In response to another D.C. Circuit decision, *Center for Energy and Economic Development* v. *EPA*, 398 F.3d 653 (D.C. Cir. 2005), EPA revised the RHR's provisions governing alternatives to source-specific BART determinations on October 13, 2006. These revisions did not alter the requirements for source-specific BART determinations that apply to Arizona's BART determinations at issue here.

[268] 40 CFR Part 51, Appendix Y. While the Guidelines are only mandatory for fossil fuel-fired electric generating plants with a total generating capacity in excess of 750 megawatts, States are encouraged to follow the BART Guidelines in making BART determinations for other types of sources. *Id.* section I.H. The Guidelines also set specific presumptive limits for SO_2 and NO_X for these large power plants, but allow states to apply more or less stringent limits based upon source-specific five-factor analyses. 70 FR 39131–39132.

[269] Memo from Joseph W. Paise Regarding Regional Haze Regulations and Guidelines for BART (July 19, 2006); Additional Regional Haze Questions (Guidance) (Sept. 27 2006). In addition, EPA issued final "Guidance for Setting Reasonable Progress Goals Under the Regional Haze Program" on June 1, 2007, but this Guidance is not directly relevant for individual BART determinations.

[270] 74 FR 2392.

[271] See, e.g., 76 FR 36450 (Nevada); 77 FR 24794 (New York); 76 FR 13944 (California); 77 FR 11798 (Rhode Island); 76 FR 27973 (Delaware); 77 FR 12770 (Nebraska); 77 FR 18052 (Colorado); 76 FR 16168 (Oklahoma); 77 FR 11914 (Vermont); 77 FR 11928 (Wisconsin); 76 FR 52604 (Kansas); 76 FR 64186 (Arkansas); 77 FR 11839 (Maryland); 76 FR 58570 (North Dakota); 77 FR 3966 (Illinois); 76 FR 76646 (South Dakota). EPA proposed limited approval and limited disapproval of the Regional Haze SIPs of states covered by the Clean Air Interstate Rule (CAIR), due to the remand of CAIR by the D.C. Circuit. See, e.g. 77 FR 3691 (Jan. 25, 2012) (proposing limited approval and limited disapproval of Virginia's Regional Haze SIP).

[272] See, e.g., 76 FR 34608 (California); 76 FR 42557 (Delaware); 76 FR 80754 (Kansas); 77 FR 19 (New Jersey); 77 FR 5191 (District of Columbia); 77 FR 14604 (Arkansas); 77 FR 17334 (Nevada); 77 FR 24845 (South Dakota); 77 FR 40150 (Nebraska); 77 FR 51915 (New York).

[273] Slip op. at 57.

[274] Arizona Regional Haze SIP, Appendix E, Public Process. Approximately 60 days prior to the public comment period, ADEQ sent a draft of the SIP to the National Park Service and U.S. Forest Service.

[275] *Id.*

[276] *Id.* Letter from Colleen McKaughan, EPA, to Eric Massey, ADEQ (Dec. 2, 2010).

[277] *Id.* NPS Initial Comments Arizona Draft Section 308 Regional Haze SIP (Nov. 29, 2010); NPS General BART Comments on ADEQ BART Analyses (Nov. 29, 2010); NPS Comments AEPCO—Apache Generating Station BART Analysis and Determination (Nov. 29, 2010); NPS Comments APS Cholla Generating Station BART Analysis and Determination (Nov. 29, 2010); NPS Comments SRP's Coronado Generating Station BART Analysis and Determination (Nov. 29, 2010); NPS Comments on ADEQ BART Exemptions, (Dec. 1, 2010).

[278] *Id.*

[279] U.S. Forest Service Specific Comments: Arizona Regional Haze SIP (Nov. 29, 2010).

BART Guidelines and EPA Guidance, but also specific guidance from EPA and the FLMs pointing out shortcomings in its Regional Haze SIP. Following receipt of these comments, Arizona had the opportunity to revise its SIP to address the deficiencies identified by the commenters, but in most instances it chose not to do so.[280]

Finally, while we agree that, in the absence of an expired statutory duty and a court-ordered deadline to issue a FIP, it would be preferable for us to give Arizona additional time to revise its Regional Haze SIP prior to promulgation of a FIP, we simply do not have this option under these circumstances. As explained in our response to the previous comment, we are obligated to issue a FIP to address any gaps left by partial disapprovals of Arizona's Regional Haze SIP. Nonetheless, we encourage ADEQ to submit a revised SIP to replace the FIP and will work with ADEQ to develop such a revised plan to meet the requirements of the CAA and the RHR.

Comment: One commenter (Earthjustice) stated that the CAA's Regional Haze program establishes a national regulatory floor and requires states to develop RH SIPs at least as stringent as this floor (citing 40 CFR 51.308). According to the commenter, ADEQ's SIP is legally and technically inadequate because it does not require adequate BART emission limits, does not achieve "reasonable progress" are required by the RHR and would fail to achieve natural visibility goals by 2064. The commenter believes that the Arizona RH SIP fails to establish a program that is at least as stringent as the national floor and that therefore EPA has a legal obligation to disapprove the SIP and to issue a FIP in its place under CAA section 110(c)(1).[281]

Response: We agree that the CAA, the RHR and the BART Guidelines set out specific requirements that Regional Haze SIPs must meet in order to be approved by EPA. Our action today addresses these requirements as they apply to ADEQ's BART determinations for Apache, Cholla and Coronado, but does not address the requirements as they apply to the remainder of Arizona's Regional Haze SIP (e.g., the reasonable progress goals set by the state). EPA will propose action on these aspects of the SIP shortly and take final action after receiving comments. As explained in the preceding responses, because of our prior finding of failure to submit, we are required to issue a FIP for any portion of the SIP that we cannot approve. Thus, we are promulgating a FIP for those aspects of ADEQ's BART determinations for Apache, Cholla and Coronado that we are not approving at this time.

G. Other Comments

1. Comment on Public Health and Ecosystem Impacts

Comment: A number of commenters provided comments on the potential health effects of our proposal. A number of other commenters stated that the Regional Haze program's sole focus is the improvement of visibility in Class I areas, and is not a health-based or emissions reduction program. In relation to the Regional Haze program, any EPA emphasis on health and emissions reduction is inappropriate. One commenter (SRP) stated that EPA's assertion of health benefits is unsubstantiated by the proposed rule. A few commenters noted that the air quality in Arizona varies from city to city, and stated that EPA should focus on the areas with the poorest air quality first, such as Phoenix.

In contrast, one commenter (Earthjustice) stated that the same pollutants that reduce visibility also cause significant public health impacts. The commenter noted that NO_X is a precursor to ground level ozone, which is associated with respiratory diseases, asthma attacks and decreased lung function, and that NO_X reacts with other substances to form particulates that can cause and worsen respiratory diseases, aggravate heart disease, and lead to premature death. The commenter indicated that SO_2 increases asthma symptoms, leads to increased hospital visits, and can form particulates that aggravate respiratory and heart diseases and cause premature death, and that PM can penetrate deep into the lungs and cause health problems such as aggravated asthma, chronic bronchitis, and heart attacks. Based on a report prepared by the Clean Air Task Force, the commenter asserted that Cholla, Coronado and Apache collectively cause approximately 41 deaths, 63 heart attacks and 747 asthma attacks annually.[282] Several other commenters provided similar comments concerning health effects.

Response: We acknowledge the commenters' concerns regarding the adverse health impacts of haze-causing emissions. We agree that the same $PM_{2.5}$ emissions that cause visibility impairment can cause respiratory problems, decreased lung function, aggravated asthma, bronchitis, and premature death. We also agree that the same NO_X emissions that cause visibility impairment also contribute to the formation of ground-level ozone, which has been linked with respiratory problems, aggravated asthma, and even permanent lung damage. Finally, we also agree that SO_2 emissions that cause visibility impairment also contribute to increased asthma symptoms, lead to increased hospital visits, and can form particulates that aggravate respiratory and heart diseases and cause premature death. Thus, to the extent that this FIP will lead to reductions in these pollutants, there will be co-benefits for public health. However, for purposes of this action, we are not authorized to consider these benefits and we have not done so.

In our NPRM, while discussing Executive Order 13045 (Protection of Children from Environmental Health Risks and Safety Risks), we stated that, to the extent the proposed rule will limit emissions of NO_X, SO_2 and PM_{10}, the rule will have a beneficial effect on children's health by reducing air pollution. In this action, while discussing Executive Order 13045 (Protection of Children from Environmental Health Risks and Safety Risks), we conclude that this action does not have a disproportionate effect on children, but again note that to the extent this final action will limit emissions of NO_X, SO_2 and PM_{10}, the rule will have a beneficial effect on children's health by reducing air pollution that causes or exacerbates childhood asthma and other respiratory issues. However, we do not believe it is necessary or appropriate to quantify the extent of this beneficial effect because we are not relying upon health effects in the promulgation of this rule.

Comment: One commenter (Earthjustice) stated that the RHR rule

[280] For example, in response to detailed comments from NPS regarding the efficiency and cost of SCR, ADEQ stated that:

ADEQ has determined that the cost computations presented by the facilities in support of their BART applications are reasonable. Many of the computations are based on vendor data and site-specific conditions. The Department does not agree that the computations over-estimate the costs of retrofit technologies and under-estimate the associated emission decreases and visibility improvement.

[281] The commenter cited *Alaska Dep't of Envtl. Conservation* v. *EPA*, 540 U.S. 461, 470, 484 (2004); *Mont. Sulphur & Chem. Co.* v. *EPA*, 666 F.3d 1174, 1181 (9th Cir. 2012) to support the contention that Congress structured the CAA to provide expansive EPA oversight to ensure SIPs comply with the CAA. The commenter cited 42 U.S.C. 7410(c), (k); *EME Homer City Generation, L.P.* v. *EPA*, No. 11–1302, ___ F.3d ___, 2012 WL 3570721, at *17 (DC Cir. Aug. 21, 2012) to support the principle that EPA must issue a FIP when it determines that a SIP does not comply with the CAA.

[282] The commenter cited Clean Air Task Force, Death and Disease From Power Plants, *http://www.catf.us/fossil/problems/power_plants/existing/map.php?state=Arizona*.

provides important environmental benefits to plants and animals, soil health and entire ecosystems. The commenter noted that NO_X and SO_2 are the primary causes of acid rain, which acidifies lakes and streams, can damage certain types of trees and soils and accelerates the decay of building materials and paints, including irreplaceable buildings and statues that are part of our nation's cultural heritage. The commenter added that nitrogen deposition, caused by wet and dry deposition of nitrates derived from NO_X emissions, causes well-known adverse impacts on ecological systems. The commenter also noted that NO_X is a precursor to ozone, which impacts plants and ecosystems by interfering with plants' ability to produce food and increasing their susceptibility to disease and insects, and also contributes to wildfires and bark beetle outbreaks in the West by depressing plant water levels and growth.

Response: We appreciate the commenter's concerns regarding the negative ecosystem impacts of emissions from the units at issue. We agree that both NO_X and SO_2 cause acid rain and can have negative impacts on ecosystems, damaging plants, trees, and other vegetation (including crop yields), which could have a negative effect on species diversity in our ecosystems. However, for purposes of this Regional Haze action, we are not authorized to consider these ecosystem impacts. Therefore, while we note the potential for co-benefits to ecosystem health resulting from our action today, we have not taken these potential benefits into account in this action.

2. Comments on Economic Impacts

Comment: Many commenters, including state officials, private citizens and representatives of local governments, schools, and business groups, expressed concern over potential economic effects resulting from EPA's proposed BART determinations, asserting that EPA's action would result in rate increases and possibly closures of one or more power plants. Some commenters cautioned EPA that rate increases would impact at-risk populations, such as seniors on fixed incomes. The commenters emphasized that the three plants have a large financial impact on the communities where they are located (i.e., they provide jobs and tax revenue) and expressed their concern over the three plants' economic viability if the plants are forced to install SCR to reduce NO_X emissions. Several representatives of local school districts discussed the harm that large increases in electric power rates would do to their programs in this time of declining state support, and one representative of a local, nonprofit hospital similarly voiced the difficulty his facility would have in absorbing large rate increases. One commenter discussed the multiplier effect by which loss of income from any job losses or the reduction in disposable income due to increased power bills would ripple through the local economies and affect local businesses and employment. A few commenters discussed the impact on Arizona's water rates, and advised EPA to consider how these rate increases would affect Arizona's economy. A few commenters asserted that the proposed rule is intended to eliminate coal as a cheap and reliable energy source.

By contrast, one commenter (Earthjustice) stated that the RHR provides substantial economic benefits, which far outweigh the costs of pollution control technologies such as SCR. The commenter noted that EPA has valued the RHR's health benefits at $8.4 to $9.8 billion annually. The commenter further asserted that requiring power plants to invest in pollution controls creates short-term construction jobs as well as permanent operations and management positions. In addition, the commenter indicated that the national parks and wilderness areas protected by the RHR serve as engines for sustainable local capital, with national park visitors contributing approximately $30 billion to local economies and supporting 300,000 jobs nationwide. Regarding Arizona specifically, the commenter stated that over 4.3 million people visited the Grand Canyon in 2010, and this supported over 6,800 jobs and resulted in over $428 million in visitor spending, while tourism at Petrified Forest National Park, Saguaro National Park and Chiricahua National Monument in 2010 supported over 1,100 jobs and resulted in over $74 million in visitor spending. The commenter contended that studies show that national park visitors highly value clean air, readily perceive haze and are willing to cut short visits to national parks based on their perception of air quality.[283]

Response: As explained in our prior responses regarding economic issues, the BART Guidelines permit consideration of economic impacts only under "unusual circumstances" where a potential control option is expected to have a "severe impact on plant operations" or "result in significant economic disruption or unemployment." None of the commenters have provided any evidence that our action today would result in the closure of any of the affected units. We discuss many of the potential economic impacts raised as concerns here in the context of our analysis of affordability of controls to AEPCO, above. Finally, we acknowledge that today's action may have positive economic impacts, as described by Earthjustice. However, we have not taken potential economic benefits into account in our action.

3. Comments From Tribal Representatives and Members

Comment: One commenter (Navajo Nation) stated that comments on our proposed actions were provided pursuant to its government-to-government relationship with EPA. The commenter stated that this EPA rulemaking has adverse implications for a pending BART FIP for Navajo Generating Station, which is on Navajo Nation land and burns Navajo coal. The commenter also stated that this rule could impact BART decisions for Four Corners Power Plant, and San Juan Generating Station.

The commenter states that EPA has an obligation to consult with Navajo Nation on a government-to-government basis for EPA actions and decisions that may affect the Navajo Nation's interests, and reminds EPA that it must defer to tribal government policy decisions, just as it would a state, when promulgating a FIP on tribal lands.

The commenter further states that EPA has failed to analyze the cumulative effects of this rulemaking and the planned and proposed EPA actions on Navajo Generating Station, Four Corners Power Plant, and San Juan Generating Station, including both visibility improvement and potential regional economic impacts. The commenter noted that the fossil fuel economy is vitally important to the Four Corners region and the Navajo Nation, with many jobs and coal royalties at stake from loss of the area's coal fired power plants and their associated mines. The commenter states that EPA must consider these impacts, as well as the impacts of utility rate increases, in this BART decision for NO_X.

The commenter observed that it is possible to go forward without imposing a FIP in Arizona, as evidenced by the renewed consideration being given to the New Mexico regional haze SIP under the current stay on the proposed FIP for that state. The commenter stated

[283] The commenter cited and submitted as Exhibit 11 Abt Assocs. Inc., Out of Sight: The Science and Economics of Visibility Impairment, at ES–7 (2000), available at *http://www.abtassociates.com/reports/ES-clear.pdf.*

that the Navajo Nation, where two power plants that are undergoing EPA BART determinations are located, shares the concerns of Arizona and New Mexico regarding the economic impacts of requiring SCR. The commenter noted that the BART decision is not based only on the most effective control measures, but is to be based on an analysis of five factors which include non-air quality impacts such as economic impacts.

The commenter also asserted that real data should underpin EPA's decisions, rather than modeling alone. The commenter also contended that a public health baseline is needed in order to chart any public health improvements that result from such emission controls.

Response: EPA appreciates the comments provided by the Navajo Nation on our proposed action pursuant to its government-to-government relationship with EPA. As part of separate rulemakings, EPA has engaged in consultation with Navajo Nation regarding the Four Corners Power Plant [284] and San Juan Generating Station. EPA is currently engaged in active consultation with the Navajo Nation and other affected tribes on the Navajo Generating Station.

Today's rule approves Arizona's SIP (in part) and implements a FIP (in part) for Apache Units 2 and 3; Cholla Units 2, 3 and 4; and Coronado Units 1 and 2. This action has no retroactive effect on final BART determinations for other facilities. We disagree that this action has a nexus to the BART determination for Navajo Generating Station, because BART analyses, whether performed by the states or EPA, are conducted on a source-by-source basis, applying all five statutory factors to a facility on an individual basis. While there are certain commonalities among the sources mentioned by the commenter (e.g., all are coal-fired power plants), there are also significant differences that necessarily affect the case-by-case BART analysis. For example, the unit size, unit age, boiler type, existing controls, type of coal burned and proximity to Class I areas vary significantly among these sources. All of these differences have a bearing on at least one of the BART factors and thus on the ultimate BART determination. Given these various distinguishing factors, we do not agree that this rule will affect our BART determination for Navajo Generating Station.

We also do not agree that we are required to consider the cumulative effects of today's rulemaking together with rulemaking actions on other BART determinations as part of our action today. As noted above, under the CAA, the RHR and the BART Guidelines, BART determinations are made on a source-by-basis, taking into account the five statutory factors. The cumulative improvements from the various SIPs, FIPs, and BART determinations are addressed in analyses under the RHR requirements for Reasonable Progress, Long Term Strategies and future updates to the SIP, which are separate from BART analyses. These cumulative improvements will be influenced by changes in hundreds or thousands of emission sources, so are more appropriately addressed through use of a grid model, such as CAMx or CMAQ, rather than the CALPUFF model recommended in the BART Guidelines, which is geared to a far lower number of sources, and lacks the detailed chemistry of the grid models.

With regard to the economic concerns raised by the commenter, we are required by the CAA and the federal regulations implementing the CAA's BART provisions to evaluate (1) cost of compliance, (2) the energy and non-air quality environmental impacts of compliance, (3) any existing pollution control technology in use at the source, (4) remaining useful life of source, and (5) degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology. As explained in our prior responses regarding economic issues, the BART Guidelines permit consideration of economic impacts only under "unusual circumstances" where a potential control option is expected to have a "severe impact on plant operations" or "result in significant economic disruption or unemployment." None of the commenters have provided any evidence that our action today would result in the closure of any of the affected units or result in significant economic disruption. We also note that none of the sources affected by today's rulemaking currently purchase coal from a mine that operates on the Navajo Nation.

We take our duty to estimate the cost of controls very seriously, and make every attempt to make a thoughtful and well informed determination. However, we do not consider a potential increase in electricity rates to be the most appropriate type of analysis for considering the costs of compliance in a BART determination. Projections of electricity rate impacts are inherently fraught with uncertainty due to the numerous variables involved and the complexity of the regulatory regime governing the power sector. Nevertheless, as discussed elsewhere in this document, as part of our consideration of the affordability of controls on AEPCO, a small entity, we have analyzed the potential rate increases associated with our proposal for Apache Units 2 and 3. Given the uncertainty inherent in such an analysis, we have used conservative assumptions in an effort to guard against understating the potential rate impacts.

Regarding the comment that EPA should not rely on modeling alone, it is extremely difficult in observational analyses to sufficiently control for all factors, including emissions from other sources, to be able to isolate the impacts of closure of a facility. A model such as CALPUFF essentially holds constant a number of factors in order to isolate the impacts of a single source. As discussed elsewhere in this document, EPA affirms that the regulatory version of CALPUFF is the correct model to use for these BART determinations.

Assessing human exposure and quantifying health benefits are outside the scope of the requirements of the Regional Haze Rule. EPA sets National Ambient Air Quality Standards (NAAQS) to establish levels of air quality that are protective of public health, including the health of sensitive populations, for a number of pollutants including particulate matter. These "sensitive" populations include asthmatics, children, and the elderly. At this time the Navajo Nation is not identified as out of attainment with any of the NAAQS. However, EPA recognizes that there are significant concerns about risk and exposure to air pollutants on the Navajo Nation and EPA will continue discussions with the Navajo Nation and will involve other federal agencies, as appropriate, to help address these concerns.

Comment: Various other representatives and members of the Hopi and Navajo Tribes provided oral testimony and/or submitted written comments at one or more of the public hearings. Most tribal community members supported the proposed FIP and stated their belief that it will improve air quality and human health in Arizona. Several commenters recounted their personal experiences with the deterioration of visibility in the rural areas in which they live, declining water supplies due to water use in mining operations, and illnesses that they believe are attributable to air pollution from the power plants and mines in the area (e.g., asthma and bronchitis). A number of commenters pointed out that there are numerous old power plants in and around the Navajo

[284] See document titled: "Timeline of all tribal consultations on BART.docx" in the docket for this final rulemaking.

Nation, which they believe are causing air pollution that contributes to haze and an increase in the incidence of lung and heart disease and cancer in humans, as well as harming native plants and animals. Some of these commenters advocated for a conversion to renewable energy sources, which they believe will provide jobs, improve health, and reduce emissions that contribute to climate change. One commenter specifically suggested that EPA promote alternatives like natural gas and algae ponds as a source of energy.

One commenter indicated that reduced haze would improve tourism, resulting in increased jobs and tax receipts. Another tribal commenter stated that before acting, EPA should evaluate the impact on employment and on the Hopi's revenue from coal if the FIP causes power plants to close.

One tribal commenter alleged that the National Academy of Sciences did a study a number of years ago that concluded that some areas of the country could be designated as "national sacrifice areas" that would be used for national priorities, irrespective of resulting permanent environmental damages. According to the commenter, many Indian reservations are located in such areas, such as all of the Navajo and Hopi reservations. The commenter asserted that the study concluded that the well-being of the people in such areas can be forfeited so that the rest of the country can enjoy cheap energy.

Response: EPA acknowledges the comments. Neither Section 169A of the CAA nor the BART Guidelines requires that BART analyses include or quantify benefits to health or tourism or impact on employment. EPA does not intend for this action to cause any power plants to close. Although a quantitative analysis of the health and tourism benefits is beyond the scope of what is required under BART EPA agrees with commenters that emission reductions achieved to improve visibility will also improve air quality. Improved air quality, in turn, affects public health and may enhance tourism in the area. EPA notes that even if we had quantified the benefits to health and tourism, such an analysis would not likely have altered the outcome of our BART determination.

Renewable energy technology is not a retrofit option for the sources subject to BART and is therefore outside the scope of our BART determination. As noted in the BART Guidelines, "[w]e do not consider BART as a requirement to redesign the source when considering available control alternatives. For example, where the source subject to BART is a coal-fired electric generator, we do not require the BART analysis to consider building a natural gas-fired electric turbine although the turbine may be inherently less polluting on a per unit basis."[285] Therefore, we did not consider such alternatives as part of our BART analyses. Nonetheless, we acknowledge that many kinds of renewable energy do not produce haze-causing pollutants, and transitioning to those sources of energy could lead to visibility improvements.

The CAA applies equally to all parts of the United States. In making a determination in this case, we have applied the applicable provisions of the CAA and the RHR. We have also considered other applicable requirements, including Executive Order 12898,[286] which establishes federal executive policy on environmental justice. This Executive Order directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that our final 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. This rule requires emissions reductions of NOx from three facilities in Arizona. The partial approval of the SIP approves state law as meeting Federal requirements.

Comment: One commenter suggested that EPA investigate the technology of cooling steam exhaust through a magnetic refrigerator to remove NO_2 as a liquid, since it would condense at the relatively high temperature of 294 K or 70 degrees F (boiling point).

Response: The BART Guidelines provide that:

> Technologies which have not yet been applied to (or permitted for) full scale operations need not be considered as available; we do not expect the source owner to purchase or construct a process or control device that has not already been demonstrated in practice.[287]

The Guidelines further provide that:

> In order to provide certainty in the process, all technologies should be considered if available before the close of the State's public comment period. You need not consider technologies that become available after this date:

The commenter has not provided evidence that this technology has been demonstrated in practice or that it was available before the close of the State's public comment period. Therefore, we have not considered it as a potential control option. An additional consideration is that typically 90 percent of the NO_X from combustion is emitted in the form of NO, rather than NO_2. Since the boiling point of NO is 121 K or −242 degrees F, much lower than for NO_2, and the stack exit temperature is the range of 300–400 K or 120–280 degrees F, a large degree of cooling would be necessary to condense the NO, and so the energy costs could be substantial.

4. Requests for Extension of Comment Period and Additional Hearings

Comment: A number of commenters remarked on EPA's timeline for soliciting public comments, and stated that they believe that the time allowed was insufficient. One commenter requested more public hearings, and another commenter requested a 90-day extension of the deadline for comments (starting from July 18, 2012), so that the public has ample time to review, analyze, comment, and react to the rule and in particular EPA's Technical Support Document. The commenter added that an extension would allow the ADEQ the opportunity to further collaborate with EPA in revising the state's SIP submittal (for the purpose of nullifying the proposed FIP), and thereby adhering to the intent of the CAA.

Response: As explained above, our proposed rule, which was signed on July 2, 2012 and published in the **Federal Register** on July 20, 2012,[288] provided for a public hearing in Phoenix, Arizona, on July 31, 2012, and a public comment deadline of August 31, 2012. In response to requests from various parties for a longer comment period and additional hearings, we extended the public comment period to a total of sixty days from publication in the **Federal Register**.[289] We also scheduled two more public hearings in

[285] BART Guidelines, 40 CFR Part 51, Appendix Y, section IV.D.1.

[286] 59 FR 7629, February 16, 1994.

[287] BART Guidelines, 40 CFR Part 51, Appendix Y, section IV.D.1.

[288] 77 FR 42834.

[289] See 77 FR 45326 (July 31, 2012).

Southern Arizona (Benson) and in Northern Arizona (Holbrook) on August 14 and 15, 2012, respectively.

Comment: One comment letter signed by 728 residents, business owners, citizens and other interested parties urged EPA to extend the comment period on our proposal and provide additional hearings near the Cholla Power Plant.

Response: As noted the preceding response, we extended the comment period on our propose rule and we held additional public hearings, including one in Holbrook, Arizona, near the Cholla Power Plant.

V. Summary of Final Action

EPA is taking final action to approve in part and disapprove in part a portion of Arizona's SIP for Regional Haze and to promulgate a FIP for the disapproved elements of the SIP. This final action addresses only the State's BART determinations for the specified units at the three power plants. We will propose action on the remainder of Arizona's Regional Haze SIP in a separate notice. EPA takes very seriously a decision to disapprove portions of a state plan. In this instance, we find that the State's NO_X BART determinations for the coal-fired units are not consistent with the requirements of the Act and the RHR. In addition, the SIP lacks the necessary compliance deadlines and requirements for equipment maintenance and operation, including monitoring, recordkeeping and reporting requirements for all pollutants at all of the BART units. As a result, we find that this final disapproval is the only path that is consistent with the Act at this time.

EPA estimates this action will improve visibility at 18 Class I areas by reducing NO_X emissions from three power plants by about 22,700 tons per year. The total costs associated with these reductions, according to the supplemental cost analysis we performed based on cost estimates provided by the facility owners, are summarized in Table 18.

TABLE 18—SUMMARY OF SUPPLEMENTAL COST ANALYSIS

	Capital cost ($)	Annualized capital cost ($/yr)	Annual O&M ($/yr)	Total annualized cost ($/yr)	Cost-effectiveness
Apache Unit 2	$82,481,439	$7,785,664	$1,760,600	$9,546,264	$3,450
Apache Unit 3	82,481,439	7,785,664	1,760,600	9,546,264	2,973
Cholla Unit 2	87,713,386	8,279,523	1,626,683	9,906,206	2,979
Cholla Unit 3	83,461,195	7,878,146	1,570,766	9,448,912	2,838
Cholla Unit 4	119,083,832	11,240,671	2,350,182	13,590,853	3,083
Coronado Unit 1	80,633,219	7,611,205	4,492,736	12,103,941	2,135
Coronado Unit 2	2,500,000	235,982	.....	235,982	1,900

VI. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

This action finalizes approval of a source-specific portion of the Arizona SIP and a Regional Haze FIP for units at three facilities in Arizona. This action is not a rule of general applicability, and not a "significant regulatory action" under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993). This type of action is exempt from review under Executive Order (EO) 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under Executive Order 13563 (76 FR 3821, January 21, 2011).

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. Burden is defined at 5 CFR 1320.3(b). Because this action will finalize approval of a source-specific portion of the Arizona SIP and a Regional Haze FIP for units at only three facilities in Arizona, the Paperwork Reduction Act does not apply. See 5 CFR 1320.3(c). 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 Office of Management and Budget (OMB) control number. The OMB control numbers for our regulations in 40 CFR are listed in 40 CFR part 9.

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. Small entities include small businesses, small organizations, and small governmental jurisdictions. For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field. This action finalizes approval of a source-specific portion of the Arizona SIP and a Regional Haze FIP for units at three electric generating facilities in Arizona. Firms primarily engaged in the generation, transmission, and/or distribution of electric energy for sale are small if, including affiliates, the total electric output for the preceding fiscal year did not exceed 4 million megawatt hours. Only one of the three facilities affected by this action is a small entity: AEPCO sold under 3 million megawatt hours in 2011.

Although a regulatory flexibility analysis as specified by the RFA is not required when a rule has impact on only one small entity, EPA estimated the potential impact to AEPCO of our proposal to require SCR in AEPCO's Units 1 and 2. EPA also requested information from AEPCO on the economics of operating Apache Generating Station and what impact the installation of SCR may have on the economics of operating Apache Generating Station. A summary of the comments regarding the impact of this action on AEPCO, and EPA's response to those concerns, is provided in section I.V. of this preamble. After considering the economic impacts of this action on small entities, I certify that this action will not have a significant economic impact on a substantial number of small

entities. The FIP for the three Arizona facilities being issued today does not impose new requirements on a substantial number of small entities because one significantly impacted small entity is not a "substantial" number. Finalizing approval of a source-specific portion of the Arizona Regional Haze SIP merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. See *Mid-Tex Electric Cooperative, Inc.* v. *FERC.* 773 F.2d 327 (D.C. Cir. 1985).

D. Unfunded Mandates Reform Act (UMRA)

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 UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, and Tribal governments, in the aggregate, or to the private sector, of $100 million or more (adjusted for inflation) in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and to adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 of UMRA do not apply when they are inconsistent with applicable law. Moreover, section 205 of UMRA allows EPA to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments, it must have developed under section 203 of UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

Under Title II of UMRA, EPA has determined that this rule does not contain a Federal mandate that may result in expenditures that exceed the inflation-adjusted UMRA threshold of $100 million (in 1996 dollars) by State, local, or Tribal governments or the private sector in any 1 year. In addition, this rule does not contain a significant Federal intergovernmental mandate as described by section 203 of UMRA nor does it contain any regulatory requirements that might significantly or uniquely affect small governments.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, because it addresses the State not fully meeting its obligation to protect visibility established in the CAA and this final action will reduce the emissions of NO_X from three facilities in Arizona. Thus, Executive Order 13132 does not apply to this action. Although section 6 of Executive Order 13132 does not apply to this action, a summary of the concerns raised by State and local officials, and EPA's response to those concerns is provided in section I.V. of this preamble.

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

Subject to the Executive Order 13175 (65 FR 67249, November 9, 2000) EPA may not issue a regulation that has tribal implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by tribal governments, or EPA consults with tribal officials early in the process of developing the proposed regulation and develops a tribal summary impact statement. We believe this rule does not have tribal implications, as specified in Executive Order 13175, and will not have substantial direct effects on tribal governments. Thus, Executive Order 13175 does not apply to this rule. However, in our proposal we requested comment on our proposed rule from tribal officials. The Navajo Nation Environmental Protection Agency provided comments on our proposed rule, both orally at a public hearing and by letter, which EPA considered in developing this final rule. EPA's summary of these comments and our response to Navajo Nation is provided in section I.V. of this preamble.

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

Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997), applies to any rule that: (1) Is determined to be economically significant as defined under Executive Order 12866; and (2) concerns an environmental health or safety risk that we have reason to believe may have a disproportionate effect on children. EPA interprets EO 13045 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 implements specific standards established by Congress in statutes. Also, because this action only applies to three sources and is not a rule of general applicability, it is not economically significant as defined under Executive Order 12866, and the rule also does not have a disproportionate effect on children. However, to the extent this action will limit emissions of NO_X, SO_2, and PM_{10}, the rule will have a beneficial effect on children's health by reducing air pollution that causes or exacerbates childhood asthma and other respiratory issues.

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

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

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, 12 (10) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards (VCS) in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. VCS are technical standards (e.g., materials specifications, test methods, sampling procedures and business practices) that are developed or adopted by the VCS bodies. The NTTAA directs EPA to provide Congress, through annual reports to OMB, with explanations when the Agency decides not to use available and applicable VCS. The

rulemaking involves technical standards. Therefore, the Agency conducted a search to identify potentially applicable voluntary consensus standards. However, we identified no such standards, and none were brought to our attention in comments. Therefore, EPA has decided to use 40 CFR Part 60 Appendix A Method 5, 40 CFR Part 51 Appendix M Methods 201A/202, 40 CFR Part 60 Appendix A Method 19, and 40 CFR Part 75.

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

Executive Order 12898 (59 FR 7629, February 16, 1994), establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States. EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it 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. This rule requires emissions reductions of NO_X from three facilities in Arizona. The partial approval of the SIP merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. Section 804 exempts from section 801 the following types of rules (1) rules of particular applicability; (2) rules relating to agency management or personnel; and (3) rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. 5 U.S.C. 804(3). EPA is not required to submit a rule report regarding today's action under section 801 because this is a rule of particular applicability and only applies to three facilities.

L. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 4, 2013. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See CAA section 307(b)(2).)

List of Subjects in 40 CFR Part 52

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

Dated: November 15, 2012.

Lisa P. Jackson,

Administrator.

Part 52, chapter I, title 40 of the Code of Federal Regulations 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 D—Arizona

■ 2. Section 52.120 is amended by adding paragraph (c)(154) to read as follows:

§ 52.120 Identification of plan.

* * * * *

(c) * * *

(154) The following plan was submitted February 28, 2011, by the Governor's designee.

(i) [Reserved]

(ii) Additional materials.

(A) Arizona Department of Environmental Quality.

(*1*) Arizona State Implementation Plan, Regional Haze Under Section 308 of the Federal Regional Haze Rule: Appendix D, Arizona BART—Supplemental Information:

(*i*) Table 1.1—NO_X BART, entry for AEPCO [Apache], ST1 [Unit 1] only.

(*ii*) Table 1.2—PM_{10} BART, entries for AEPCO [Apache], APS Cholla Power Plant and SRP Coronado Generating Station.

(*iii*) Table 1.3—SO_2 BART, entries for AEPCO, APS Cholla Power Plant and SRP Coronado Generating Station.

■ 3. Section 52.145 is amended by adding paragraphs (e) and (f) to read as follows:

§ 52.145 Visibility protection.

* * * * *

(e) *Approval.* On February 28, 2011, the Arizona Department of Environmental Quality submitted the "Arizona State Implementation Plan, Regional Haze Under Section 308 of the Federal Regional Haze Rule" ("Arizona Regional Haze SIP").

(1) With the exception of the NO_X BART determinations for Units ST2 and ST3 at AEPCO Apache Generating Station; Units 2, 3, and 4 at APS Cholla Power Plant; and Units 1 and 2 at SRP Coronado Generating Station, and the BART compliance provisions for all BART emissions limits at the eight units at the three power plants, the BART determinations for AEPCO Apache Generating Station, APS Cholla Power Plant, and SRP Coronado Generating Station in the Arizona Regional Haze SIP meet the applicable requirements of Clean Air Act sections 169A and 169B and the Regional Haze Rule in 40 CFR 51.301 through 51.308.

(f) *Source-specific federal implementation plan for regional haze at Apache Generating Station, Cholla Power Plant, and Coronado Generating Station* — (1) *Applicability.* This paragraph (f) applies to each owner/operator of the following coal-fired electricity generating units (EGUs) in the state of Arizona: Apache Generating Station, Units 2 and 3; Cholla Power Plant, Units 2, 3, and 4; and Coronado Generating Station, Units 1 and 2. This paragraph (f) also applies to each owner/operator of the following natural gas-fired EGUs in the state of Arizona: Apache Generating Station Unit 1. The provisions of this paragraph (f) are severable, and if any provision of this paragraph (f), or the application of any provision of this paragraph (f) to any owner/operator or circumstance, is held invalid, the application of such provision to other owner/operators and other circumstances, and the remainder of this paragraph (f), shall not be affected thereby.

(2) *Definitions.* Terms not defined below shall have the meaning given to them in the Clean Air Act or EPA's

regulations implementing the Clean Air Act. For purposes of this paragraph (f):

ADEQ means the Arizona Department of Environmental Quality.

Boiler-operating day means a 24-hour period between 12 midnight and the following midnight during which any fuel is combusted at any time in the unit.

Coal-fired unit means any of the EGUs identified in paragraph (f)(1) of this section, except for Apache Generating Station, Unit 1.

Continuous emission monitoring system or CEMS means the equipment required by 40 CFR Part 75 and this paragraph (f).

Emissions limitation or emissions limit means any of the Federal Emission Limitations required by this paragraph (f) or any of the applicable PM_{10} and SO_2 emissions limits for Apache Generating Station, Cholla Power Plant, and Coronado Generating Station submitted to EPA as part of the Arizona Regional Haze SIP in a letter dated February 28, 2011, and approved into the Arizona State Implementation Plan on December 5, 2012.

Flue Gas Desulfurization System or FGD means a pollution control device that employs flue gas desulfurization technology, including an absorber utilizing lime, fly ash, or limestone slurry, for the reduction of sulfur dioxide emissions.

Group of coal-fired units mean Units 1 and 2 for Coronado Generating Station; Units 2 and 3 for Apache Generating Station; and Units 2, 3, and 4 for Cholla Power Plant.

lb means pound(s).

NO_X means nitrogen oxides expressed as nitrogen dioxide (NO_2).

Owner(s)/operator(s) means any person(s) who own(s) or who operate(s), control(s), or supervise(s) one or more of the units identified in paragraph (f)(1) of this section.

MMBtu means million British thermal unit(s).

Operating hour means any hour that fossil fuel is fired in the unit.

PM_{10} means filterable total particulate matter less than 10 microns and the condensable material in the impingers as measured by Methods 201A and 202.

Regional Administrator means the Regional Administrator of EPA Region IX or his/her authorized representative.

SO_2 means sulfur dioxide.

SO_4 removal efficiency means the quantity of SO_2 removed as calculated by the procedure in paragraph (f)(5)(iii)(B) of this section.

Unit means any of the EGUs identified in paragraph (f)(1) of this section.

Valid data means data recorded when the CEMS is not out-of-control as defined by Part 75.

(3) *Federal emission limitations.*—(i) *NO_X* emission limitations. The owner/operator of each coal-fired unit subject to this paragraph (f) shall not emit or cause to be emitted NO_X in excess of the following limitations, in pounds per million British thermal units (lb/MMBtu) from any group of coal-fired units. Each emission limit shall be based on a rolling 30-boiler-operating-day average, unless otherwise indicated in specific paragraphs.

Group of coal-fired units	Federal emission limitation
Apache Generating Station Units 2 and 3	0.070
Cholla Power Plant Units 2, 3, and 4	0.055
Coronado Generating Station Units 1and 2	0.065

(ii) *SO_2 removal efficiency requirement.* The owners/operators of Cholla Power Plant Units 2, 3, and 4 shall achieve and maintain a 30-day rolling average SO_2 removal efficiency of 95 percent at each unit.

(4) *Compliance dates.* (i) The owners/operators of each unit subject to this paragraph (f) shall comply with the NO_X emissions limitations and other NO_X-related requirements of this paragraph (f) no later than December 5, 2017.

(ii) The owners/operators of each unit subject to this paragraph (f) shall comply with the applicable PM_{10} and SO_2 emissions limits submitted to EPA as part of the Arizona Regional Haze SIP in a letter dated February 28, 2011, and approved into the Arizona State Implementation Plan on December 5, 2012, as well as the related compliance, recordkeeping and reporting of this paragraph (f) no later than the following dates:

Unit	Compliance date	
	PM_{10}	SO_2
Apache Generating Station, Unit 1	June 3, 2013	June 3, 2013.
Apache Generating Station, Unit 2	December 5, 2016	December 5, 2016.
Apache Generating Station, Unit 3	December 5, 2016	December 5, 2016.
Cholla Power Plant, Unit 2	April 1, 2016	April 1, 2016.
Cholla Power Plant, Unit 3	June 3, 2013	June 3, 2013.
Cholla Power Plant, Unit 4	June 3, 2013	June 3, 2013.
Coronado Generating Station, Unit 1	June 3, 2013	June 3, 2013.
Coronado Generating Station, Unit 2	June 3, 2013	June 3, 2013.

(iii) The owners/operators of Cholla Power Plant Units 2, 3 and 4 shall comply with the SO_2 removal efficiency requirement in paragraph (f)(5)(iii)(B) of this section all related compliance, recordkeeping and reporting requirements no later than the following dates:

Cholla Power Plant, Unit 2.	April 1, 2016.
Cholla Power Plant, Unit 3.	December 5, 2013.
Cholla Power Plant, Unit 4.	December 5, 2013.

(5) *Compliance determinations for NO_X and SO_2.*—(i) *Continuous emission monitoring system.*

(A) At all times after the compliance date specified in paragraph (f)(4) of this section, the owner/operator of each coal-fired unit shall maintain, calibrate, and operate a CEMS, in full compliance with the requirements found at 40 CFR Part 75, to accurately measure SO_2, NO_X, diluent, and stack gas volumetric flow rate from each unit. In addition, the owner/operator of Cholla Units 2, 3, and 4 shall calibrate, maintain, and operate a CEMS, in full compliance with the requirements found at 40 CFR Part 75, to accurately measure SO_2 emissions and diluent at the inlet of the sulfur dioxide control device. Apache Unit 1 NO_X and diluent CEMs shall be operated to meet the requirements of Part 75. All valid CEMS hourly data shall be used to determine compliance with the emission limitations for NO_X and SO_2 in paragraph (f)(3) of this section for each unit. When the CEMS is out-of-control as defined by Part 75, that CEMs data shall be treated as missing data and not used to calculate the emission average. Each required

CEMS must obtain valid data for at least 90 percent of the unit operating hours, on an annual basis.

(B) The owner/operator of each unit shall comply with the quality assurance procedures for CEMS found in 40 CFR Part 75. In addition to these Part 75 requirements, relative accuracy test audits shall be calculated for both the NO_X and SO_2 pounds per hour measurement and the heat input measurement. The CEMs monitoring data shall not be bias adjusted. The inlet SO_2 and diluent monitors required by this rule shall also meet the Quality Assurance/Quality Control (QA/QC) requirements of Part 75. The testing and evaluation of the inlet monitors and the calculations of relative accuracy for lb/hr of NO_X, SO_2 and heat input shall be performed each time the Part 75 CEMS undergo relative accuracy testing. In addition, relative accuracy test audits shall be performed in the units of lb/MMBtu for the inlet and outlet SO_2 monitors at Cholla Units 2, 3, and 4. Heat input for Apache Unit 1 shall be measured in accordance with Part 75 fuel gas measurement procedures found in 40 CFR Part 75, Appendix D.

(ii) *Compliance determinations for NO_X.* (A) The 30-day rolling average NO_X emission rate for each group of coal-fired units shall be calculated for each calendar day, even if a unit is not in operation on that calendar day, in accordance with the following procedure: step one, for each unit, sum the hourly pounds of NO_X emitted during the current boiler-operating day (or most recent boiler-operating day if the unit is not in operation), and the preceding twenty-nine (29) boiler-operating days, to calculate the total pounds of NO_X emitted over the most recent thirty (30) boiler-operating day period for each coal-fired unit; step two, for each unit, sum the hourly heat input, in MMBtu, during the current boiler-operating day (or most recent boiler-operating day if the unit is not in operation), and the preceding twenty-nine (29) boiler-operating days, to calculate the total heat input, in MMBtu, over the most recent thirty (30) boiler-operating day period for each coal-fired unit; step 3, sum together the total pounds of NO_X emitted from the group of coal-fired units over each unit's most recent thirty (30) boiler-operating day period (the most recent 30 boiler-operating day periods for different units may be different); step four, sum together the total heat input from the group of coal-fired units over each unit's most recent thirty (30) boiler-operating day period; and step five, divide the total pounds of NO_X emitted from step three by the total heat input from step four for each group of coal-fired units, to calculate the 30-day rolling average NO_X emission rate for each group of coal-fired units, in pounds of NO_X per MMBtu, for each calendar day. Each 30-day rolling average NO_X emission rate shall include all emissions and all heat input that occur during all periods within any boiler-operating day, including emissions from startup, shutdown, and malfunction.

(B) The 30-day rolling average NO_X emission rate for Apache Unit 1 shall be calculated in accordance with the following procedure: step one, sum the total pounds of NO_X emitted from the unit during the current boiler-operating day and the previous twenty-nine (29) boiler-operating days; step two, sum the total heat input to the unit in MMBtu during the current boiler-operating day and the previous twenty-nine (29) boiler-operating days; and step three, divide the total number of pounds of NO_X emitted during the thirty (30) boiler-operating days by the total heat input during the thirty (30) boiler-operating days. A new 30-day rolling average NO_X emission rate shall be calculated for each new boiler-operating day. Each 30-day rolling average NO_X emission rate shall include all emissions and all heat input that occur during all periods within any boiler-operating day, including emissions from startup, shutdown, and malfunction.

(C) If a valid NO_X pounds per hour or heat input is not available for any hour for a unit, that heat input and NO_X pounds per hour shall not be used in the calculation of the 30-day rolling average.

(iii) *Compliance determinations for SO_2.* (A) The 30-day rolling average SO_2 emission rate for each coal-fired unit shall be calculated in accordance with the following procedure: Step one, sum the total pounds of SO_2 emitted from the unit during the current boiler-operating day and the previous twenty-nine (29) boiler-operating days; step two, sum the total heat input to the unit in MMBtu during the current boiler-operating day and the previous twenty-nine (29) boiler-operating day; and step three, divide the total number of pounds of SO_2 emitted during the thirty (30) boiler-operating days by the total heat input during the thirty (30) boiler-operating days. A new 30-day rolling average SO_2 emission rate shall be calculated for each new boiler-operating day. Each 30-day rolling average SO_2 emission rate shall include all emissions and all heat input that occur during all periods within any boiler-operating day, including emissions from startup, shutdown, and malfunction.

(B) The 30-day rolling average SO_2 removal efficiency for Cholla Units 2, 3, and 4 shall be calculated as follows: Step one, sum the total pounds of SO_2 emitted as measured at the outlet of the FGD system for the unit during the current boiler-operating day and the previous twenty-nine (29) boiler-operating days as measured at the outlet of the FGD system for that unit; step two, sum the total pounds of SO_2 delivered to the inlet of the FGD system for the unit during the current boiler-operating day and the previous twenty-nine (29) boiler-operating days as measured at the inlet to the FGD system for that unit (for each hour, the total pounds of SO_2 delivered to the inlet of the FGD system for a unit shall be calculated by measuring the ratio of the lb/MMBtu SO_2 inlet to the lb/MMBtu SO_2 outlet and multiplying the outlet pounds of SO_2 by that ratio); step three, subtract the outlet SO_2 emissions calculated in step one from the inlet SO_2 emissions calculated in step two; step four, divide the remainder calculated in step three by the inlet SO_2 emissions calculated in step two; and step five, multiply the quotient calculated in step four by 100 to express as a percentage removal efficiency. A new 30-day rolling average SO_2 removal efficiency shall be calculated for each new boiler-operating day, and shall include all emissions that occur during all periods within each boiler-operating day, including emissions from startup, shutdown, and malfunction.

(C) If a valid SO_2 pounds per hour at the outlet of the FGD system or heat input is not available for any hour for a unit, that heat input and SO_2 pounds per hour shall not be used in the calculation of the 30-day rolling average.

(D) If both a valid inlet and outlet SO_2 lb/MMBtu and an outlet value of lb/hr of SO_2 are not available for any hour, that hour shall not be included in the efficiency calculation.

(6) *Compliance determinations for particulate matter.* Compliance with the particulate matter emission limitation for each coal-fired unit shall be determined from annual performance stack tests. Within sixty (60) days of the compliance deadline specified in paragraph (f)(4) of this section, and on at least an annual basis thereafter, the owner/operator of each unit shall conduct a stack test on each unit to measure PM_{10} using EPA Method 5, in 40 CFR part 60, Appendix A, or Method 201A/202 in 40 CFR Part 51, Appendix M. A test protocol shall be submitted to EPA and ADEQ a minimum of 30 days prior to the scheduled testing. The protocol shall identify which method(s)

will be used to demonstrate compliance. Each test shall consist of three runs, with each run at least 120 minutes in duration and each run collecting a minimum sample of 60 dry standard cubic feet. Results shall be reported in lb/MMBtu using the calculation in 40 CFR Part 60 Appendix A Method 19. In addition to annual stack tests, the owner/operator shall monitor particulate emissions for compliance with the emission limitations in accordance with the applicable Compliance Assurance Monitoring (CAM) plan developed and approved in accordance with 40 CFR Part 64. The averaging time for any other demonstration of the PM_{10} compliance or exceedance shall be based on a 6-hour average.

(7) *Recordkeeping.* The owner or operator of each unit shall maintain the following records for at least five (5) years:

(i) All CEMS data, including the date, place, and time of sampling or measurement; parameters sampled or measured; and results.

(ii) Daily 30-day rolling emission rates for NO_X and SO_2 and SO_2 removal efficiency, when applicable, for each unit, calculated in accordance with paragraph (f)(5) of this section.

(iii) Records of quality assurance and quality control activities for emissions measuring systems including, but not limited to, any records required by 40 CFR Part 75.

(iv) Records of the relative accuracy test for hourly NO_X and SO_2 lb/hr measurement and hourly heat input measurement.

(v) Records of all major maintenance activities conducted on emission units, air pollution control equipment, and CEMS.

(vi) Any other records required by 40 CFR Part 75.

(8) *Reporting.* All reports and notifications under this paragraph (f) shall be submitted to the Director of Enforcement Division, U.S. EPA Region IX, at 75 Hawthorne Street, San Francisco, CA 94105.

(i) The owner/operator shall notify EPA within two weeks after completion of installation of combustion controls or Selective Catalytic Reactors on any of the units subject to this section.

(ii) Within 30 days after the applicable compliance date(s) in paragraph (f)(4) of this section and within 30 days of every second calendar quarter thereafter (i.e., semi-annually), the owner/operator of each unit shall submit a report that lists the daily 30-day rolling emission rates for NO_X and SO_2 for each unit and, for Cholla Units 2, 3, and 4, the SO_2 removal efficiency, calculated in accordance with paragraph (f)(5) of this section. Included in this report shall be the results of any relative accuracy test audit performed during the two preceding calendar quarters.

(9) *Enforcement.* Notwithstanding any other provision in this implementation plan, any credible evidence or information relevant as to whether the unit would have been in compliance with applicable requirements if the appropriate performance or compliance test had been performed, can be used to establish whether or not the owner or operator has violated or is in violation of any standard or applicable emission limit in the plan.

(10) *Equipment operations.* At all times, including periods of startup, shutdown, and malfunction, the owner or operator shall, to the extent practicable, maintain and operate the unit including associated air pollution control equipment in a manner consistent with good air pollution control practices for minimizing emissions. Pollution control equipment shall be designed and capable of operating properly to minimize emissions during all expected operating conditions. Determination of whether acceptable operating and maintenance procedures are being used will be based on information available to the Regional Administrator which may include, but is not limited to, monitoring results, review of operating and maintenance procedures, and inspection of the unit.

(11) *Affirmative defense for malfunctions.* The following regulations are incorporated by reference and made part of this federal implementation plan:

(i) R–18–2–101, paragraph 65;

(ii) R18–2–310, sections (A), (B), (D) and (E) only; and

(iii) R18–2–310.01.

[FR Doc. 2012–28565 Filed 12–4–12; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL REGISTER

Vol. 77 Wednesday,
No. 234 December 5, 2012

Part IV

Office of Personnel Management

45 CFR Part 800
Patient Protection and Affordable Care Act; Establishment of the Multi-State Plan Program for the Affordable Insurance Exchanges; Proposed Rule

OFFICE OF PERSONNEL MANAGEMENT

45 CFR Part 800

RIN 3206–AM47

Patient Protection and Affordable Care Act; Establishment of the Multi-State Plan Program for the Affordable Insurance Exchanges

AGENCY: U.S. Office of Personnel Management.

ACTION: Proposed rule.

SUMMARY: The U.S. Office of Personnel Management (OPM) is issuing a proposed rule to implement the Multi-State Plan Program (MSPP). OPM is establishing the MSPP pursuant to the Patient Protection and Affordable Care Act, as amended by the Health Care and Education Reconciliation Act of 2010, referred to collectively as the Affordable Care Act. Through contracts with OPM, health insurance issuers will offer at least two multi-State plans (MSPs) on each of the Affordable Insurance Exchanges (Exchanges). Under the law, an MSPP issuer may phase in the States in which it offers coverage over four years, but it must offer MSPs on Exchanges in all States and the District of Columbia by the fourth year in which the MSPP issuer participates in the MSPP. OPM aims to administer the MSPP in a manner that is consistent with State insurance laws and that is informed by input from a broad array of stakeholders.

DATES: Comments are due on or before January 4, 2013.

ADDRESSES: You may submit comments, identified by Regulation Identifier Number (RIN) 3206–AM47 using any of the following methods:

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

Mail, Hand Delivery or Courier: National Healthcare Operations, Healthcare and Insurance, U.S. Office of Personnel Management, 1900 E Street NW., Room 2347, Washington, DC 20415.

FOR FURTHER INFORMATION CONTACT: Julia Elam by telephone at (202) 606–2128, by FAX at (202) 606–4430, or by email at *mspp@opm.gov.*

SUPPLEMENTARY INFORMATION: The U.S. Office of Personnel Management (OPM) is proposing this regulation to outline the Multi-State Plan Program (MSPP), a new program created pursuant to section 1334 of the Affordable Care Act to offer high-quality health insurance products on the Exchanges.

Abbreviations

FEHBA Federal Employees Health Benefits Act (5 U.S.C. 8901 et seq.)
FEHBP Federal Employees Health Benefits Program
HHS U.S. Department of Health and Human Services
HMO Health Maintenance Organization
MSP Multi-State Plan
MSPP Multi-State Plan Program
NAIC National Association of Insurance Commissioners
OPM U.S. Office of Personnel Management
PHS Act Public Health Service Act
QHP Qualified Health Plan
SHOP Small Business Health Options Program

Table of Contents

I. Background

Section 1334 of the Affordable Care Act creates the Multi-State Plan Program (MSPP) to foster competition among plans competing in the individual and small group health insurance markets on the Affordable Insurance Exchanges (Exchanges) on the basis of price, quality, and benefit delivery. The Affordable Care Act directs the U.S. Office of Personnel Management (OPM) to contract with private health insurance issuers to offer at least two multi-State plans (MSPs) on each of the Exchanges in the 50 States and the District of Columbia. The law allows MSPP issuers to phase in coverage, but coverage must be offered on Exchanges in all States and the District of Columbia by the fourth year in which the MSPP issuer participates in the MSPP. The first open enrollment period for plans offered through Exchanges will begin on October 1, 2013, for coverage starting in January 2014.

A. Affordable Insurance Exchanges

The Affordable Care Act authorizes the establishment of Exchanges where individuals and small businesses with up to 100 employees can purchase qualified coverage. States have the option of defining a small group as one with up to 50 employees through 2016.[1] Beginning January 1, 2014, the Exchanges will provide competitive marketplaces for individuals and small employers to directly compare available private health insurance options on the basis of price, quality, and other factors. The Exchanges will enhance competition in the health insurance market, improve choice of affordable health insurance, and give individuals and small businesses purchasing power comparable to that of large businesses.

The U.S. Department of Health and Human Services (HHS) has issued a final regulation outlining standards to certify Exchanges and qualified health plans (QHPs) that will be offered on Exchanges.[2] If a State does not elect to operate an Exchange or is not certified (or conditionally approved) to operate one by January 1, 2013, HHS will operate the Exchange in that State.

The purpose of this proposed regulation is to outline the process by which OPM will establish the MSPP, pursuant to section 1334 of the Affordable Care Act, to offer high-quality, private health insurance products on the Exchanges, as well as to establish standards and requirements for MSPs and MSPP issuers. This proposed regulation recognizes that the MSPP is an important tool for implementing the Affordable Care Act by fostering competition in Exchanges on the basis of price, quality, and benefit delivery, while ensuring that MSPs operate on a level playing field with other issuers operating in the Exchanges.

B. Objectives of the Multi-State Plan Program (MSPP)

The MSP is a new product and will be one of several private health insurance options offered on the Exchanges beginning in 2014. In administering the MSPP, OPM is advancing several important objectives:

- To ensure a choice of at least two high-quality products to consumers participating on each Exchange;
- To promote competition in the health insurance marketplace to the benefit of all consumers;

[1] For purposes of this regulation, OPM refers to Affordable Insurance Exchanges and SHOPs as "Exchanges" collectively.

[2] 45 CFR Parts 155 and 156.

- To offer plans from the same issuer to families or small businesses that may reside or operate in more than one State;
- To provide strong, effective contractual oversight of the issuers that choose to offer MSPs; and
- To work cooperatively with States and HHS to ensure a level playing field between QHPs and MSPs.

Across the country, consumers shopping for insurance in the individual and small group market often have limited options. In some States, the market is extremely concentrated. The MSPP will provide consumers in every Exchange with the additional choice of two high-quality health insurance plans thereby further promoting competition on the Exchanges. Moreover, like the health plans offered in the Federal Employees Health Benefits Program (FEHBP), consumers will benefit from OPM oversight and contract negotiation experience to ensure consumers get the greatest value for their premium dollars. Section 1334 of the Affordable Care Act directs OPM to enter into contracts with participating issuers, including negotiating premiums and benefits, as is done in the FEHBP. In addition, OPM will monitor MSP performance in the market, and oversee plan compliance with legal requirements and contractual terms.

Issuers participating in the MSPP will benefit from market efficiencies because they will contract with a single agency—OPM—which will enable them to participate in all Exchanges. Specifically, section 1334(d) of the Affordable Care Act provides that health plans that meet OPM's requirements for MSPs are deemed certified to be offered on all Exchanges. In return for these administrative efficiencies, MSPP issuers will offer at least two plans (one at the silver level of coverage and one at the gold level of coverage) in each Exchange. The statute allows MSPP issuers to phase in their coverage in all States and the District of Columbia over four years, though MSPP issuers must offer coverage in at least 31 States in the first year of their participation.

Pursuant to section 1334 of the Affordable Care Act, the Director of OPM will set the standards for the MSPP. OPM expects that these standards will be consistent with the standards set for QHPs and QHP issuers by HHS and the Exchanges, although in some unique and specific circumstances, as addressed in this proposed rule, the MSP standards may differ from QHP requirements. In implementing the MSPP, OPM will promote a level playing field on each Exchange, meaning that, to the extent any of the rules governing MSPs and MSPP issuers differ from those governing QHPs, they will be designed to afford the MSPs and MSPP issuers neither a competitive advantage nor a disadvantage with respect to other plans offered on the Exchange. OPM will administer the MSPP in a manner that is sensitive to the significant State and Federal interests affected by the MSPP and that is informed by input from a broad array of stakeholders. Accordingly, OPM appreciates the coordination and cooperation with the States and HHS in administration of the MSPP.

C. Review of OPM's Role in Contracting Under the Federal Employees Health Benefits Program (FEHBP)

Section 1334(a)(4) directs OPM to implement the MSPP "in a manner similar to the manner in which the Director implements the contracting provisions with respect to carriers" under the FEHBP. OPM therefore intends to draw on its significant experience in contracting with and overseeing private issuers in administering FEHBP to develop and manage the MSPP.

The Federal Employees Health Benefits Act (FEHBA) was enacted in 1959 to provide health benefits to Federal employees, annuitants, and their dependents. OPM has more than 50 years of experience working with private issuers in the large group market. Approximately eight million employees, annuitants, and their family members are currently covered under the FEHBP. Enrollees can choose from among fee-for-service plans with preferred providers, local HMOs, consumer-driven health plans, or high-deductible health plan options. Among these options are six nationwide plans, each of which offers coverage in all 50 States and the District of Columbia. In 2011, 78.9 percent of Federal employees and annuitants chose to participate in the FEHBP nationwide plans, which offer portable coverage that continues when the enrollee or a covered family member moves to another State.[3] OPM has been able to administer this robust health insurance program efficiently, keeping administrative costs low.

In managing contracts with carriers in FEHBP, OPM negotiates rates and benefits annually, oversees contract compliance, reviews plan brochures, handles enrollees' complaints, contracts with an external entity for recommendations during OPM's review of disputed claims, and monitors the financial stability of all participating carriers, including the maintenance of adequate reserves in a dedicated fund. Through this process, OPM has developed relationships with health insurance issuers and plans around the country, including local, community-based plans. In the FEHBP, OPM acts on behalf of employees and annuitants of the Federal government. OPM has significant responsibility to ensure that FEHBP health plans provide the best possible coverage at the lowest cost.[4]

OPM currently only negotiates contracts with carriers in the large group market. While OPM intends to create a process for negotiating with issuers participating in the MSPP that is guided by its experience in the FEHBP, this process will necessarily differ in certain respects from the FEHBP process to account for the differences between the large group market, where OPM currently operates, and the individual and small group markets, which will be served by the Exchanges.

D. Overview of the MSPP's Statutory Requirements

Section 1334 of the Affordable Care Act directs OPM to administer the MSPP. Specifically, section 1334(a)(1) of the Affordable Care Act requires OPM to "enter into contracts with health insurance issuers, (which may include a group of health insurance issuers affiliated either by common ownership and control or by the common use of a nationally licensed service mark) * * * to offer at least 2 multi-State qualified health plans through each Exchange in each State."[5] OPM interprets section 1334(a)(1) as requiring OPM to contract with at least two issuers, which may be "groups of health insurance issuers affiliated either by common ownership and control or by the common use of a nationally licensed service mark."[6]

The Director is authorized to implement and administer the MSPP "in a manner similar to the manner in which the Director implements the contracting provisions with respect to carriers under the Federal Employees Health Benefit Program."[7] Further, OPM may enter into these contracts without regard to competitive bidding

[3] U.S. Office of Personnel Management. Healthcare and Insurance, Federal Employee Insurance Operations (March 2011). This percentage includes participation in the following nationwide plans: Blue Cross Blue Shield (BCBS), Government Employees Health Association, Inc. (GEHA), Mail Handlers, American Postal Workers Union (APWU), National Association of Letter Carriers (NALC), and Special Agents Mutual Benefit Association (SAMBA).

[4] It should be noted that § 1334(g)(2) directs OPM to treat MSPs as a separate risk pool from the FEHBP, and the MSPP will not affect FEHBP costs.

[5] Affordable Care Act § 1334(a)(1).

[6] Affordable Care Act § 1334(a)(1).

[7] Affordable Care Act § 1334(a)(4).

laws.[8] Each MSPP contract must be for a term of at least one year, but can be automatically renewable in the absence of a notice of termination from either the MSPP issuer or OPM.[9]

The statute grants to OPM the authority to certify MSPs.[10] Any MSPs offered under a contract negotiated with OPM are then "deemed to be certified by an Exchange for purposes of section 1311(d)(4)(A)" of the Affordable Care Act and would not need to apply separately for certification on each individual Exchange,[11] as recognized in current regulations at 45 CFR 155.1010(b)(1). The Director is authorized to withdraw approval of an MSPP contract after notice and opportunity for a hearing.[12] The Director is also given the explicit statutory authority to negotiate with each MSP "(A) a medical loss ratio; (B) a profit margin; (C) the premiums to be charged; and (D) such other terms and conditions of coverage as are in the interests of enrollees in such plans."[13]

The Affordable Care Act directs that an MSPP issuer be licensed in each State where it offers an MSP[14] and be "subject to all requirements of State law not inconsistent with this section [1334], including the standards and requirements that a State imposes that do not prevent the application of a requirement of part A of title XXVII of the Public Health Service Act (PHS Act) or a requirement of this title [I of the Affordable Care Act]."[15] The Affordable Care Act directs that issuers must comply with the minimum standards for carriers under section 8902(e) of title 5 of the United States Code to the extent that the standards do not conflict with provisions of title I of the Affordable Care Act.[16] Congress also authorized OPM to establish additional standards for MSPs that OPM, in consultation with HHS, deems "appropriate."[17]

The Affordable Care Act authorizes an MSPP issuer to phase-in the States in which the MSP is offered.[18] In the first year the MSP is offered, it must be offered in at least 60 percent of the States (31 States).[19] In the second year, it must be offered in at least 70 percent of the States (36 States).[20] In the third year, it must be offered in at least 85 percent of the States (44 States).[21] In all subsequent years, the MSPP issuer must offer the MSP in all States and District of Columbia.[22]

The statute gave the Director the authority to determine if the plan meets essential health benefits package requirements, meets qualified health plan requirements of title I of the Affordable Care Act, meets premiums rating requirements under part A of title XXVII of the PHS Act, and offers the plan in all geographic locations prescribed by the statute.[23] The statute specifies that an MSP must offer a uniform benefits package in each State that includes essential health benefits pursuant to section 1302 of the Affordable Care Act.[24] Under the statute, this does not prevent a State from requiring additional benefits[25] so long as it defrays the costs.[26] The MSPP issuer must offer the plan in all States after a phase-in, including those with adjusted community rating at the time of enactment of the Affordable Care Act.[27] At least one MSP must not provide coverage of services described in section 1303(b)(1)(B)(i) of the Affordable Care Act as applicable.[28] Finally, to the extent that they do not conflict with provisions in title I of the Affordable Care Act, requirements under chapter 89 of title 5 of the United States Code (the FEHBA) will apply to MSPs.

Though our experience with the FEHBP guides us in crafting the MSPP, the statute distinguishes the MSPP from FEHBP in important respects. Thus, the Affordable Care Act prohibits the Director from allocating fewer resources to administering the FEHBP in order to administer the MSPP and requires the Director to ensure that the two programs are kept separate.[29] Any premiums paid for coverage under the MSPP are not to be considered Federal funds.[30] Enrollees of each program must be treated as separate risk pools[31] and FEHBP carriers are not required to participate in the MSPP.[32]

We are also guided by the level playing field provision of the Affordable Care Act. Section 1324 of the Act specifies that if an MSP or Consumer Operated and Oriented Plan (CO–OP)[33] is not subject to any Federal or State law related to one of the 13 categories listed in section 1324(b), then neither shall any health insurance coverage offered by a private health insurance issuer be subject to such law.[34] The categories listed in section 1324(b) are: guaranteed renewal, rating, preexisting conditions, non-discrimination, quality improvement and reporting, fraud and abuse, solvency and financial requirements, market conduct, prompt payment, appeals and grievances, privacy and confidentiality, licensure, and benefit plan material or information. Beginning in 2014, the Affordable Care Act sets Federal standards for categories such as guaranteed renewal, preexisting conditions, and non-discrimination that will apply in all States.

E. Stakeholder Interaction

In order to assess the level of interest in participating in the MSPP, and to obtain feedback from stakeholders about the program, OPM issued a Request for Information (RFI) on June 16, 2011.[35] OPM received 19 responses representing the views of 39 groups and organizations. Responses came from health insurance issuers (including dental and vision insurance vendors), employer organizations, labor organizations, consumer groups, patient organizations, and provider associations. This proposed rule does not directly respond to each of the responses from the RFI. However, these responses informed the drafting of this proposed rule.

In addition to the RFI, OPM has held meetings and phone calls with numerous stakeholders to seek input and guidance before engaging in proposed rulemaking, including from the National Association of Insurance Commissioners (NAIC), States, tribal representatives through the tribal consultation process, consumer advocates, health insurance issuers, labor organizations, provider associations, and trade groups. OPM values the participation of a broad array of diverse stakeholders, and OPM encourages them to submit comments on this proposed rule.

II. Proposed Regulatory Approach

A. Overview of Regulatory Approach

OPM's approach to the development of this proposed regulation seeks to:

[8] Affordable Care Act § 1334(a)(1).
[9] Affordable Care Act § 1334(a)(2).
[10] Affordable Care Act § 1334(d).
[11] Affordable Care Act § 1334(d).
[12] Affordable Care Act § 1334(a)(7).
[13] Affordable Care Act § 1334(a)(4).
[14] Affordable Care Act § 1334(b)(2).
[15] Affordable Care Act § 1334(b)(2).
[16] Affordable Care Act § 1334(b)(3).
[17] Affordable Care Act § 1334(b)(4).
[18] Affordable Care Act § 1334(e).
[19] Affordable Care Act § 1334(e)(1).
[20] Affordable Care Act § 1334(e)(2).
[21] Affordable Care Act § 1334(e)(3).
[22] Affordable Care Act § 1334(e)(4).
[23] Affordable Care Act § 1334(c)(1).
[24] Affordable Care Act § 1334(c)(1)(A).
[25] Affordable Care Act § 1334(c)(2).
[26] Affordable Care Act § 1334(c)(4).
[27] Affordable Care Act § 1334(c)(1)(D).
[28] See also Affordable Care Act § 1334(a)(6).
[29] Affordable Care Act § 1334(g)(5).
[30] Affordable Care Act § 1334(g)(5).
[31] Affordable Care Act § 1334(g)(2).
[32] Affordable Care Act § 1334(g)(6).
[33] Affordable Care Act § 1322.
[34] Affordable Care Act § 1324.
[35] The RFI is available at *https://www.fbo.gov/index?s=opportunity&mode=form&id=677e422dd3f2bc983cb985eb73995b63&tab=core&_cview=1.*

• Create a program that will attract issuers to apply to offer a new product in each Exchange in 50 States and the District of Columbia.

• Balance State and Federal regulatory interests in a manner that will enable MSPP issuers to offer viable plans on Exchanges while maintaining a level playing field between issuers.

Ensure a level playing field such that neither MSPs nor plans offered by non-MSPP issuers are advantaged or disadvantaged on Exchange marketplaces.

OPM seeks comment on whether these proposed regulations satisfy these goals.

B. Governing Law

The Affordable Care Act generally requires that the MSPP be governed by all State and Federal laws that apply to QHPs. The Act, however, grants discretion to the Director to administer the MSPP in a manner that fulfills OPM's statutory responsibility to ensure that there are at least two issuers offering MSPs on each Exchange in every State and the District of Columbia. OPM recognizes that potential MSPP issuers seek administrative simplicity and some uniformity of standards in the MSPP. Accordingly, in unusual circumstances, it may be necessary for the Director to adopt standards or requirements for the MSPP that differ from standards and requirements applicable to QHPs under either State or Federal law. This proposed regulation, however, reflects the Director's intention for the MSPs and MSPP issuers to adhere to all State and Federal laws applicable to QHPs and QHP issuers, except to the extent any such laws are inconsistent with these regulations, OPM guidance, or OPM's contracts with MSPP issuers.

It is not possible at this time, however, to identify with specificity the laws that OPM deems to be inconsistent with these regulations, OPM guidance, or OPM's contracts with MSPP issuers. OPM will monitor future developments around the State specific requirements that will be in place in 2014 and beyond and identify inconsistencies as they arise.

OPM has addressed the evolving nature of the law and OPM's interest in providing meaningful guidance to the public regarding the standards and requirements that apply to the MSPP in four primary ways. First, OPM has identified the currently existing provisions of Federal law that govern QHPs and, thus, the MSPP. Second, OPM has asserted its intention to require MSPs and MSPP issuers to follow all State law requirements with respect to the 13 categories of laws set forth in section 1324(b) of the Affordable Care Act, the level playing field provision. Third, OPM has set forth the standards and requirements that will govern the MSPP, which it has established based on its research into currently existing State and Federal requirements. OPM believes that these standards and requirements are consistent with State legal requirements. Fourth, OPM has proposed establishing a dispute resolution process to be used after these regulations are published in final form to resolve future disputes about the applicability of State law requirements to the MSPP. OPM believes this approach affords it sufficient flexibility to administer the MSPP in 50 States and the District of Columbia without disrupting State markets. OPM requests public comment on whether these proposed standards and requirements will ensure a level playing field between MSPP issuers and QHP issuers, whether the standards and requirements OPM is proposing for the MSPP are consistent with applicable State and Federal requirements for QHPs, and whether the MSPs or MSPP issuers will be at a competitive advantage or disadvantage under this approach with respect to the QHPs offered on the Exchanges.

Level Playing Field

As discussed above, OPM is proposing to require compliance with State and Federal laws related to the 13 categories listed in section 1324(b) of the Affordable Care Act. There are, however, three categories of law among the 13 listed in section 1324(b) of the Affordable Care Act for which OPM would like specifically to solicit public comment: appeals, rating, and benefit plan material or information.

Appeals

OPM proposes to resolve external appeals pursuant to its own process, which will be similar to the disputed claims process used in the FEHBP. OPM interprets section 1334(a)(4) of the Affordable Care Act to require OPM to maintain authority over external review because Congress directed that OPM implement the MSPP in a manner similar to the manner in which it implements the contracting provisions of the FEHBP. In the FEHBP, OPM resolves all external appeals as a part of its contract administration responsibilities. OPM similarly believes that it is necessary to decide these appeals in the MSPP in order to ensure that the MSPP contract is administered equitably throughout all 51 jurisdictions and to provide enrollees an avenue of redress for all denied claims. This proposed approach would not trigger the level playing field provisions of section 1324 because MSPP issuers will still be subject to the same law as other issuers. The law governing external appeals for all issuers is found in section 2719 of the PHS Act and its implementing regulations at 45 CFR 147.136. The Departments of Health and Human Services, Labor, and the Treasury intend to propose amendments to those regulations to apply to the MSPP process the same standards that apply to State external review processes.

Rating

For purposes of compliance with section 1324(b)(2) of the Affordable Care Act, OPM has defined "rating" to require compliance with the rating factors permitted by section 2701 of the PHS Act. Thus, the proposed rule would require MSPP issuers, in proposing premiums for OPM approval, to use only the rating factors permitted by section 2701 of the PHS Act. It would also require MSPP issuers to comply with State laws relating to rating factors.

With regard to the MSPP, OPM does not consider "rating" to be the same as "rate review." As directed by section 1334(a)(4) of the Affordable Care Act, the Director negotiates premiums, a medical loss ratio, a profit margin, and such other terms and conditions as are in the best interest of enrollees. With respect to rate review, OPM intends to conduct its own rate review process, and provide its rate review analysis to each State in which the MSP is operating. Each State also would have the opportunity to review the MSP rates under its own procedures. If a State disagrees with OPM's determination to approve the MSP rates, OPM would work with the State to attempt to resolve the differences. We expect that few such disagreements will arise and, if they do, that we will be successful in resolving them in a manner that is acceptable both to OPM and the State. In the event that a State withholds approval of an MSP rate for reasons that OPM determines, in its discretion, to be arbitrary, capricious, or an abuse of discretion, the Act authorizes the Director to make the final decision to approve rates for participation in the MSPP notwithstanding the absence of State approval. We expect that the Director will rarely, if ever, have to exercise this authority to approve MSP rates over the objection of a State. . OPM welcomes comments on whether this is an appropriate approach and on the impact of this approach.

Benefit Plan Material or Information

MSPs will be subject to Federal and State laws with respect to benefit plan material or information, including requirements proposed in § 800.113. OPM has defined the term "benefit plan material or information" to include explanations or descriptions, whether printed or electronic, that describe a health insurance issuer's products. The term does not include a policy or contract for health insurance coverage. While OPM intends to review and approve policy forms for health insurance coverage, OPM expects MSPP issuers to comply with related state law requirements for policy form review. OPM expects that that few disagreements will arise between OPM and a state regarding policy form review and, if they do, that we will be successful in resolving them in a manner that is acceptable both to OPM and the State at issue. As it does in the FEHBP, OPM will review and approve the policy or contract for health insurance coverage. In § 800.113, OPM has proposed reserving its authority to request benefit plan material or information (other than the policy document or information) for review by OPM in addition to any State review. In § 800.113, OPM also has proposed to allow an MSPP issuer to state that OPM has certified a plan and will oversee its administration. OPM solicits comments on whether it is appropriate to exclude policies and contracts from the definition of "benefit plan material or information."

Process for Disputes Regarding State Law

OPM is sensitive to the impact that its decisions with respect to the standards and requirements applicable to the MSPP could potentially have on State insurance markets. For this reason, with respect to the 13 categories listed in section 1324(b) of the Affordable Care Act, as stated above, OPM's proposal is to require MSPP issuers to comply with all State laws in those categories, as defined in these regulations. There may be other State laws, however, that are not related to the 13 categories listed in section 1324(b) for which compliance would prevent OPM from administering the MSPP. In those circumstances, the State law requirements may be inconsistent with these regulations, OPM guidance, or OPM's contracts with MSPP issuers. With respect to those non-1324(b) provisions, OPM is proposing a process for States to seek changes to the regulations, OPM guidance, or OPM's contracts with MSPP issuers in order to bring them into compliance with applicable State law.

The proposed process is intended to allow for a targeted analysis of particular State law provisions and its impact on OPM's ability to administer the MSPP. This process is particularly important given that many States are still developing their Exchange standards. OPM invites comments on this process, including its scope, the factors OPM should consider when determining whether State law is applicable or whether the relevant market has been or will be disrupted by the inapplicability of State law and whether the process will be an effective way to resolve any such disputes.

OPM also invites comments on whether it should include in this process States' having concerns about MSPP issuer compliance with State law requirements related to the 13 categories listed in section 1324(b) of the Affordable Care Act. As discussed above, OPM's intention is to ensure that MSPP issuers comply with all State law requirements concerning the 13 categories, and OPM appreciates comments on whether this proposed rule has met this intent. However, OPM recognizes that future issues could arise regarding whether MSPs and MSPP issuers are properly made subject to State and Federal laws related to the section 1324(b) categories. OPM is asking for comment on whether the dispute resolution process should also be available as another avenue for addressing any such concerns.

III. Provisions of the Proposed Regulation

A. General Provisions and Definitions (Subpart A, 800.10 and 800.20)

The purpose of this subpart is to define the basis and scope of part 800. In addition, this subpart sets forth definitions for terms that are used throughout this part.

1. Basis and Scope (§ 800.10)

The primary authority for the establishment of the MSPP is section 1334 of the Affordable Care Act. In addition, section 1324 of the Affordable Care Act is the level playing field provision. It addresses MSP compliance with applicable Federal or State law in 13 categories. Other relevant statutory provisions of title I of the Affordable Care Act are enumerated in § 800.102. In addition, MSPP issuers and MSPs must comply with all provisions of part A of title XXVII of the PHS Act enumerated in § 800.102.

Section 800.10 proposes the scope of this proposed regulation, which is to establish standards for the following:

(1) Health insurance issuers wishing to contract with OPM to participate in the MSPP;

(2) Health insurance issuers to appeal a decision by OPM either to non-renew or terminate a health insurance issuer's contract to participate in the MSPP; and

(3) Enrollees in an MSP to appeal denials of payment or services by an MSPP issuer.

2. Definitions (§ 800.20)

Section 800.20 proposes definitions for terms that are used throughout part 800. In general, the definitions contained in § 800.20 come from three sources: title I of the Affordable Care Act and the final Exchange regulation at 45 CFR parts 155, 156, and 157; title XXVII of the PHS Act and the regulations at 45 CFR part 144; and the FEHBA at chapter 89 of title 5, United States Code and the regulations governing the FEHBP at 5 CFR part 890 and 48 CFR 1609.70. Some new definitions were created for the purpose of implementing the MSPP. The application of the terms defined in this section is limited to this proposed rule.

Several defined terms in this section are in common use and are defined as such. These include:

- FEHBP
- HHS
- HHS Secretary ("Secretary")
- OPM
- OPM Director ("Director")

Several terms are based on definitions in the Affordable Care Act or regulations issued to implement 45 CFR Parts 155, 156, and 157. These include:

- Cost sharing (defined in 45 CFR 155.20).
- Exchange (defined in 45 CFR 155.20).
- Level of coverage (defined as one of four standardized actuarial values, or AV, of plan coverage specified in section 1302(d)(1) of the Affordable Care Act).
- Plan year (defined in 45 CFR. 155.20).
- QHP (defined in 45 CFR 155.20).
- SHOP (defined in 45 CFR 155.20).
- Small employer (defined in 45 CFR 155.20).
- State (defined in 45 CFR 155.20).

OPM proposes definitions for several terms based on three HHS proposed rules. First, HHS published a proposed essential health benefits (EHB) rule in the **Federal Register** on November 26, 2012 to provide standards related to EHB, actuarial value (AV), and accreditation. Second, HHS published a proposed rule in the **Federal Register** on

November 26, 2012 to provide standards related to fair health insurance premiums, guaranteed availability, guaranteed renewability, risk pools, and rate review (the proposed health insurance market rules). Third, HHS will soon publish a proposed rule in the **Federal Register** to provide notice of standards relating to benefit and payment parameters for 2014, including standards related to advance payments of the premium tax credit and cost-sharing reductions (the proposed payment rule). OPM expects to follow the definitions promulgated by HHS. The proposed definitions include:

- *Actuarial value (AV)* (defined in proposed 45 CFR 156.20).
- *EHB-benchmark plan* (defined in proposed 45 CFR 156.20).
- *Indian* (defined in proposed 45 CFR 155.300(a)).
- *Zero cost sharing plan variation* (defined in proposed 45 CFR 156.400).
- *Percentage of total allowed cost of benefits* (defined in proposed 45 CFR 156.20).
- *Plan variation* (defined in proposed 45 CFR 156.400).
- *Silver plan variation* (defined in proposed 45 CFR 156.400).
- *Standard plan* (defined in proposed 45 CFR 156.400).

Several terms are given the same definition as previously released regulations pertaining to the PHS Act, the Affordable Care Act, and the FEHBA. These include:

- *Health insurance coverage* (defined in 45 CFR 144.103).
- *Health insurance issuer, or issuer,* means an insurance company, insurance service, or insurance organization (including an HMO) that is required to be licensed to engage in the business of insurance in a State and that is subject to State law that regulates insurance (within the meaning of section 514(b)(2) of the Employee Retirement Income Security Act (ERISA)). This term does not include a group health plan as defined in 45 CFR 146.145(a).

Several terms below are given specific definitions for use in this regulation and should only be read to apply to this proposed rule. OPM proposes the following definitions to implement this regulation.

- *Applicant* means an issuer or group of issuers that submitted an application to OPM to be considered for participation in the MSPP.
- *Benefit plan material or information* means explanations or descriptions, whether printed or electronic, that describes a health insurance issuer's products. The term does not include a policy or contract for health insurance coverage.
- *Group of issuers* means (1) a group of health insurance issuers who are either affiliated by common ownership and control or by common use of a nationally licensed service mark, or (2) an affiliation of health insurance issuers and an entity who is not an issuer but who owns a nationally licensed service mark.
- *Licensure* means the authorization obtained from the appropriate State official or regulatory authority to offer health insurance coverage in the State.
- *MSP* means a private health plan that is offered under a contract with OPM pursuant to section 1334 of the Affordable Care Act and meets the requirements of this part.
- *MSPP* means the program administered by OPM pursuant to section 1334 of the Affordable Care Act.
- *MSPP issuer* means a health insurance issuer or group of issuers, as defined in this proposed rule, that has a contract with OPM to offer health plans pursuant to section 1334 of the Affordable Care Act and meets the requirements of this part.
- *Nationally licensed service mark* means a word, name, symbol, or device, or any combination thereof, that an issuer or group of issuers uses consistently nationwide to identify itself. Section 1334(a)(1) states that issuers applying for an MSPP contract may include a group of issuers affiliated either by common ownership and control or by the common use of a nationally licensed service mark. Licensing of service marks can take place by private agreement between two or more issuers.
- *Non-profit entity* means: (1) An organization that is incorporated under State law as a non-profit entity and licensed under State law as a health insurance issuer, or (2) a group of health insurance issuers licensed under State law a substantial portion of which are incorporated under State law as non-profit entities. Pursuant to section 1334(a)(3), at least one MSPP contract is to be with a non-profit entity. OPM has interpreted this requirement with the goal of attracting a broad pool of potential issuers that will provide high-quality private health insurance coverage to consumers.
- *Prompt payment* means a requirement imposed on a health insurance issuer to pay a provider or enrollee for a claimed benefit or service within a defined time period, including the penalty or consequence imposed on the issuer for failure to meet the requirement.
- *Rating* means the process, including rating factors, numbers, formulas, methodologies, and actuarial assumptions, used to set premiums for a health plan.
- *State insurance commissioner* means the commissioner or other chief insurance regulatory official of a State.[36]

B. Multi-State Plan Issuer Requirements (Subpart B, 800.101 Through 800.116)

The purpose of this subpart is to set forth standards for MSPP issuers in order to participate in the MSPP pursuant to section 1334(b) of the Affordable Care Act. The following proposed provisions of the regulation implement this statutory provision.

1. General Requirements (§ 800.101)

This section proposes standards to implement section 1334(b) of the Affordable Care Act. It also proposes that an MSPP issuer must offer a choice of plans (i.e., at least one of each at the silver level of coverage and gold level of coverage) on the individual Exchange and in the SHOP, if the MSPP issuer chooses to participate in the SHOP. In addition, OPM proposes that the MSPP issuer will, pursuant to its contract with OPM, offer child-only coverage for each level of coverage that it makes available in each Exchange. An MSPP issuer must ensure that all MSPs it offers meet the requirements of this proposed rule.

Regarding eligibility and enrollment, OPM proposes that MSPP issuers meet the same requirements as those that apply to QHP issuers under the Exchange rules in 45 CFR parts 155 and 156. OPM seeks comment on any unique enrollment and eligibility issues that might affect MSPs.

2. Compliance With Federal Law (§ 800.102)

The purpose of this section is to specify the laws with which MSPP issuers must comply as a condition of participation in the MSPP. Section 1334(b)(2) of the Affordable Care Act directs an MSPP issuer to be licensed in every State and be "subject to all requirements of State law not inconsistent with this section [1334], including the standards and requirements that a State imposes that do not prevent the application of a requirement of part A of title XXVII of the PHS Act or a requirement of this title [I of the Affordable Care Act]." Section 1334(b)(3) further directs an MSPP issuer to comply "with the minimum standards prescribed for carriers offering health benefits plans under section 8902(e) of title 5, United States Code, to the extent that such

[36] This definition is used in many of the models issued by the NAIC. See, for example, NAIC Unfair Trade Practices Model Act § 2.B. and accompanying Drafting Note (July 2008).

standards do not conflict with a provision of this title [I of the Affordable Care Act]." In addition, section 1334(c)(1)(B) requires an MSP to meet all the requirements of title I of the Affordable Care Act with respect to a QHP, and section 1334(f) states that "the requirements under chapter 89 of title 5, United States Code, applicable to health benefits plans under such chapter shall apply to multi-State qualified health plans provided for under this section [1334] to the extent that such requirements do not conflict with a provision of this title." OPM has performed a detailed analysis of title I of the Affordable Care Act and part A of title XXVII of the PHS Act. The list contained in the appendices of the proposed rule is intended to clarify for applicants and MSPP issuers the exact provisions of these laws that they must comply with in order to enter into an MSPP contract with OPM and maintain that contract.

This list is focused exclusively on title I of the Affordable Care Act and part A of title XXVII of the PHS Act. It is not intended to specify every legal requirement that applies to MSPP issuers and MSPs. In addition to the statutory provisions that are listed, MSPP issuers must comply with any applicable regulations implementing those provisions. For example, MSPP issuers must ensure guaranteed availability of coverage, and MSPP issuers offering MSPs in a State must accept every individual and employer in the State that applies for coverage, subject to certain exceptions, as outlined in § 147.104 of the HHS proposed health insurance market rules (including any modifications adopted in the final HHS rules). Additionally, MSPP issuers must ensure guaranteed renewability of coverage, and MSPP issuers offering MSPs in a State must renew coverage at the option of the plan sponsor or individual, with certain exceptions, as outlined in § 147.106 of the HHS proposed health insurance market rules (including any modifications adopted in the final HHS rules). OPM will coordinate its approach with the final HHS health insurance market rules.

OPM notes that the preamble to the regulations implementing 45 CFR parts 155, 156, and 157 leaves to the discretion of each Exchange whether to require a QHP issuer to participate in both the SHOP and the individual market Exchanges.[37] Given that MSPP issuers are required to make MSPs available in 31 States in the first year and must build the capacity to be available in all States and the District of Columbia by the fourth year, OPM is proposing to allow MSPP issuers flexibility to phase in coverage to the SHOPs. Accordingly, MSPP issuers may offer coverage in the individual Exchange, and not the SHOP, throughout the duration of the phase-in period. MSPP issuers that initially choose to offer coverage only in the individual Exchange and not the SHOP must provide to OPM their plan to expand coverage to the SHOP in all States. In any event, OPM proposes that by the end of the phase-in period, MSPP issuers are required to offer coverage on the SHOP in addition to the individual Exchange. We solicit comments on this approach to SHOP participation, including on whether participation in SHOP should be required from the outset or, whether we should allow MSPP issuers to provide a plan that requires a period longer than the phase-in period to fully participate in the SHOP.

3. Authority To Contract With Issuers (§ 800.103)

In this section, OPM specifies that it may enter into an MSPP contract with a group of issuers affiliated either by common ownership and control or by the use of a nationally licensed service mark, or an affiliation of health insurance issuers and an entity that is not an issuer but that owns a nationally licensed service mark, as set forth in section 1334(a)(1) of the Affordable Care Act.

4. Phased Expansion (§ 800.104)

This section implements provisions of section 1334(e) of the Affordable Care Act. OPM proposes to allow for contracting with an issuer that offers coverage in part of a State, but not necessarily the entire State. OPM proposes that, for each State in which the MSPP issuer offers partial coverage, the issuer's application for participation in the MSPP under § 800.301 and the MSPP issuer's information submitted to support renewal of the contract under § 800.305 must include a plan for offering coverage throughout the State. OPM will monitor the MSPP issuer's progress in implementing the plan as part of its contract compliance activities under subpart E. OPM requests comment on whether an MSPP issuer should be required to offer coverage statewide by the fourth year of participation in the MSPP, when coverage must be offered in each Exchange in 50 States and the District of Columbia. OPM will evaluate MSP issuers to ensure that the locations in which they propose to offer MSP coverage have been established without regard to racial, ethnic, language, health status-related factors listed in section 2705(a) of the PHS Act, or other factors that exclude specific high utilizing, high cost, or medically-underserved populations. OPM also proposes to clarify that, during each year of the phase-in period, an issuer need only be licensed in the States where it is offering coverage during that year, and not in all States.

5. Benefits (§ 800.105)

The RFI did not ask specific questions about the health benefit packages that would be offered by MSPs.[38] However, some respondents mentioned benefits package design in addressing questions about the level of interest in the MSPP, enrollment and marketing, and operations. Some respondents preferred a uniform benefits package for MSPs. For instance, one respondent stated that consumers would benefit from having an MSP structured as a national plan offering uniform benefits across all States. Other respondents raised the concern that a uniform package would be inconsistent with or inadequate in comparison to State benefit mandates. Another respondent stated that if OPM requires MSPP issuers to provide benefits that are not required for QHP issuers, MSPs may attract higher risk individuals, making the MSP less competitive on an Exchange.

Section 1334(c)(1)(A) of the Affordable Care Act directs that an MSP offer a benefits package that is uniform in each State and consists of the essential health benefits described in section 1302 of the Affordable Care Act. OPM proposes to implement this provision through proposed § 800.105. OPM has developed its proposed benefits policy in coordination with HHS, which has already promulgated the EHB proposed rule. HHS proposes that EHB would be defined by a benchmark plan selected by each State, or in the absence of a State benchmark designation, a default benchmark. These proposed base-benchmark plans would be supplemented, if necessary, to ensure they meet EHB standards including coverage in each of the 10 coverage categories set forth in the statute.[39] HHS

[37] 77 FR at 18401 (March 27, 2012).

[38] Responses to the RFI were due on September 9, 2011 to OPM, which was before HHS published its proposed rule on essential health benefits.

[39] The four benchmark plan types for EHB proposed by HHS for 2014 and 2015 are: (1) The largest plan by enrollment in any of the three largest small group insurance products in the State's small group market; (2) any of the largest three State employee health benefit plans by enrollment; (3) any of the largest three national FEHBP plan options by enrollment; or (4) the largest insured commercial non-Medicaid Health Maintenance

also proposed at 45 CFR 156.105 that MSPs must meet benchmark standards set by OPM.

In § 800.105(a)(1), OPM proposes that an MSPP issuer must offer a uniform benefits package for each MSP. OPM proposes that the benefits for each MSP must be uniform within a State, but not necessarily uniform among States. In § 800.105(a)(2), OPM proposes that the benefits package noted in § 800.105(a)(1) must comply with section 1302 of the Affordable Care Act as well as any applicable standards set by OPM or HHS in regulations. Together, these two provisions clarify that MSPP issuers must comply with applicable HHS requirements and that OPM may issue additional guidance regarding any issues unique to MSPs.

In § 800.105(b)(1), OPM proposes allowing potential MSPP issuers to offer a benefits package, in all States, that is substantially equal to either (1) each State's EHB-benchmark plan in each State in which it operates; or (2) any EHB-benchmark plan selected by OPM. The second option offers administrative efficiencies for MSPP issuers, who face a number of challenges in being able to offer MSPs in all 50 States and the District of Columbia. We note, however, that issuers could potentially accomplish a similar consistency in their benefits offerings by adhering to State EHB benchmark plans and applying the EHB substitution rules proposed at 45 CFR 156.115. We request comment on these options, including on whether either option would discourage or encourage an issuer's participation in the MSPP and whether or not, given the proposed substitution rules, the allowance of the OPM benchmark option disrupts State level playing fields.

No matter which option an MSPP issuer chooses, it would need to apply that benefits package option uniformly to each of the States in which the MSPP issuer proposes to offer MSPs. That is, except as discussed below with respect to § 800.105(c)(5), our proposed approach does not permit an issuer to use a State benchmark plan in some of the States in which it is operating and an OPM-chosen benchmark plan in others.

In § 800.105(c)(1), OPM proposes selecting, as EHB-benchmark plans, the three largest FEHBP plan options by enrollment that are open to Federal employees, and annuitants, which have been identified by HHS pursuant to section 1302(b) of the Affordable Care Act. On July 3, 2012, HHS identified the largest three FEHBP plan options, as of March 31, 2012, to be the following: Blue Cross Blue Shield (BCBS) Standard Option, BCBS Basic Option, and Government Employees Health Association (GEHA) Standard Option.[40] An MSPP issuer that selects one of these benchmarks must have a uniform benefits package in all States in which it operates an MSP.

Upon initial comparative research, it appears that the proposed OPM-selected EHB-benchmark plans are largely similar in scope of benefits covered as those benchmark-eligible plans in the small group markets.[41] This research also indicates that the proposed OPM-selected EHB-benchmark plans, like other benchmark-eligible plans, may lack coverage for pediatric oral services, pediatric vision services, and habilitative services and devices. Moreover, the EHB-benchmark may also lack State-required benefits. Accordingly, OPM is proposing standards for supplementing the proposed OPM-selected EHB-benchmark plans in proposed §§ 800.105(c)(2)–(4).

In § 800.105(c)(2), OPM proposes that any OPM-selected EHB-benchmark plan lacking coverage of pediatric oral services or pediatric vision services must be supplemented by the addition of the entire category of benefits from the largest Federal Employee Dental and Vision Insurance Program (FEDVIP) dental or vision plan option, respectively, pursuant to 45 CFR 156.110(b) and section 1302(b) of the Affordable Care Act. On July 3, 2012, HHS identified the largest FEDVIP dental and vision plan options, as of March 31, 2012, to be, respectively, the following: MetLife Federal Dental Plan High Option and FEP BlueVision High Option.

In § 800.105(c)(4), an MSPP issuer must follow State definitions where the State chooses to specifically define the habilitative services category pursuant to proposed 45 CFR 156.110(f). In the case in which a State chooses not to define this category, OPM proposes that if any OPM-selected EHB-benchmark plan lacks coverage of habilitative services and devices, then OPM may determine what habilitative services and devices are to be included in that EHB-benchmark plan.

In § 800.105(c)(5), OPM proposes that, for at least years 2014 and 2015, OPM's EHB-benchmark plans would also include, for each State, any State-required benefits enacted by December 31, 2011 that are included in a State's EHB-benchmark plan or specific to the market in which the MSP offers coverage. Accordingly, these State-required benefits would be treated as part of the EHB. However, consistent with proposed 45 CFR 155.170, OPM is proposing that State-required benefits enacted after December 31, 2011 would be in addition to the EHB. Under section 1334(c)(4) of the Affordable Care Act, a State must assume the cost of such additional benefits over the EHB by making payments either to the enrollee or on behalf of the enrollee to the MSPP issuer, if applicable. An MSPP issuer must calculate and report the costs of additional State-required benefits pursuant to 45 CFR 155.170.

OPM is proposing that if an MSPP issuer chooses to use an EHB-benchmark plan selected by OPM in all States, the MSPP issuer would need to use a State-selected benchmark only in States that do not allow substitution for services at all within the benchmark benefits. MSPs using an OPM benchmark in States that require all plans to offer the same set of benefits would be different from all of the other plans offered on the market, potentially causing adverse selection. OPM seeks comment on this proposal.

In § 800.105(d), OPM proposes that an MSPP issuer's benefits package, including its prescription drug list, must be submitted to and approved by OPM, which would determine whether a benefits package proposed by a MSPP issuer is substantially equal to an EHB-benchmark plan, in accordance with the guidelines set forth by HHS in the proposed EHB rule. In determining whether an MSPP issuer's benefits package should be approved, OPM proposes to follow the HHS approach set forth at proposed 45 CFR 156.115, 156.120, and 156.125 (subject to any changes adopted in the final HHS rule). Proposed 45 CFR 156.115(b) allows issuers to make benefit substitutions within each EHB category, and directs issuers to submit evidence of actuarial equivalence of substituted benefits to a State. OPM requests comments on whether MSPP issuers should submit evidence of actuarial equivalence of substituted benefits to the OPM in addition to, or in lieu of, their submission to a State.

Organization (HMO) operating in the State. See proposed 45 CFR 156.100.

[40] Centers for Medicare and Medicaid Services, Essential Health Benefits: List of the Largest Three Small Group Products by State, available at *http://cciio.cms.gov/resources/files/largest-smgroup-products-7-2-2012.pdf.PDF* (July 3, 2012).

[41] U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, ASPE Research Brief, Essential Health Benefits: Comparing Benefits in Small Group Products and State and Federal Employee Plans, available at *http://aspe.hhs.gov/health/reports/2011/MarketComparison/rb.pdf* (December 2011).

In reviewing an MSPP issuer's proposed benefit design, OPM plans to review an MSPP issuer's benefits package for discriminatory benefit design pursuant to section 1302(b)(4) of the Affordable Care Act and proposed 45 CFR 156.110(d), 156.110(e), and 156.125. OPM will work closely with States and HHS to identify and investigate any potentially discriminatory benefit design in MSPs.

OPM solicits comments on the provision of pediatric dental services by MSPs in order to meet the requirements of section 1302(b)(1)(J) of the Affordable Care Act. Under one possible approach, an MSP would have to cover pediatric dental services in conjunction with other benefits in its benefits package. OPM solicits comments on how stand-alone dental plans offered on the Exchanges should affect this requirement, if at all. OPM solicits comments on this approach, including their advantages, disadvantages, and whether there is legal justification for each approach, and invites comment on other possible approaches.

OPM anticipates that its policy on EHB benchmark standards for the MSPP will evolve as HHS develops the final EHB rule. OPM solicits comments on the provisions of proposed § 800.105, including provisions relating to the two EHB benchmark options and limited scope dental plans.[42]

6. Cost-Sharing Limits, Premium Tax Credits, and Cost-Sharing Reductions (§ 800.106)

In § 800.106(a), OPM proposes that for each MSP it offers, an MSPP issuer must ensure that the cost-sharing provisions of the MSP comply with section 1302(c) of the Affordable Care Act as well as any applicable standards set by OPM or HHS in regulations. This provision clarifies that MSPP issuers must comply with any applicable HHS requirements and that OPM may issue additional guidance regarding issues unique to MSPs. See HHS proposed standards at 45 CFR 156.170. OPM solicits comments on additional standards, if any, that it should adopt to address unique issues faced by MSPs.

In § 800.106(b), OPM proposes that for each MSP it offers, an MSPP issuer must make available to an eligible individual the premium tax credits under section 36B of the Internal Revenue Code of 1986 and the cost-sharing reductions under section 1402 of the Affordable Care Act. An MSPP issuer must also comply with any standards set by OPM or HHS in regulations concerning the administration of these subsidies. This provision would implement section 1334(c)(3)(B) of the Affordable Care Act, which specifies that individuals enrolled in an MSP are eligible for the premium tax credits and cost-sharing reductions just as they would be if purchasing any other insurance product on the Exchange. This provision also clarifies that MSPP issuers must comply with applicable statutory and HHS requirements, and that OPM may issue additional guidance regarding any unique issues faced by MSPs. See HHS proposed standards at 45 CFR part 156, subpart E. OPM solicits comments on what additional guidance, if any, it should adopt to address unique issues faced by MSPs.

7. Levels of Coverage (§ 800.107)

In § 800.107(a), OPM proposes that an MSPP issuer, like QHPs participating in Exchanges, must offer at least one plan at the silver level of coverage and one plan at the gold level of coverage in each Exchange in which the issuer is certified to offer an MSP pursuant to a contract with OPM. OPM also clarifies that it will use its discretion about whether an MSPP issuer may offer products in addition to the required gold and silver products.

In § 800.107(c), OPM proposes that for each level of coverage, an MSPP issuer must offer a child-only plan at the same level of coverage, as any health insurance coverage offered to individuals who, as of the beginning of the plan year, have not attained the age of 21. An MSPP issuer could satisfy this standard by offering the same product to consumers seeking child-only coverage that it offers to consumers seeking coverage solely for adults or for families including both adults and children, as long as the child-only coverage is priced in accordance with the applicable rating rules.

OPM recognizes that HHS has requested comments in its proposed EHB rule and draft notice of benefit and payment parameters for 2014 on the definition of levels of coverage and plan variations. The proposed HHS regulations direct QHP issuers to offer silver plan variations for the purpose of implementing the reduction or elimination of cost sharing for eligible enrollees in a QHP pursuant to section 1402 of the Affordable Care Act, see proposed 45 CFR part 156. OPM proposes in § 800.107(d) that MSPP issuers shall comply with applicable HHS requirements to offer such plan variations. In addition, OPM proposes in § 800.107(e) that MSP plan variations will be submitted to OPM for review and approval. OPM will coordinate its approach on this issue with the final HHS notice of benefit and payment parameters for 2014. OPM will exercise this discretion to promote the best interests of enrollees and potential enrollees in the MSPP and to assure adequate administrative oversight of each MSP and MSPP issuer.

8. Assessments and User Fees (§ 800.108)

In this section, OPM proposes to reserve its authority to assess a user fee on MSPP issuers to cover the agency's costs of performing its functions under the Affordable Care Act for a plan year. The purpose of assessments and user fees would be to cover the administrative costs of performing the contracting and certification of MSPs and of operating the program, functions typically conducted through an Exchange for QHPs. OPM seeks comments on the use of assessments and user fees to fund the MSPP.

9. Network Adequacy (§ 800.109)

Consistent with the Affordable Care Act's goal of providing more competition in the health insurance markets and expanding coverage of the uninsured, OPM asked RFI respondents to indicate which areas of the country are difficult to serve and how the respondent would handle hard-to-serve areas. OPM also asked for recommendations with respect to standards for network access. Respondents identified rural areas as difficult to serve, and one respondent noted that every State has areas that are difficult to serve. Some respondents were able to identify a means of reaching hard-to-serve areas, and some stated that they had been able to overcome these difficulties. In addition, some respondents indicated a willingness to collaborate with other organizations to increase capacity to provide coverage. Some respondents suggested having a uniform network adequacy standard across all States for MSPs, some wanted to preserve State network adequacy laws, and others suggested using the rule applicable to QHPs on a specific Exchange.

With respect to network adequacy, OPM's proposed standard mirrors the HHS standard set forth in 45 CFR

[42] In a pending advanced notice of proposed rulemaking regarding Certain Preventive Services under the Affordable Care Act (77 FR 16,501 (Mar. 21, 2012), one of several proposals for comments was that one or more issuers offering an MSP could be incentivized or required to provide contraceptive coverage to participants and beneficiaries covered under certain religious organizations' self-insured plans as part of an accommodation of those organizations' religious objections to providing such coverage. Should the proposed and final rule regarding Certain Preventive Services affect the MSPP, this final rule may include that policy as well.

156.230 and is intended to ensure that an MSP's services are available to all enrollees.[43] Consistent with the Exchange final rule's alignment with the NAIC Model Act, OPM proposes to require an MSPP issuer to: (1) Maintain a sufficient provider network in the number and types of providers to assure that all services will be accessible without reasonable delay for enrollees; (2) offer a provider network that is consistent with network adequacy provisions set out in section 2702(c) of the PHS Act; and (3) offer a provider network that includes essential community providers in compliance with 45 CFR 156.235. OPM intends for an MSPP issuer to make its provider directory available to the Exchange for online publication and to potential enrollees in hard copy, upon request. OPM is aware that certain States have more specific rules on network adequacy and will consult with States to set more specific criteria with respect to network adequacy for the MSPP in future guidance. OPM requests comments on its approach to network adequacy, including issues concerning network adequacy as a condition of State licensure and any issues for MSPs with respect to State-specific network adequacy requirements.

10. Service Area (§ 800.110)

With respect to service areas, OPM proposes that MSPP issuers adhere to the service areas defined by Exchanges, but does not necessarily require that an MSP be offered in all defined service areas. OPM proposes that, for each State in which the MSPP issuer does not offer coverage in all service areas, the MSPP issuer's application for participation in the MSPP under § 800.301 and the MSPP issuer's information submitted to support renewal of the contract under § 800.305 must include a plan for offering coverage throughout the State. OPM will monitor the MSPP issuer's progress in implementing the plan as part of its contract compliance activities under subpart E. OPM seeks comment on whether MSPP issuers should be required to offer MSPs in all service areas by the fourth year of participation in the MSPP, when coverage must be offered in each Exchange in all the States and the District of Columbia. OPM has also heard concerns about MSPP issuers' ability to cover an entire Exchange service area during the four year phase-in period and is considering permitting an exception if an MSPP issuer can only offer an MSP in a portion of a service area during the phase-in as long as the selection of the service areas is not discriminatory. In States where the Exchange permits issuers to define their service areas, OPM proposes to require that it approve an MSPP issuer's service areas and will ensure MSPs meet QHP requirement in 45 CFR 155.1055(b).[44] OPM also plans to review any requests for coverage of partial county service areas and coordinate with HHS in order to align service areas with those of QHPs to prevent gaming of service areas. OPM believes that allowing MSPP issuers time to develop the capacity to offer coverage throughout a service area will enhance competition in the MSPP. OPM invites comments on this approach.

11. Accreditation Requirement (§ 800.111)

With respect to accreditation, OPM proposes that MSPP issuers be or become accredited consistent with the requirements for QHP issuers specified in section 1311 of the Affordable Care Act, in 45 CFR 156.275(a), and in applicable State law. OPM proposes that MSPP issuers be or become accredited by an accrediting entity recognized by HHS pursuant to 45 CFR 156.275(c).

Consistent with 45 CFR 155.1045, which gives OPM discretion to establish a timeline for accreditation for MSPP issuers not already accredited, OPM proposes to require that an MSPP issuer that is not accredited as of the date that it enters into a contract with OPM become accredited within the timeframe established by OPM. A potential MSPP issuer may need additional time to obtain accreditation on the basis of the local performance of its MSPs in multiple States.

OPM also proposes that the MSPP issuer authorize the accrediting entity to release to OPM and to Exchanges a copy of the MSPP issuer's most recent accreditation survey, along with any survey-related information that OPM or an Exchange may require, such as corrective action plans and summaries of findings. The release of survey information is intended to strengthen OPM's oversight of MSPs and MSPP issuers and is the same as standards for QHP issuers set forth in 45 CFR 156.275. OPM requests comments on its proposed accreditation requirements.

12. Reporting Requirements (§ 800.112)

OPM also proposes to use the FEHBP approach as a model for reporting requirements, and OPM requests comment on this approach. Examples of reporting that is currently required for the FEHBP and that may be required for the MSPP include financial reports, premium payment information, enrollment reporting, and quality assurance information.[45] OPM will determine the data and information that MSPP issuers report and the frequency and process for submitting such reports. Reporting of certain types of information is critical for OPM to implement and administer the MSPP. To oversee MSPP contracts, OPM will need to collect certain information to ensure the integrity of the MSPP, to protect enrollees, to prevent fraud and abuse, to monitor quality and quality improvement, and for other purposes. The agency will develop and issue guidance on this subject for MSPP issuers and potential issuers.

The proposed regulation specifies that OPM may collect such data and information as are permitted or required by the Affordable Care Act to be collected from an MSPP issuer. Additionally, the Affordable Care Act at section 3101(a)(2)(E), requires that "any reporting requirement imposed for purposes of measuring quality under any ongoing or federally conducted or supported health care or public health program, activity, or survey includes requirements for the collection of data on individuals receiving health care items or services under such programs activities by race, ethnicity, sex, primary language, and disability status."

Therefore, OPM intends to collect this data by these categories. OPM will also collect such other data and information as it determines necessary for the oversight and administration of the MSPP. OPM requests comments on the types of information it proposes to collect and mechanisms that can reduce unnecessary duplication of data disclosure to OPM, HHS, States, and the Exchanges.

With respect to quality reporting, under FEHBP, OPM requires all health plans to report their performance through Healthcare Effectiveness Data

[43] This HHS standard is based on the NAIC Managed Care Plan Network Adequacy Model Act (74–1) and establishes a baseline for measuring network adequacy.

[44] 45 CFR 155.1055(b) establishes that QHP service areas be established in a non-discriminatory manner and states that: "such service areas meet the following minimum criteria: (a) The service area of a QHP covers a minimum geographical area that is at least the entire geographic area of a county, or a group of counties defined by the Exchange, unless the Exchange determines that serving a smaller geographic area is necessary, nondiscriminatory, and in the best interest of the qualified individuals and employers. (b) The service area of a QHP has been established without regard to racial, ethnic, language, health status-related factors specified under section 2705(a) of the PHS Act, or other factors that exclude specific high utilizing, high cost or medically-underserved populations."

[45] OPM's Routine Reports and Submissions required for FEHB carriers is available at *http://www.opm.gov/carrier/reports/index.asp.*

and Information Set (HEDIS) metrics and Consumer Assessment of Healthcare Providers and Systems (CAHPS) surveys, independent of the source of plan accreditation. This allows for comparison between plans in a consistent manner. OPM expects to take a similar approach to performance measurement in MSPs to facilitate oversight. OPM requests comments on the unique aspects of accreditation and reporting for MSPs as compared with accreditation of QHPs.

13. Benefit Plan Material or Information (§ 800.113)

OPM has defined the term "benefit plan material or information" narrowly to include explanations or descriptions, whether printed or electronic, that describe a health insurance issuer's products. The term does not include a policy or contract for health insurance coverage.

OPM proposes that MSPP issuers comply with Federal and State laws related to benefit plan material or information. OPM also proposes that an MSPP issuer must comply with OPM guidance specifying OPM standards, process, and timeline for approval of benefit plan material or information.

Similar to QHPs, OPM proposes that all MSP enrollee notices must meet minimum access standards for individuals with limited English proficiency and for individuals with disabilities as described in 45 CFR 155.205(c). As stated in the final Exchange rule, HHS intends to issue further guidance on minimum standards to address language access and coordinate HHS accessibility standards with insurance affordability programs, and across HHS programs, as appropriate. OPM expects MSPP issuers to adhere to these minimum access standards once HHS publishes this guidance. OPM may also establish additional standards for MSPP applications and notices.

OPM proposes that an MSPP issuer is responsible for the accuracy of its benefit plan material or information. Benefit plan material or information must also be in plain language, be truthful, not be misleading, and contain no material omissions. QHPs must comply with the provisions of section 2715 of the PHS Act and its implementing regulations at 45 CFR 147.200 on uniform explanation of coverage documents and standardized definitions, and OPM also will require MSPs to comply with the statute and regulations. Additionally, OPM expects that MSPP issuers will meet any requirements that allow standardized benefit information to be displayed on HHS or Exchange web portals.

Unlike the policy or contract for health insurance coverage, which OPM will review and approve, OPM proposes to review and approve only certain benefit plan material or information as defined in § 800.20 of the proposed regulation. OPM may not necessarily review all benefit plan material or information. It may request from MSPP issuers those materials that it wishes to review and approve. OPM's review will focus on the MSPP issuer's compliance with the standards promulgated by OPM with respect to benefit plan material or information. OPM will work with States concerning this review of benefit plan material or information and may work with States to define the respective roles through Memoranda of Understanding (MOU).

In paragraph (g) of § 800.113, OPM proposes to allow an MSPP issuer to state that OPM has certified a plan as an MSP and will oversee its administration. OPM is aware that many States have adopted laws or regulations prohibiting issuers from using advertisements that "may lead the public to believe that the advertised coverages are somehow provided by or endorsed by [a] governmental agenc[y]." [46] However, because OPM will have certified an MSPP issuer and an MSP as meeting certain standards, potential issuers may wish to include this fact in materials they distribute to the public subject to review by OPM. OPM does not view this as a violation of State law anti-endorsement provisions, because it is a recitation of the fact that the issuer is providing coverage pursuant to a contract with OPM.

14. Compliance With State Law (§ 800.114)

In § 800.114, OPM proposes that MSPP issuers generally must comply with State law in accordance with section 1334(b)(2) of the Affordable Care Act. However, the Affordable Care Act provides that MSPs and MSPP issuers need not comply with State laws that:

(1) Are inconsistent with section 1334 of the Affordable Care Act or regulations issued to implement that section;

(2) Prevent the application of a requirement of part A of title XXVII of the PHS Act; or

(3) Prevent the application of a requirement of title I of the Affordable Care Act.

Accordingly, OPM reserves the right to determine in its judgment, as effectuated through an MSPP contract, these regulations, or OPM guidance, whether particular State laws fall into these categories.

15. Level Playing Field (§ 800.115)

In § 800.115, OPM proposes to maintain a level playing field by requiring MSPs and MSPP issuers to comply with the State and Federal laws relating to the 13 categories listed in section 1324(b) of the Affordable Care Act.

16. Process for Dispute Resolution (§ 800.116)

In § 800.116, OPM proposes a process for resolving disputes about the applicability to the MSPs and MSPP issuers of State laws not related to the categories set forth in section 1324(b) of the Affordable Care Act. Under this process, a State may request that OPM reconsider a standard applicable to MSPs or MSPP issuers that is consistent with that State's laws for QHPs or QHP issuers. As discussed above (see discussion on proposed § 800.114), the State must demonstrate that the law is not inconsistent with section 1334 or regulations issued to implement that section; does not prevent the application of part A of title XXVII of the PHS Act; and does not prevent the application of a requirement of the sections of title I of the Affordable Care Act specified in § 800.101 of this proposed regulation. In making these determinations, OPM proposes to examine several factors, including whether the law at issue:

(1) Imposes on MSPP issuers or MSPs any requirement that differs from those applicable to QHP issuers or QHPs offered in one or more Exchanges in that State;

(2) Creates responsibilities, administrative burdens, or costs for an MSPP issuer that significantly deter or impede the MSPP issuer from offering a viable product in one or more Exchanges;

(3) Creates responsibilities, administrative burdens, or costs for OPM that significantly deter or impede OPM's effective implementation of the MSPP; or

(4) Prevents an MSPP issuer from offering an MSP in one or more Exchanges in a State.

OPM solicits comments on whether to have such a process, its scope, the factors OPM should consider when determining whether State law is applicable or whether the relevant market has been or will be disrupted by the inapplicability of State law, and whether the process will be an effective way to resolve any such disputes. OPM

[46] These State law prohibitions derive from the NAIC's Advertisements of Accident and Sickness Insurance Model Regulation § 13.C. (Apr. 1999).

further invites comments on whether the process should also be available for States to raise disputes concerning laws related to the 13 categories listed in section 1324(b) of the Affordable Care Act.

17. Other Issues

Adjusted community rating:

Section 1334(c)(1)(D) of the Affordable Care Act requires that MSPP issuers offer the MSP in all geographic regions and in all States that have adopted adjusted community rating before March 23, 2010, the enactment date of the Affordable Care Act. The statute does not require that these adjusted community rating States be included in the first year of the phase-in process described in section 1334(e) of the Affordable Care Act and in § 800.104 of this proposed regulation for several reasons. First, in 2014 all health insurance issuers in the individual and small group market, both inside and outside the Exchange, must comply with section 2701 of the PHS Act and will therefore use adjusted community rating based only on age, tobacco use, geographic area, and family composition. The States described in section 1334(c)(1)(D) will therefore not be unique. Second, OPM interprets the phase-in provision of subsection (e) of section 1334 to permit a phase-in of compliance with (c)(1)(D) of section 1334. OPM's rationale is that an MSPP issuer has four years to offer MSPs in each Exchange in all States and the District of Columbia, and section 1334(e) contains no requirements about the particular States an MSPP issuer must cover in any of the phase-in years. Potential issuers will need flexibility to choose their initial States and the order in which they phase in other States. For this reason, OPM proposes not to identify any specific States that an MSPP issuer must cover in the initial years of the MSPP.

Financial requirements:

OPM anticipates MSPP issuers will meet State financial requirements including participation in State guaranty funds and meeting State reserving requirements. OPM may seek to execute an MOU between a State and OPM specifying how OPM will be notified and the circumstances that would trigger a payment from such fund with respect to an MSPP issuer or MSP. OPM invites comments on the participation of MSPP issuers in State guaranty funds. OPM also seeks comment on how it may further ensure the financial stability of MSPs across State lines.

C. Premiums, Rating Factors, Medical Loss Ratios, and Risk Adjustment (Subpart C, 800.201 Through 800.204)

Section 1334(a)(4) on "Administration" directs that OPM implement the MSPP "in a manner similar to the manner" in which OPM implements the contracting provisions with respect to carriers under the FEHBP, including negotiating with each MSPP issuer: (1) A medical loss ratio (MLR); (2) a profit margin; (3) the premiums to be charged; and (4) such other terms and conditions of coverage as are in the interests of enrollees in such plans. The following proposed provisions of the regulation implement this section.

1. General Requirements (§ 800.201)

As it does with FEHBP carriers, OPM proposes in § 800.201(a) and (b) to negotiate annually with an MSPP issuer the premiums for each MSP offered by that issuer, and these premiums will remain in effect for the 12-month plan year. OPM has authority to negotiate "premiums to be charged," including the authority to review an MSPP issuer's rating practices. "Rating" means the process, including rating factors, numbers, formulas, methodologies, and actuarial assumptions, used to set premiums for a health plan. In addition to rating factors, HHS or the States may set other requirements for premium increases in the individual and small group markets. In reviewing an MSPP issuer's proposed rate information, OPM plans to review an MSPP issuer's rate proposal and cost-sharing arrangements for discriminatory benefit design, and will work closely with States to identify and investigate any potentially discriminatory benefit design in MSPs.

In FEHBP, OPM issues rating guidance to FEHBP carriers via a carrier letter. This guidance provides carriers information needed to construct their rating structures for FEHBP and instructions for submitting rates for negotiation with OPM. Similarly, OPM proposes to issue guidance addressing methods for the development of rates for the MSPP. In addition, this guidance will provide instructions for submitting rating structures as part of OPM's process for negotiating premiums with each MSPP issuer.

OPM intends that each MSP set its premiums on a State-by-State basis. Unlike the FEHBP, there will not be any MSPs that are offered at one premium nationwide. Therefore, OPM intends to follow State rating laws as much as practicable so as not to distort local markets. This will also be necessary in order for MSPP issuers to participate in the temporary reinsurance program established pursuant to section 1341 of the Affordable Care Act and 45 CFR part 153, the risk corridor program established pursuant to section 1342 of the Affordable Care Act and 45 CFR part 153, and the risk adjustment program established pursuant to section 1343 of the Affordable Care Act and 45 CFR part 153.

OPM recognizes that HHS has requested comments on calculation of AV in its proposed EHB rule; see proposed 45 CFR 156.135. The proposed HHS regulation states an issuer would use the AV calculator developed by HHS to determine the plan's level of coverage as proposed, subject to exceptions in section 156.135(b) OPM proposes in section 800.201(d) that MSPP issuers shall calculate AV in the same manner as QHP issuers. OPM intends to review MSPP issuer compliance with these AV provisions. OPM will coordinate its approach with the final HHS EHB rule on this issue.

In approving rates for MSPs, OPM intends to follow State rating standards with respect to rating factors generally applicable in a State. OPM will comply with section 2701 of the PHS Act and any applicable regulations under that section that sets forth basic requirements in terms of rating factors and their application. Under section 2701, States have flexibility in applying narrower ratios for age and tobacco use and may require issuers to use pure community rating. Section 1334(a)(4) gives OPM the explicit authority to negotiate premiums, profit margins, and an MLR. Recognizing that some States have a prior approval process for rates and the authority to reject rates, OPM intends to work closely with each State in approving a rate for the MSPs in that State and will consult with that State about patterns in its markets and about other rates that an MSPP issuer might be proposing in that State for non-MSPs. However, the final decision regarding rates for MSPs rests with OPM, as required by the statute. OPM proposes that MSPP issuers follow State rating standards, and OPM's process will meet the standards with respect to review and disclosure requirements for an "effective rate review program" as set out in 45 CFR 154.[47]

As described above, and set out in the proposed § 800.201(e) and (f), with respect to rate review, OPM intends to conduct its own rate review process, but intends to share its rate review analysis

[47] Rate Increase Disclosure and Review, 45 CFR 154 (May 23, 2012), available at *http://cciio.cms.gov/resources/files/rate_increase_final_rule.pdf.*

with each State in which an MSP is operating. MSPP issuers are subject to a State's rate review process including a State's Effective Rate Review Program established by HHS pursuant to section 2794 of the PHS Act and 45 CFR 154. OPM proposes that for States with Effective Rate Review Programs under section 2794, the MSPP issuer would comply with the State standards. In addition, OPM proposes that in States where HHS is reviewing rates, HHS would take the judgment of OPM for MSP rates. Furthermore, MSPP issuers must comply with the reporting and disclosure requirements for all rate justifications to HHS, States, and Exchanges, such as the requirements set forth in 42 CFR 156.210(c).

Each State would have the opportunity to review the MSP rates under its own procedures and processes. If a State disagrees with OPM's determination to approve the MSP rates, OPM would work with the State to attempt to resolve the differences. OPM expects that few such disagreements will arise and, if they do, that we will be successful in resolving them in a manner that is acceptable both to OPM and the State at issue. In the event that a State withholds approval of an MSP rate for reasons that OPM determines, in its discretion, to be arbitrary, capricious, or an abuse of discretion, the Act authorizes the Director to make the final decision to approve rates for participation in the MSPP notwithstanding the absence of State approval. We expect that the Director will rarely, if ever, have to exercise this authority to approve MSP rates over the objection of a State. OPM welcomes comments on whether this is an appropriate approach and on the impact of this approach.

After OPM and the MSPP issuer complete the rate negotiation process, and OPM approves the rates, an MSPP issuer would file rates with the Exchange, when necessary to post MSP premium and rate information to the Exchange portal, and with the State, when necessary to meet licensure requirements.

Section 1312(c)(1) and (2) of the Affordable Care Act provide that a health insurance issuer consider all enrollees in all non-grandfathered health plans in the individual market to be members of a single risk pool and all enrollees in non-grandfathered health plans in the small group market to be members of a single risk pool within a State. With proposed § 800.201(g), OPM clarifies that an MSPP issuer must consider MSP enrollees to be members of the same risk pool as all other enrollees of the issuer in non-grandfathered health plans in the individual and small group markets, respectively. *OPM intends for the MSPP issuer to be subject to any Federal or State regulations that implement or enforce section 1312(c), such as proposed 45 CFR 156.80.* In addition, section 1312(c)(3) permits a State to merge the individual and small group markets within the State. Under § 800.201(g), a State election to merge its individual and small group markets, as well as any Federal or State regulations promulgated to implement section 1312, would apply to an MSPP issuer.

2. Rating Factors (§ 800.202)

Section 2701 of the PHS Act, as amended by the Affordable Care Act, requires issuers in the individual and small group market to rate based only on permitted rating factors: Family composition, geographic area, age, and tobacco use within limits. Section 1334(c)(1)(C) of the Affordable Care Act explicitly limits MSPP issuers to only these factors as well. OPM proposes in § 800.202(a) that MSPP issuers shall comply with requirements setting standards for fair health insurance premiums appearing in HHS regulations. MSPP issuers must follow standards set for rating areas in a State established under any HHS or State regulations implementing section 2701 of the PHS Act.

In approving rates for MSPs, OPM intends to follow State rating standards with respect to rating factors, including the application of tobacco use. OPM will also coordinate its approach with the final HHS health insurance market rules.

3. Medical Loss Ratio (§ 800.203)

OPM expects MSPP issuers to attain the MLR required under section 2718 of the PHS Act and regulations promulgated by HHS. Section 1334(a)(4) of the Affordable Care Act authorizes OPM to set an MLR for each MSP, similar to FEHBP. OPM reserves the authority to impose a different, MSP-specific MLR threshold (i.e., an MLR threshold based only on an MSPP issuer's MSP population in each State) if that would be in the best interests of enrollees. Proposed § 800.203 articulates this discretion. It is not OPM's intention to apply a national aggregate MLR. OPM requests comments on its proposal to set an MSP-specific MLR and the methodology that MSPP issuers should use to calculate an MSP-specific MLR.

The proposed rule gives OPM the discretion to take appropriate action if an MSPP issuer fails to attain any required MLR. Such appropriate actions may include intermediate sanctions, such as suspension of marketing. In the case of widespread, repeated failures, more severe sanctions may include decertifying an MSP in one or more States or terminating an MSPP issuer's contract pursuant to § 800.404. OPM will coordinate all actions concerning MLR with HHS to ensure that there is not duplicative reporting by issuers or duplicative compliance activity.

In addition to the explicit authority for OPM to set an MLR, section 1334(a)(4) also provides OPM with the authority to set a profit margin. OPM has not proposed a standard for profit margin. OPM seeks comment on whether OPM should set such a standard, and the impact that such a standard would have on the Exchanges and any existing state requirements concerning profit margin.

4. Reinsurance, Risk Corridors, and Risk Adjustment (§ 800.204)

OPM proposes that an MSPP issuer participates in the transitional reinsurance program for the individual market established pursuant to section 1341 of the Affordable Care Act and 45 CFR part 153 and comply with requirements issued by HHS or the State, if the State is operating an Exchange, to implement the program. For example, if a State were to impose additional reinsurance assessments on issuers, MSPs would be subject to such assessments in order to maintain a level playing field. OPM also proposes that an MSPP issuer participates in the temporary risk corridors program established pursuant to section 1342 of the Affordable Care Act and 45 CFR part 153 and comply with requirements issued by HHS to implement the program. Additionally, OPM proposes that an MSPP issuer participates in the risk adjustment program established pursuant to section 1343 of the Affordable Care Act and 45 CFR part 153 and comply with requirements on issued by HHS or the State, if the State is operating an Exchange, to implement the program. Participation by MSPP issuers in these programs will ensure that all issuers have the same fiscal responsibilities and protections.

D. Application and Contracting Procedures (Subpart D, 800.301 Through 800.306)

This subpart describes the process by which issuers can apply to participate in the MSPP.

1. Application Process (§ 800.301)

Section 1334(a) authorizes OPM to implement the MSPP without regard to section 5 of title 41, United States Code, or other statutes requiring competitive

bidding. Therefore, OPM has structured the process as an application process rather than a request for proposals, which affords the agency discretion to contract with as many issuers as meet the requirements of section 1334. The MSPP contract application must be in such form, contain such information, and be submitted in such manner as OPM may prescribe. This process is modeled on the approach OPM uses under the FEHBP.

2. Review of Applications (§ 800.302)

OPM will review applications to determine whether the applicant meets the requirements of this part. OPM may request additional information from the applicant to make the determination. OPM may either accept an applicant to enter into MSPP contract negotiations or decline to enter negotiations with the applicant. In the latter case, OPM will inform the applicant in writing of the reason(s) for declining the application.

OPM reserves discretion about whether to enter into contract negotiations with an applicant. However, a decision by OPM to decline an application to participate in the MSPP does not preclude the applicant from submitting an application to participate in the MSPP for a subsequent year.

3. MSPP Contracting (§ 800.303)

An applicant does not become an MSPP issuer until it signs a contract with OPM to participate in the MSPP. OPM will establish a standard contract for the MSPP. OPM will approve benefit packages and negotiate premiums for an MSP for each plan year. OPM may also negotiate additional terms, conditions, and requirements that are in the interests of MSP enrollees or that OPM, in consultation with HHS, determines to be appropriate.

Each MSPP contract will specify the Exchanges in which the MSPP issuer is authorized to offer the MSP for a plan year, as well as the benefit packages and premiums to be charged. An MSPP issuer cannot offer an MSP on an Exchange unless its MSPP contract includes a certification authorizing the MSPP issuer to offer the MSP on that Exchange.

4. Term of the Contract (§ 800.304)

The term of the contract will be for a period of at least 12 consecutive months defined as the plan year. "Plan year" is defined as a consecutive 12-month period during which the MSP provides coverage for health benefits and may be a calendar year or otherwise.

5. Contract Renewal Process (§ 800.305)

If an MSPP issuer is in compliance with the requirements of this rule and wishes to continue participating in the MSPP, OPM will conduct negotiations with such an issuer to renew its MSPP contract. The agency recognizes that section 1334(a)(2) creates an expectation of automatic renewal. However, OPM intends to fulfill its statutory responsibility to ensure that all MSPP issuers and MSPs remain in compliance with all legal requirements. Therefore, an MSPP issuer wishing to continue in the MSPP for a subsequent year must provide to OPM, in the form, manner, and timeline prescribed by OPM, the information requested by OPM for determining whether the MSPP issuer continues to meet the requirements of the MSPP. OPM retains discretion to renew the MSPP contract for a subsequent plan year with an MSPP issuer who submits the information described above and continues to meet the requirements of applicable law and this rule. OPM may decline to renew the MSPP contract of an MSPP issuer if: (1) OPM and the MSPP issuer fail to agree on benefits and premiums for an MSP on one or more Exchanges for the subsequent plan year; (2) the MSPP issuer has engaged in conduct described in § 800.404(a); or (3) OPM determines that the MSPP issuer will be unable to comply with a material provision of section 1334 of the Affordable Care Act.

If OPM and the MSPP issuer fail to agree on benefits and premiums for an MSP on one or more Exchanges by the date set by OPM, that MSP would be offered on that Exchange or Exchanges in the subsequent plan year with the same premiums and benefits as in the current plan year, unless OPM or the MSPP issuer provides written notice of non-renewal, or OPM exercises its discretion to withdraw the certification of that MSP on one or more Exchanges. Based on its experience with the FEHBP, OPM anticipates that situations in which OPM and the MSPP issuer fail to agree on premiums and benefits will occur infrequently. If OPM chooses not to renew an MSPP issuer's MSPP contract, OPM must provide the MSPP issuer with notice and the opportunity for a hearing pursuant to § 800.405. It is OPM's intention to ensure that premium and benefit information for all MSPs are submitted to each Exchange in compliance with the timeline established by that Exchange.

6. Nonrenewal (§ 800.306)

For this subpart, OPM is defining "nonrenewal" to mean the decision by either OPM or an MSPP issuer to not renew an MSPP contract. Either OPM or an MSPP issuer may decline to renew a contract by giving a written notice of nonrenewal. The issuer's notice must be given in accordance with its MSPP contract, and an issuer must comply with the rules of an Exchange with respect to termination of a QHP, including the requirement to provide advance notice in writing to enrollees. If an Exchange does not specify the timeframe for notifying enrollees, OPM will require notice no later than 90 days prior to termination, unless OPM determines that there is good cause for less than 90 days' notice.

E. Compliance (Subpart E, 800.401 Through 800.405)

This subpart describes how OPM will enforce compliance in the MSPP.

1. Contract Performance (§ 800.401)

Pursuant to an MSPP contract with OPM, an MSPP issuer must meet the requirements of section 1334 and the requirements of this part. Each MSPP issuer will be required to:

- Have the financial resources, in the judgment of OPM, to carry out its obligations under the MSPP.
- Keep reasonable financial and statistical records, and furnish reports related to these records with respect to the MSP or the MSPP, as may be requested by OPM.
- Permit representatives of OPM (including the OPM Office of Inspector General), the U.S. Government Accountability Office, and any other applicable Federal government auditing entities to audit and examine its records and accounts which pertain, directly or indirectly, to the MSP at such reasonable times and places as may be designated by OPM or the U.S. Government Accountability Office. Also, note that nothing in this proposed regulation changes or diminishes the authorities of HHS, including the authorities of the HHS Office of Inspector General.
- Submit to OPM a properly completed and signed novation or change-of-name agreement in a timely manner and in accordance with 48 CFR 42.12.
- Perform the MSPP contract in accordance with prudent business practices as described below.
- Not engage in poor business practices as described below.

Under the MSPP, OPM proposes prudent businesses practices to include, but not be limited to: (1) Timely compliance with OPM instructions and directives; (2) legal and ethical business and health care practices; (3) compliance with the terms of the MSPP

contract, regulations, statutes, and additional agency guidance; (4) timely and accurate adjudication of claims or rendering of medical services; (5) a system of accounting for costs incurred under the MSPP contract; (6) accurate accounting reports of administration costs relevant to the MSPP contract; (7) applying performance standards for assuring contract quality outlined in § 800.402; and (8) a system of internal controls related to the MSP and MSPP issuer.

Under the MSPP, OPM will consider the following types of activities, among others, as poor business practices: (1) Using fraudulent or unethical business or health care practices or otherwise displaying a lack of business integrity or honesty; (2) repeatedly or knowingly providing false or misleading information in the rate setting process for an MSP; (3) failing to comply with OPM instructions or directives; (4) having an accounting system that is incapable of separate accounting for costs incurred under the MSPP contract and/or lacks internal controls necessary to fulfill the terms of the MSPP contract; (5) failing to assure that the MSPP issuer properly pays or denies claims, or provides medical services which are inconsistent with standards of good medical practice; and (6) entering into contracts or employment agreements with providers, provider groups, or health care workers that include provisions or financial incentives that directly or indirectly create an inducement to limit or restrict communication about medically necessary services to any individual covered under the MSPP. Financial incentives are defined as bonuses, withholds, commissions, profit sharing or other similar adjustments to basic compensation (e.g., service fee, capitation, salary) which have the effect of limiting or reducing communication about appropriate medically necessary services.

OPM seeks to encourage MSPP issuers to meet or exceed performance standards. OPM proposes to establish performance escrow accounts for each MSPP issuer through a modest assessment on issuers. The funds from such accounts could be used to provide a rebate to enrollees in cases of inadequate performance or could be returned to plan as a reward for meeting performance standards. These accounts could also be used to hold funds paid in response to audit findings, not meeting performance standards under the contract, or other issues of noncompliance. OPM requests comment on the establishment of a performance escrow account. Specifically, OPM solicits comments on how best to collect, hold, and release these funds. OPM also requests comments on alternative methods of fulfilling OPM's goals of ensuring contract compliance and ensuring performance standards are met.

2. Contract Quality Assurance (§ 800.402)

This section describes general policies and procedures to ensure that services acquired under the MSPP contract conform to the contract's quality assurance requirements. Periodically, OPM will evaluate an MSPP issuer's system of internal controls as discussed in § 800.401. Upon the initial review, OPM will acknowledge in writing whether or not the system established and maintained by the MSPP issuer is consistent with the requirements set forth in the MSPP contract. In addition to reviewing an MSPP issuer's system of internal controls, OPM will issue specific performance standards for MSPP contracts. The OPM Office of the Inspector General will conduct periodic evaluations of the contractor's system of internal controls.

3. Fraud and Abuse (§ 800.403)

Pursuant to the MSPP contract, an MSPP issuer is required to have a program to assess its vulnerability to fraud and abuse *as well as to address such vulnerabilities*. The fraud detection system of the MSPP issuer must be designed to detect and eliminate fraud and abuse by employees of the MSPP issuer and its subcontractors, by providers furnishing goods and services to MSP enrollees, and by MSP enrollees. An MSPP issuer must provide to OPM, upon request, such information or assistance as may be necessary for OPM to carry out any audit activities. OPM will determine the timeline, form, and manner in which the MSPP issuer must submit this information to OPM.

4. Compliance Actions (§ 800.404)

OPM may impose compliance actions against an MSPP issuer for the following causes, as OPM may determine:

- Failure of the MSPP issuer to meet the requirements of the MSPP contract and § 800.401(a) and (b).
- Sustained failure of the MSPP issuer to perform the MSPP contract in accordance with prudent business practices.
- Evidence of poor business practices or demonstration of a pattern of poor business practices by the MSPP issuer.
- Violation of law or regulation by the MSPP issuer.

At any time during the contract term, OPM may impose a compliance action against an MSPP issuer if it determines that the MSPP issuer is not in compliance with applicable law, this part, or the terms of the MSPP contract. In this situation, OPM may take compliance actions against the MSPP issuer, including, but not limited to: (1) Establishing and implementing a corrective action plan; (2) imposing intermediate sanctions; (3) imposing monetary penalties; (4) reducing the MSPP issuer's service area; (5) withdrawing certification for the MSPP issuer to offer an MSP on one or more Exchanges; (6) not renewing the MSPP contract; or (7) terminating the MSPP contract. If OPM initiates a compliance action, it will notify the MSPP issuer in writing of the compliance action. The notice will indicate the specific reason for the compliance action. If the compliance action is the withdrawal of the certification of the MSPP issuer to offer the MSP on one or more Exchanges, the nonrenewal of the MSPP contract, or the termination of the MSPP contract, the notice must also include a statement that the MSPP issuer is entitled to request a reconsideration of OPM's determination to impose the compliance action in accordance with § 800.405, including a hearing on the issuer's request.

If OPM does not renew or terminates an MSPP contract or withdraws certification of the MSPP issuer to offer an MSP on one or more Exchanges, the MSPP issuer must adhere to any requirements related to notification of termination of a QHP imposed by an Exchange. If an Exchange does not have requirements to notify enrollees of the termination of a QHP, then the MSPP issuer must provide current enrollees with a notice of the MSP's termination no later than 90 calendar days prior to termination.

For purposes of subpart E of 45 CFR part 800, termination of a contract means OPM's withdrawal of approval of the contract.

5. Reconsideration of Compliance Actions (§ 800.405)

In the case of withdrawal of the certification of the MSPP issuer to offer the MSP on one or more Exchanges, nonrenewal of the MSPP contract, or termination of the MSPP contract, the MSPP issuer has the right to request a reconsideration of OPM's action in accordance with the process proposed in this regulation. OPM's reconsideration may be conducted by the Director or a representative designated by the Director who did not participate in the initial decision that is the subject of the request for review. OPM will notify the MSPP issuer in

writing of the final decision and the specific reasons for that final decision. OPM's written decision will constitute final agency action that is subject to review under the Administrative Procedure Act in the appropriate U.S. district court. Such review is limited to the record that was before OPM when it made its decision.

F. Appeals by Enrollees for Denial of Claims for Payment or Service (Subpart F, 800.501 Through 800.505)

The Affordable Care Act added a new section 2719 to the PHS Act. This section requires that all non-grandfathered group health plans and health insurance issuers provide for internal appeals and external review processes that meet specific consumer protection standards. Under regulations and guidance issued by HHS, along with the Departments of Labor and Treasury, health insurance issuers must meet specific standards with respect to internal appeals and external review processes. With respect to external review, States must have external review processes that meet specific minimum criteria. If a State external review process meets these criteria, an issuer in that State must comply with that external review process. In States with no external review process, or with a process that has not been determined to meet specific criteria, health insurance issuers must implement a separate "federal external review process." In this subpart, OPM proposes that MSPP issuers have an internal appeals process consistent with the requirements of section 2719 of the PHS Act and its implementing regulations at 45 CFR 147.136(b). With respect to its internal appeals process, therefore, an MSP must meet the same standards as QHPs.

With respect to external review, OPM proposes that MSPP issuers would comply with OPM's external review process, which will meet the standards for State external review processes established under section 2719 of the PHS Act and 45 CFR 147.136(c). OPM's external review process for the MSPP will be similar to the disputed claims process administered under the FEHBP.

The disputed claims process serves two purposes: First, it provides an avenue of redress for enrollees whose claims have been denied, and second, it permits OPM to ensure the uniform and correct administration of FEHBP contracts. Similarly, proposed § 800.504(b) would protect enrollees by creating a process for review of adverse benefit determinations while simultaneously providing OPM with a necessary tool for contractual oversight. By reviewing these adverse benefit determinations, OPM would be able to ensure the uniform and equitable administration of the MSPP. OPM will issue further guidance explaining the details of its process for external review of adverse benefit determinations.

OPM considered an approach for external review that would expand the use of the Federal external review process that OPM administers in conjunction with HHS, which is currently used for external review of cases arising in States without effective processes, to be the exclusive method of external review for the MSPP. OPM also considered a hybrid approach to external review under which OPM would render a final decision in all cases, using the standards and timeframes of 45 CFR 147.136(d) for adverse benefit determinations based on medical judgment, and using a process similar to the FEHBP disputed claims process for adverse benefit determinations not based on medical judgment.

OPM proposes instead to build on its expertise concerning external review while adhering to external standards under section 2719 and its implementing regulations. MSP enrollees would benefit from access to an external review process that is consistent with the process that is available to enrollees in QHPs for adverse benefit determinations. OPM considers it necessary for the appropriate administration of MSPP contracts to perform external review of adverse benefit determinations.

For all notices involving internal appeals and external review, cultural and linguistic appropriateness standards, as articulated in 45 CFR 147.136(e), would apply. Notices to MSP enrollees must adequately describe the enrollee's rights and obligations with respect to external review of adverse benefit determinations. OPM will review such notices to ensure appropriateness and accessibility.[48]

OPM's decision about an adverse benefit determination will constitute final agency action that is subject to review under the Administrative Procedure Act in the appropriate U.S. district court.

OPM requests comments on this approach for MSPP appeals as well as the alternative approaches mentioned and feasible combinations of the different approaches. OPM also invites comments on the impact of the approaches in providing for a level playing field for all plans on the Exchanges, consumer choice and consistency of processes across different Exchanges.

G. Miscellaneous (Subpart G, 800.601 and 800.602)

Section 800.601 reserves to OPM the right to implement and supplement this regulation with operational guidelines.

Section 800.602(a) implements the requirement of section 1334(a)(6) of the Affordable Care Act that at least one MSP on each Exchange not provide coverage of services described in section 1303(b)(1)(B) of the Affordable Care Act. OPM proposes to implement this requirement across all Exchanges subject to the phase-in provision of § 800.104. In § 800.602(b), OPM proposes to apply the State opt out provisions in section 1303(a) of the Affordable Care Act to MSPs.

IV. Regulatory Impact Analysis

OPM has examined the impact of this rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993) and Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011). 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). A regulatory impact analysis must be prepared for major rules with economically significant effects ($100 million or more in any 1 year adjusted for inflation). Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as an action that is likely to result in a rule that may:

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

[48] Note, nothing in this regulation should be construed as limiting an individual's rights under federal civil rights statutes, such as Section 1557 of the Affordable Care Act and Title VI of the Civil Rights Act of 1964 (Title VI). For example, to ensure non-discrimination on the basis of national origin, entities covered by Title VI must take reasonable steps to ensure meaningful access by persons with limited English proficiency to their programs and activities. For more information, see "Guidance to federal Financial Assistance recipients regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons to better understand the obligations under Title VI," at *http://www.hhs.gov/ocr/civilrights/resources/specialtopics/lep/policyguidancedocument.html.*

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

(3) Materially alter the budgetary impacts of entitlement 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 Executive Order 12866.

The economic impact of this rule may exceed the $100 million threshold for at least one year; we therefore assess costs and benefits as required by the Executive Order.

This rule gives health insurance issuers the opportunity to contract with OPM to offer a product on the Affordable Insurance Exchanges, but does not require those issuers to outlay funds. In a 2009 analysis of legislation that ultimately became the Affordable Care Act, the Congressional Budget Office (CBO) and the Joint Committee on Taxation (JCT) estimated the effects of the Affordable Care Act on nationwide insurance enrollment and on the federal budget.[49] CBO and JCT estimated that "from 2016 on, between 23 million and 25 million people will receive coverage through the [E]xchanges." [50] We lack the information necessary to make assumptions about the potential enrollment penetration for MSPs on the Exchange but seek comment on the number of states where MSPs will participate and the influence of current market dynamics on enrollment in MSPs.

One primary benefit of health insurance coverage would be an increase in longevity or health for newly enrolled individuals. Improved access to health care services has been shown to lead to higher use of preventive services and health improvements, such as reduced hypertension, improved vision and better self-reported health status, as well as better clinical outcomes and lower mortality.[51] [52]

Additional benefits would be generated for newly enrolled individuals in the form of improved financial security. There is evidence that bankruptcy filings, for instance, decrease in response to increases in Medicaid eligibility.[53] Furthermore, a 2011 analysis by the Office of the Assistant Secretary for Planning and Evaluation (ASPE) found that most of the uninsured were unable to afford a single hospitalization, because 90 percent of the uninsured reported having total financial assets below $13,000.[54] A related benefit would be generated by increased access to non-employment-based health insurance, which can give individuals greater flexibility to separate from current employment in order to search for positions that better match their skills or interests.

Expansion of health insurance coverage leads to many benefits such as improved access to health care, and improved financial security for the newly insured. However, insurance coverage, which generally makes medical care more affordable, can lead to an inefficiency commonly called moral hazard. When people make economic decisions to purchase goods and services, but do not bear the full cost of these goods and services, there can be a tendency to purchase more than the efficient amount of that service. Studies that estimated the effects of Medicare, however, found that the cost of this inefficiency is likely more than offset by the benefit of risk reduction.[55] [56]

Administrative costs of the rule would be generated both within OPM and by issuers deciding to offer MSPs. The costs that MSPP issuers may incur are the same as those of QHPs and, as stated in 45 CFR part 157, will include: accreditation, network adequacy standards, and quality improvement strategy reporting. The costs associated with MSP certification offset the costs that issuers would face were they to be certified by the State, or HHS on behalf of the State, to offer QHPs through the Exchange.

Finally, some of the most notable effects of Exchanges in general, and MSPs in particular, may not be net social costs or benefits, but would instead be transfers between members of society. Potential examples include decreases in uncompensated care and changes in premiums that do not reflect shifts in society's resource use to or away from provision of medical services and insurance policies.

OPM lacks data to quantify most of these benefits, costs and transfers. Perhaps most notably, OPM cannot isolate the effects of MSPs from forecasts of the overall effects of the Affordable Care Act coverage provisions, and, therefore, requests comments on any aspects of this proposed rule's cost-benefit analysis.

V. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35; see 5 CFR part 1320) requires that 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. OPM is proposing several collections from MSPP issuers or applicants seeking to become MSPP issuers, but we have determined that they are exempt from the requirements of the Paperwork Reduction Act. For example, we seek to collect information in connection with the MSPP application process and reporting requirements under § 800.112. We are also proposing requirements for issuers to authorize accrediting entities to send documentation to OPM under § 800.111. The proposal would also set up a process under § 800.116 for states to request that OPM reconsider a standard applicable to MSPs or MSPP issuers that does not comply with that State's laws for QHPs. Under § 800.503, MSPP issuers are directed to provide certain written notices, which are third-party disclosures under the Paperwork Reduction Act. These collections would generally be considered reporting requirements under the Paperwork Reduction Act. Moreover, based on responses to the RFI, subsequent conversations with both responding health insurance issuers and other

---

[49] Letter to Senator Harry Reid, Majority Leader, from Douglas W. Elmendorf, Director of the Congressional Budget Office, December 19, 2009, p. 9.

[50] Congressional Budget Office. *Estimates for the Insurance Coverage Provisions of the Affordable Care Act Updated for the Recent Supreme Court Decision* (July 2012), p.13.

[51] Brook, Robert H., John E. Ware. William H. Rogers, Emmett B. Keeler, Allyson Ross Davies, Cathy D. Sherbourne, George A. Goldberg, Kathleen N. Lohr, Patricia Camp and Joseph P. Newhouse. *The Effect of Coinsurance on the Health of Adults: Results from the RAND Health Insurance Experiment*. Santa Monica, CA: RAND Corporation, 1984. Finkelstein, A. et al. "The Oregon Health Insurance Experiment: Evidence from the First Year." *NBER Working Paper* No. 17190, July 2011. Doyle, J.J. "Health Insurance, Treatment and Outcomes: Using Auto Accidents and Health Shocks." National Bureau of Economic Research. *NBER Working Paper* No. 11099, February 2005.

[52] See the regulatory impact analysis developed by HHS for the Exchange Establishment final rule, available at *http://cciio.cms.gov* under "Regulations and Guidance", for a comprehensive overview of the empirical evidence on the benefits of enhanced availability of quality, affordable health insurance, which to great extent applies to the MSPP program and this proposed rule as well.

[53] Gross, T., Notowidigdo, M. "Health Insurance and the Consumer Bankruptcy Decision: Evidence from Medicaid Expansions." *Journal of Public Economics* 95(7–8): 2011.

[54] Assistant Secretary for Planning and Evaluation The Value of Health Insurance: Few of the Uninsured Have Adequate Resources to Pay Potential Hospital Bills: 2011. Washington DC: US Department of Health and Human Services.

[55] Finkelstein A, McKnight R: "What Did Medicare Do (And Was It Worth It)?" Journal of Public Economics 2008, 92:1644–1669.

[56] Finkelstein, Amy, "The Aggregate Effects of Health Insurance: Evidence from the Introduction of Medicare," National Bureau of Economic Research. Working Paper No. 11619, Sept, 2005.

health insurance issuers subsequent to the RFI, and other practical considerations, OPM expects fewer than ten responsible entities to respond to all of the collections noted above. For that reason alone, the collections are exempt from the Paperwork Reduction Act under 44 U.S.C. 3502(3)(A)(i). There may also be other reasons why these collections are exempt from these requirements. We seek comments on these assumptions.

VI. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA)[57] requires agencies to prepare an initial regulatory flexibility analysis to describe the impact of the proposed rule on small entities, unless the head of the agency can certify that the rule would not have a significant economic impact on a substantial number of small entities. The RFA 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."

The RFA requires agencies to analyze options for regulatory relief of small businesses, if a proposed rule has a significant impact on a substantial number of small entities. For purposes of the RFA, small entities include small businesses, small non-profit organizations, and small government jurisdictions. Small businesses are those with sizes below thresholds established by the SBA. With respect to health insurers, the SBA size standard is $7.0 million in annual receipts.[58]

OPM does not think that small businesses with annual receipts less than $7.0 million would likely have sufficient economies of scale to become MSPP issuers or be part of a group of MSPP issuers. Similarly, while the Director must enter into an MSPP contract with at least one non-profit entity, OPM does not think that small non-profit organizations would likely have sufficient economies of scale to become MSPP issuers or be part of a group of MSPP issuers.

OPM does not think that this proposed rule would have a significant economic impact on a substantial number of small businesses with annual receipts less than $7.0 million, because there are only a few health insurance issuers that could be considered small businesses. Moreover, while the Director must enter into an MSPP contract with at least one non-profit entity, OPM does not think that this proposed rule would have a significant economic impact on a substantial number of small non-profit organizations, because few health insurance issuers are small non-profit organizations.

OPM incorporates by reference previous analysis by HHS, which provides some insight into the number of health insurance issuers that could be small entities. Particularly, as discussed by HHS in the Medical Loss Ratio interim final rule (75 FR 74918), few, if any, issuers are small enough to fall below the size thresholds for small business established by the SBA. In that rule, HHS used a data set created from 2009 NAIC Health and Life Blank annual financial statement data to develop an updated estimate of the number of small entities that offer comprehensive major medical coverage in the individual and group markets. For purposes of that analysis, HHS used total Accident and Health earned premiums as a proxy for annual receipts. HHS estimated that there are 28 small entities with less than $7 million in accident and health earned premiums offering individual or group comprehensive major medical coverage. OPM concurs with this HHS analysis, and, thus, does not think that this proposed rule would have a significant economic impact on a substantial number of small entities.

Based on the foregoing, OPM is not preparing an analysis for the RFA because OPM has determined, and the Director certifies, that this proposed rule would not have a significant economic impact on a substantial number of small entities.

VII. Unfunded Mandates

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA)[59] requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a proposed rule (and subsequent final rule) that includes any Federal mandate that may result in expenditures in any one year by a State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million in 1995 dollars, updated annually for inflation. In 2012, that threshold is approximately $139 million. UMRA does not address the total cost of a rule. Rather, it focuses on certain categories of costs, 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.

This proposed rule does not place any Federal mandates on State, local, or Tribal governments, or on the private sector. This proposed rule would establish the MSPP, a voluntary federal program that provides health insurance issuers the opportunity to contact with OPM to offer MSPs on the Exchanges. Section 3 of UMRA excludes from the definition of "Federal mandate" duties that arise from participation in a voluntary Federal program. Accordingly, no analysis under UMRA is required.

VIII. Federalism

Executive Order 13132 outlines fundamental principles of federalism, and requires the adherence to specific criteria by Federal agencies in the process of their formulation and implementation of policies that have "substantial direct effects" on the States, the relationship between the national government and States, or on the distribution of power and responsibilities among the various levels of government. Federal agencies promulgating regulations that have these federalism implications must consult with State and local officials, and describe the extent of their consultation and the nature of the concerns of State and local officials in the preamble to the regulation.

These proposed regulations have federalism implications, because they have direct effects on the States, the relationship between the national government and States, or on the distribution of power and responsibilities among various levels of government. In particular, under proposed § 800.114, OPM may deem a State law to be inconsistent with section 1334 of the Affordable Care Act, and, thus, inapplicable to an MSP or MSPP issuer. However, in OPM's view, the federalism implications of these proposed regulations are substantially mitigated because, OPM expects that the vast majority of States have laws that are consistent with section 1334 of the Affordable Care Act. Furthermore, proposed § 800.116 sets forth a process for dispute resolution if a State seeks to

[57] 5 U.S.C. 601 *et seq.*

[58] According to the SBA size standards, entities with average annual receipts of $7 million or less would be considered small entities for North American Industry Classification System (NAICS) Code 524114 (Direct Health and Medical Insurance Carriers) (for more information, see "Table of Size Standards Matched To North American Industry Classification System Codes," effective March 26, 2012, U.S. Small Business Administration, available at *http://www.sba.gov*).

[59] Public Law 104–4.

challenge OPM's determination that a State law is inapplicable to an MSP or MSPP issuer.

In compliance with the requirement of Executive Order 13132 that agencies examine closely any policies that may have federalism implications or limit the policy making discretion of the States, OPM has engaged in efforts to consult with and work cooperatively with affected State and local officials, including attending meetings of the NAIC and consulting with State insurance officials on an individual basis. It is expected OPM will act in a similar fashion in enforcing the Affordable Care Act requirements. Throughout the process of developing these proposed regulations, OPM has attempted to balance the States' interests in regulating health insurance issuers, and the statutory requirement to provide two MSPs in all Exchanges in the 50 States and the District of Columbia. By doing so, it is OPM's view that it has 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 signature affixed to this proposed regulation, OPM certifies that it has complied with the requirements of Executive Order 13132 for the attached regulations in a meaningful and timely manner.

List of Subjects in 45 CFR Part 800

Administrative practice and procedure, Health facilities, Health insurance, Health professions, reporting and recordkeeping requirements.

U.S. Office of Personnel Management.

John Berry,

Director.

For the reasons stated in the preamble, the U.S. Office of Personnel Management proposes to add 45 CFR chapter VIII. consisting of part 800, to read as follows:

Title 45

CHAPTER VIII—OFFICE OF PERSONNEL MANAGEMENT

PART 800—MULTI-STATE PLAN PROGRAM

Subpart A—General Provisions and Definitions

Subpart B—Multi-State Plan Issuer Requirements

Subpart C—Premiums, Rating Factors, Medical Loss Ratios, and Risk Adjustment

Subpart D—Application and Contracting Procedures

Subpart E—Compliance

Subpart F—Appeals by Enrollees for Denials of Claims for Payment or Service

Subpart G—Miscellaneous

Authority: Section 1334 of the Patient Protection and Affordable Care Act, (Pub. L. 111–148), as amended by the Health Care and Education Reconciliation Act of 2010 (Pub. L. 111–152).

Subpart A—General Provisions and Definitions

§ 800.10 Basis and scope.

(a) *Basis.* This part is based on the following sections of title I of the Affordable Care Act:

(1) 1001. Amendments to the Public Health Service Act.

(2) 1302. Essential Health Benefit Requirements.

(3) 1311. Affordable Choices of Health Benefit Plans.

(4) 1324. Level Playing Field.

(5) 1334. Multi-State Plans.

(6) 1341. Transitional Reinsurance Program for Individual Market in Each State.

(7) 1342. Establishment of Risk Corridors for Plans in Individual and Small Group Markets.

(8) 1343. Risk Adjustment.

(b) *Scope.* This part establishes standards for health insurance issuers to contract with the United States Office of Personnel Management (OPM) to offer multi-State plans to provide health insurance coverage on Exchanges for each State. It also establishes standards for appeal of a decision by OPM affecting the issuer's participation in the Multi-State Plan Program (MSPP) and standards for an enrollee in a multi-State plan (MSP) to appeal denials of payment or services by an MSPP issuer.

§ 800.20 Definitions.

The following definitions apply to this part:

Actuarial value (AV) has the meaning given such term in proposed 45 CFR 156.20.

Affordable Care Act means the Patient Protection and Affordable Care Act (Pub. L. 111–148) as amended by the Health Care and Education Reconciliation Act of 2010 (Pub. L. 111–152).

Applicant means an issuer or group of issuers that has submitted an application to OPM to be considered for participation in the Multi-State Plan Program.

Benefit plan material or information means explanations or descriptions, whether printed or electronic, that describe a health insurance issuer's products. The term does not include a policy or contract for health insurance coverage.

Cost sharing has the meaning given such term in 45 CFR 155.20.

Director means the Director of the United States Office of Personnel Management.

EHB-benchmark plan has the meaning given such term in proposed 45 CFR 156.20.

Exchange means a governmental agency or non-profit entity that meets the applicable requirements of 45 CFR part 155 and makes qualified health plans (QHPs) and MSPs available to qualified individuals and qualified employers. Unless otherwise identified, this term refers to State Exchanges,

regional Exchanges, subsidiary Exchanges, and a Federally-facilitated Exchange.

Federal Employees Health Benefits Program or *FEHBP* means the health benefits program administered by the United States Office of Personnel Management pursuant to chapter 89 of title 5, United States Code.

Group of issuers means:

(1) A group of health insurance issuers who are affiliated either by common ownership and control or by common use of a nationally licensed service mark (as defined in this section); or

(2) An affiliation of health insurance issuers and an entity that is not an issuer but that owns a nationally licensed service mark (as defined in this section).

Health insurance coverage means benefits consisting of medical care (provided directly, through insurance or reimbursement, or otherwise) under any hospital or medical service policy or certificate, hospital or medical service plan contract, or HMO contract offered by a health insurance issuer. Health insurance coverage includes group health insurance coverage, individual health insurance coverage, and short-term, limited duration insurance.

Health insurance issuer or *Issuer* means an insurance company, insurance service, or insurance organization (including an HMO) that is required to be licensed to engage in the business of insurance in a State and that is subject to State law that regulates insurance (within the meaning of section 514(b)(2) of the Employee Retirement Income Security Act (ERISA)). This term does not include a group health plan as defined in 45 CFR 146.145(a).

HHS means the United States Department of Health and Human Services.

Indian has the meaning given to the term in proposed 45 CFR 155.300(a).

Indian plan variation has the meaning given such term in proposed 45 CFR 156.400.

Level of Coverage means one of four standardized actuarial values of plan coverage as defined by section 1302(d)(1) of the Affordable Care Act.

Licensure means the authorization obtained from the appropriate State official or regulatory authority to offer health insurance coverage in the State.

Multi-State Plan or *MSP* means a health plan that is offered under a contract with OPM pursuant to section 1334 of the Affordable Care Act and meets the requirements of this part.

Multi-State Plan Program Issuer or *MSPP issuer* means a health insurance issuer or group of issuers (as defined in this section) that has a contract with OPM to offer health plans pursuant to section 1334 of the Affordable Care Act and meets the requirements of this part.

Multi-State Plan Program or *MSPP* means the program administered by OPM pursuant to section 1334 of the Affordable Care Act.

Nationally licensed service mark means a word, name, symbol, or device, or any combination thereof, that an issuer or group of issuers uses consistently nationwide to identify itself.

Non-profit entity means:

(1) An organization that is incorporated under State law as a non-profit entity and licensed under State law as a health insurance issuer; or

(2) A group of health insurance issuers licensed under State law, a substantial portion of which are incorporated under State law as non-profit entities.

OPM means the United States Office of Personnel Management.

Percentage of total allowed cost of benefits has the meaning given such term in 45 CFR 156.20.

Plan year means a consecutive 12 month period during which a health plan provides coverage for health benefits. A plan year may be a calendar year or otherwise.

Prompt payment means a requirement imposed on a health insurance issuer to pay a provider or enrollee for a claimed benefit or service within a defined time period, including the penalty or consequence imposed on the issuer for failure to meet the requirement.

Qualified Health Plan or *QHP* means a health plan that has in effect a certification that it meets the standards described in subpart C of 45 CFR part 156 issued or recognized by each Exchange through which such plan is offered pursuant to the process described in subpart K of 45 CFR part 155.

Rating means the process, including rating factors, numbers, formulas, methodologies, and actuarial assumptions, used to set premiums for a health plan.

Secretary means the Secretary of the Department of Health and Human Services.

SHOP means a Small Business Health Options Program operated by an Exchange through which a qualified employer can provide its employees and their dependents with access to one or more qualified health plans (QHPs).

Silver plan variation has the meaning given such term in 45 CFR 156.400.

Small employer means, in connection with a group health plan with respect to a calendar year and a plan year, an employer who employed an average of at least 1 but not more than 100 employees on business days during the preceding calendar year and who employs at least 1 employee on the first day of the plan year. In the case of plan years beginning before January 1, 2016, a State may elect to define small employer by substituting "50 employees" for "100 employees."

Standard plan has the meaning given such term in proposed 45 CFR 156.400.

State means each of the 50 States or the District of Columbia.

State Insurance Commissioner means the commissioner or other chief insurance regulatory official of a State.

Subpart B—Multi-State Plan Issuer Requirements

§ 800.101 General requirements.

An MSPP issuer must:

(a) *Licensed.* Be licensed as a health insurance issuer in each State where it offers health insurance coverage;

(b) *Contract with OPM.* Have a contract with OPM pursuant to this part;

(c) *Required levels of coverage.* Offer levels of coverage as required by § 800.107;

(d) *Eligibility and enrollment.* MSPs and MSPP issuers must meet the same requirements for eligibility, enrollment, and termination of coverage as those that apply to QHPs and QHP issuers pursuant to 45 CFR parts 155 subparts D, E, and H and 45 CFR 156.250, 156.260, 156.265, 156.270, 156.285.

(e) *Applicable to each MSP.* Ensure that each of its MSPs meets the requirements of this part;

(f) *Compliance.* Comply with all standards set forth in this part;

(g) *OPM direction and other legal requirements.* Timely comply with OPM instructions and directions and with other applicable law; and

(h) *Other requirements.* Meet such other requirements as determined appropriate by OPM, in consultation with HHS, pursuant to § 1334(b)(4) of the Affordable Care Act.

(i) *Non-discrimination.* In carrying out the requirements of this part, the MSPP issuer must:

(1) Comply with applicable non-discrimination statutes; and

(2) With respect to its MSP, not discriminate based on race, color, national origin, disability, age, sex (including pregnancy and gender identity), or sexual orientation.

§ 800.102 Compliance with Federal law.

(a) *Public Health Service Act.* As a condition of participation in the MSPP, an MSPP issuer must comply with the

provisions of part A of title XXVII of the PHS Act, as determined by the Director, as listed in appendix A to this part.

(b) *Affordable Care Act.* As a condition of participation in the MSPP, an MSPP issuer must comply with the provisions of title I of the Affordable Care Act, as determined by the Director, as listed in appendix B to this part.

§ 800.103 Authority to contract with issuers.

(a) *General.* OPM may enter into contracts with health insurance issuers to offer at least two MSPs on Exchanges and SHOPs in each State, without regard to any statutes that would otherwise require competitive bidding.

(b) *Non-profit entity.* In entering into contracts with health insurance issuers to offer MSPs, OPM will enter into a contract with at least one non-profit entity as defined in § 800.20.

(c) *Group of issuers.* Any contract to offer an MSP may be with a group of issuers as defined in § 800.20.

(d) *Individual and group coverage.* The contracts will provide for individual health insurance coverage and for group health insurance coverage for small employers.

§ 800.104 Phased expansion.

(a) *Phase-in.* OPM may enter into a contract with a health insurance issuer to offer an MSP if the health insurance issuer agrees that:

(1) With respect to the first year for which the health insurance issuer offers an MSP, the health insurance issuer will offer the MSP in at least 60 percent of the States (31 States);

(2) With respect to the second such year, the health insurance issuer will offer the MSP in at least 70 percent of the States (36 States);

(3) With respect to the third such year, the health insurance issuer will offer the MSP in at least 85 percent of the States (44 States); and

(4) With respect to each subsequent year, the health insurance issuer will offer the MSP in all States.

(b) *Partial coverage within a State.* OPM may enter into a contract with an MSPP issuer even if the MSPP issuer's MSPs for a State cover fewer than all the service areas specified for that State pursuant to § 800.110. For each State in which the MSPP issuer offers partial coverage, the MSPP issuer's application for participation in the MSPP under section 800.301 and the MSPP issuer's information submitted to support renewal of the contract under section 800.305 must include a plan for offering coverage throughout the State. OPM will monitor the MSPP issuer's progress in implementing the plan as part of its contract compliance activities under subpart E of this part.

(c) *Licensed where offered.* OPM may enter into a contract with an MSPP issuer who is not licensed in every State, provided that the issuer is licensed in every State where it offers MSP coverage through any Exchanges in that State and demonstrates to OPM that it is making a good faith effort to become licensed in every State consistent with the timeframe in paragraph (a) of this section.

§ 800.105 Benefits.

(a) *Benefits package.* (1) An MSPP issuer must offer a uniform benefits package, including the essential health benefits (EHB) described in section 1302 of the Affordable Care Act, for each MSP within a State.

(2) The benefits package noted in paragraph (a)(1) of this section must comply with section 1302 of the Affordable Care Act as well as any applicable standards set by OPM or HHS.

(b) *Benefits package options.* (1) An MSPP issuer must offer a benefits package, in all States, that is substantially equal to:

(i) The EHB-benchmark plan in each State in which it operates; or

(ii) Any EHB-benchmark plan selected by OPM under paragraph (c) of this section.

(2) An issuer applying to participate in the MSPP must select one of the two benefits package options described in paragraph (b)(1) of this section in its application.

(c) *OPM selection of benchmark plans.* (1) The OPM-selected EHB-benchmark plans are the three largest Federal Employees Health Benefits Program (FEHBP) plan options, as identified by HHS pursuant to section 1302(b) of the Affordable Care Act, and as supplemented pursuant to paragraphs (c)(2) through (4) of this section.

(2) Any EHB-benchmark plan selected by OPM under paragraph (c)(1) of this section lacking the coverage of pediatric oral services or pediatric vision services must be supplemented by the addition of the entire category of benefits from the largest Federal Employee Dental and Vision Insurance Program (FEDVIP) dental or vision plan options, respectively, pursuant to 45 CFR 156.110(b) and section 1302(b) of the Affordable Care Act.

(3) An MSPP issuer must follow State definitions where the State chooses to specifically define the habilitative services category pursuant to 45 CFR 156.110(f).

(4) Any EHB-benchmark plan selected by OPM under paragraph (c)(1) of this section must include, for each State, any State-required benefits enacted before December 31, 2011 that are included in the State's EHB-benchmark plan as described in paragraph (b)(1)(i) of this section, or specific to the market in which the plan is offered. In the case in which a State chooses not to define this category, OPM proposes that if any OPM-selected EHB-benchmark plan lacks coverage of habilitative services and devices, then OPM may determine what habilitative services and devices are to be included in that EHB-benchmark plan.

(d) *OPM approval.* An MSPP issuer's benefits package, including its prescription drug list, must be submitted to approved by OPM, which will review a benefits package proposed by an MSPP issuer and determine if it is substantially equal to an EHB-benchmark plan described in paragraph (b)(1) of this section pursuant to standards set forth by OPM or HHS including proposed 45 CFR 156.115, 156.120, and 156.125.

(e) *State payments for additional State-required benefits.* If a State requires that benefits in addition to the benchmark package be offered to MSP enrollees in that State, then pursuant to section 1334(c)(2) of the Affordable Care Act, the State must assume the cost of such additional benefits by making payments either to the enrollee or on behalf of the enrollee to the MSPP issuer.

§ 800.106 Cost-sharing limits, premium tax credits, and cost-sharing reductions.

(a) *Cost-sharing limits.* For each MSP it offers, an MSPP issuer must ensure that the cost-sharing provisions of the MSP comply with section 1302(c) of the Affordable Care Act as well as any applicable standards set by OPM or HHS.

(b) *Premium tax credits and cost-sharing reductions.* For each MSP it offers, an MSPP issuer must make available to an eligible individual the premium tax credits under section 36B of the Internal Revenue Code of 1986 and the cost-sharing reductions under section 1402 of the Affordable Care Act. An MSPP issuer must also comply with any applicable standards set by OPM or HHS.

§ 800.107 Levels of coverage.

(a) *Silver and gold levels of coverage required.* An MSPP issuer must offer at least one MSP at the silver level of coverage and at least one MSP at the gold level of coverage on each Exchange in which the issuer is certified to offer an MSP pursuant to a contract with OPM.

(b) *Bronze or platinum metal levels of coverage permitted.* Pursuant to a contract with OPM, an MSPP issuer may offer one or more MSPs at the bronze level of coverage or the platinum level of coverage, or both, on any Exchange or SHOP in any State.

(c) *Child-only plans.* For each level of coverage, the MSPP issuer must offer a child-only plan at the same level of coverage, as any health insurance coverage offered to individuals who, as of the beginning of the plan year, have not attained the age of 21.

(d) *Plan variations for the reduction or elimination of cost sharing.* An MSPP issuer must comply with section 1402 of the Affordable Care Act as well as any applicable standards set by OPM or HHS.

(e) *OPM approval.* An MSPP issuer must submit the levels of coverage plans and plan variations to OPM for review and approval by OPM.

§ 800.108 Assessments and user fees.

(a) *Discretion to charge assessment and user fees.* OPM may require an MSPP issuer to pay an assessment or user fee as a condition of participating in the MSPP.

(b) *Determination of amount.* The amount of the assessment or user fee charged by OPM for a plan year is the amount determined necessary by OPM to meet the costs of OPM's functions under the Affordable Care Act for a plan year, including but not limited to such functions as entering into contracts with, certifying, recertifying, decertifying, and overseeing MSPs and MSPP issuers for that plan year.

§ 800.109 Network adequacy.

(a) *General requirement.* An MSPP issuer must ensure that the provider network of each of its MSPs, as available to all enrollees, meets the following standards:

(1) Maintains a network that is sufficient in number and types of providers to assure that all services will be accessible without unreasonable delay;

(2) Is consistent with the network adequacy provisions of section 2702(c) of the Public Health Service Act; and

(3) Includes essential community providers in compliance with 45 CFR 156.235.

(b) *Provider directory.* An MSPP issuer must make its provider directory for an MSP available to the Exchange for publication online pursuant to guidance from the Exchange and to potential enrollees in hard copy upon request. In the provider directory, an MSPP issuer must identify providers that are not accepting new patients.

(c) *OPM guidance.* OPM will issue guidance containing the criteria and standards that it will use to determine the adequacy of a provider network.

§ 800.110 Service area.

An MSPP issuer must offer an MSP within one or more service areas in a State defined by each Exchange pursuant to 45 CFR 155.1055. If an Exchange permits issuers to define their service areas, an MSPP issuer must obtain OPM's approval for its proposed service areas. Pursuant to § 800.104, OPM may enter into a contract with an MSPP issuer even if the MSPP issuer's MSPs for a State cover fewer than all the service areas specified for that State. For each State in which the MSPP issuer does not offer coverage in all service areas, the MSPP issuer's application for participation in the MSPP under section 800.301 and the MSPP issuer's information submitted to support renewal of the contract under section 800.305 must include a plan for offering coverage throughout the State. OPM will monitor the MSPP issuer's progress in implementing the plan as part of its contract compliance activities under Subpart E and will ensure MSPs meet QHP requirement in 45 CFR 155.1055(b).

§ 800.111 Accreditation requirement.

(a) *General requirement.* An MSPP issuer must be or become accredited consistent with the requirements for QHP issuers specified in section 1311 of the Affordable Care Act and in 45 CFR 156.275(a).

(b) *Release of survey.* An MSPP issuer must authorize the accrediting entity that accredits the MSPP issuer to release to OPM and to the Exchange a copy of its most recent accreditation survey, together with any survey-related information that OPM or an Exchange may require, such as corrective action plans and summaries of findings.

(c) *Timeframe for accreditation.* An MSPP issuer that is not accredited as of the date that it enters into a contract with OPM must become accredited within the timeframe established by OPM as authorized by 45 CFR 155.1045.

§ 800.112 Reporting requirements.

(a) *OPM specification of reporting requirements.* OPM will specify the data and information that must be reported by an MSPP issuer, including data permitted or required by the Affordable Care Act and such other data as OPM may determine necessary for the oversight and administration of the MSPP. OPM will also specify the form, manner, processes, and frequency for the reporting of data and information. The Director of OPM may require that MSPP issuers submit claims payment and enrollment data to facilitate OPM's oversight and administration of the MSPP in a manner similar to the FEHBP.

(b) *Quality and quality improvement standards.* An MSPP issuer must comply with any standards required by OPM for reporting quality and quality improvement activities including, but not limited to, implementation of a quality improvement strategy, disclosure of quality measures to enrollees and prospective enrollees, reporting of pediatric quality measures, and implementation of rating and enrollee satisfaction surveys, which will be similar to standards under section 1311(c)(1)(E), (H), and (I), (c)(3), and (c)(4) of the Affordable Care Act.

§ 800.113 Benefit plan material or information.

(a) *Compliance with Federal and State law.* An MSPP issuer must comply with Federal and State laws relating to benefit plan material or information, including the provisions of this section and guidance issued by OPM specifying its standards, process, and timeline for approval of benefit plan material or information.

(b) *General standards for MSP applications and notices.* An MSPP issuer must provide all applications and notices to enrollees in accordance with the standards described in at 45 CFR 155.205(c). OPM may establish additional standards to meet the needs of MSP enrollees.

(c) *Accuracy.* An MSPP issuer is responsible for the accuracy of its benefit plan material or information.

(d) *Truthful, not misleading, no material omissions, and plain language.* All benefit plan material or information must be:

(1) Truthful, not misleading, and not contain material omissions; and

(2) Written in plain language, as defined in section 1311(e)(3)(B) of the Affordable Care Act.

(e) *Uniform Explanation of Coverage Documents and Standardized Definitions.* An MSPP issuer must comply with the provisions of section 2715 of the PHS Act and regulations issued to implement that section.

(f) *OPM review and approval of benefit plan material or information.* OPM may request an MSPP issuer submit to OPM benefit plan material or information, as defined in § 800.20. OPM reserves the right to review and approve benefit plan material or information to ensure that an MSPP issuer complies with Federal and State laws, and the standards prescribed by

OPM with respect to benefit plan material or information.

(g) *Statement on certification by OPM.* An MSPP issuer may include a statement in its benefit plan material or information that:

(1) OPM has certified the MSP as eligible to be offered on the Exchange; and

(2) OPM monitors the MSP for compliance with all applicable law.

§ 800.114 Compliance with applicable State law.

(a) *Compliance with State law.* An MSPP issuer must, with respect to each of its MSPs, generally comply with State law pursuant to section 1334(b)(2) of the Affordable Care Act. However, the MSPs and MSPP issuers need not comply with State laws that:

(1) Are inconsistent with section 1334 of the Affordable Care Act or this part;

(2) Prevent the application of a requirement of part A of title XXVII of the PHS Act; and

(3) Prevent the application of a requirement of title I of the Affordable Care Act.

(b) *Determination of inconsistency.* OPM reserves the right to determine, in its judgment, as effectuated through an MSPP contract, these regulations, or OPM guidance whether the standards set forth in paragraph (a) of this section are satisfied with respect to particular State laws. In making any such determinations, OPM will consider whether the State law at issue:

(1) Imposes on MSPP issuers or MSPs a requirement or requirements that differ from those applicable to QHP issuers and QHPs offered on one or more Exchanges in that State;

(2) Creates responsibilities, administrative burdens, or costs for an MSPP issuer that significantly deter or impede the MSPP issuer from offering a viable product on one or more Exchanges;

(3) Creates responsibilities, administrative burdens, or costs for OPM that significantly deter or impede OPM's effective implementation of the MSPP; or

(4) Prevents an MSPP issuer from offering an MSP on one or more Exchanges in that State.

§ 800.115 Level playing field.

An MSPP issuer must, with respect to each of its MSPs, meet the following requirements in order to ensure a level playing field:

(a) *Guaranteed renewal.* Guarantee that an enrollee can renew enrollment in an MSP in compliance with sections 2703 and 2742 of the PHS Act.

(b) *Rating.* In proposing premiums for OPM approval, use only the rating factors permitted under section 2701 of the PHS Act and State law.

(c) *Preexisting conditions.* Not impose any preexisting condition exclusion and comply with section 2704 of the PHS Act.

(d) *Non-discrimination.* Comply with section 2705 of the PHS Act.

(e) *Quality improvement and reporting.* Comply with all Federal and State quality improvement and reporting requirements. "Quality improvement and reporting" means quality improvement as defined in section 1311(h) of the Affordable Care Act and quality improvement plans or strategies required under State law, and quality reporting as defined in section 2717 of the PHS Act and section 1311(g) of the Affordable Care Act. Quality improvement also includes activities such as, but not limited to, implementation of a quality improvement strategy, disclosure of quality measures to enrollees and prospective enrollees, and reporting of pediatric quality measures, which will be similar to standards under section 1311(c)(1)(E), (H), and (I) of the Affordable Care Act.

(f) *Fraud and abuse.* Comply with all Federal and State fraud and abuse laws.

(g) *Licensure.* Be licensed in every State in which it offers an MSP.

(h) *Solvency and financial requirements.* Comply with the solvency standards set by each State in which it offers an MSP.

(i) *Market conduct.* Comply with the market conduct standards of each State in which it offers an MSP.

(j) *Prompt payment.* Adhere to applicable State law in negotiating the terms of payment in contracts with its providers and in making payments to claimants and providers.

(k) *Appeals and grievances.* Comply with Federal standards under section 2719 of the PHS Act for appeals and grievances relating to adverse benefit determinations, as described in subpart F.

(l) *Privacy and confidentiality.* Comply with all Federal and State privacy and security requirements and laws. Comply with any standards required by OPM in guidance or contract, which will be similar to the standards contained in 45 CFR part 162 and applicable State law.

(m) *Benefit plan material or information.* Comply with Federal and State law, including § 800.113 of this part.

§ 800.116 Process for dispute resolution.

(a) *Determinations about applicability of State law under section 1334(b)(2) of the Affordable Care Act.* In the event of a dispute about the applicability to an MSP or MSPP issuer of a State law not related to the 13 categories in section 1324(b) of the Affordable Care Act, the State may request that OPM reconsider a determination, made under section 800.114 that an MSP or MSPP issuer is not subject to such State law.

(b) *Required demonstration.* A State making a request under subparagraph (1) must demonstrate that the State law at issue:

(1) Is not inconsistent with section 1334 of the Affordable Care Act or this part;

(2) Does not prevent the application of a requirement of part A of title XXVII of the PHS Act; and

(3) Does not prevent the application of a requirement of title I of the Affordable Care Act.

(c) *Request for review.* The request must be in writing and include contact information, including the name, telephone number, email address, and mailing address of the person or persons whom OPM may contact regarding the request for review. The request must be in such form, contain such information, and be submitted in such manner and within such timeframe as OPM may prescribe.

(1) The requester may submit to OPM any relevant information to support its request.

(2) OPM may obtain additional information relevant to the request from any source as it may, in its judgment, deem necessary. OPM will provide the requester with a copy of any additional information it obtains and provide an opportunity for the requester to respond (including by submission of additional information or explanation).

(3) OPM will issue a written decision within 60 calendar days after receiving the written request, or after the due date for the response, whichever is later, unless a different timeframe is agreed upon.

(4) OPM's written decision will constitute final agency action that is subject to review under the Administrative Procedure Act in the appropriate U.S. district court. Such review is limited to the record that was before OPM when OPM made its decision.

Subpart C—Premiums, Rating Factors, Medical Loss Ratios, and Risk Adjustment

§ 800.201 General requirements.

(a) *Premium negotiation.* OPM will negotiate annually with an MSPP issuer, on a State by State basis, the premiums for each MSP offered by that issuer in that State. Such negotiations may

include negotiations about the cost-sharing provisions of an MSP.

(b) *Duration.* Premiums will remain in effect for the plan year.

(c) *Guidance on rate development.* OPM will issue guidance addressing methods for the development of premiums for the MSPP. Such guidance will follow State rating standards generally applicable in a State to the greatest extent practicable.

(d) *Calculation of actuarial value.* An MSPP issuer must calculate actuarial value in the same manner as QHP issuers under section 1302(d) of the Affordable Care Act as well as any applicable standards set by OPM or HHS.

(e) *OPM rate review process.* An MSPP issuer must participate in the rate review process established by OPM to negotiate rates for MSPs. The rate review process established by OPM will be similar to the process established by HHS pursuant to section 2794 of the PHS Act and disclosure and review standards established under 45 CFR part 154.

(f) *State Effective Rate Review.* With respect to its MSPs, an MSPP issuer is subject to a State's rate review process including a State's Effective Rate Review program established by HHS pursuant to section 2794 of the PHS Act and 45 CFR part 154. In the event HHS is reviewing rates for a State pursuant to section 2794 of the PHS Act, then HHS will defer to OPM's judgment of the MSPs proposed rate increase. In the event that a State withholds approval of an MSP rate for reasons that OPM determines, in its discretion, to be arbitrary, capricious, or an abuse of discretion, OPM retains authority to make the final decision to approve rates for participation in the MSPP notwithstanding the absence of State approval.

(g) *Single risk pool.* An MSPP issuer must consider all enrollees in an MSP to be in the same risk pool as all enrollees in all other health plans in the individual market or small group market, respectively, in compliance with section 1312(c) of the Affordable Care Act, 45 CFR 156.80, and any applicable Federal or State laws and regulations implementing section 1312(c).

§ 800.202 Rating factors.

(a) *Permissible rating factors.* In proposing premiums for each MSP, an MSPP issuer must use only the rating factors permitted under section 2701 of the PHS Act.

(b) *Application of variations based on age or tobacco use.* Rating variations permitted under section 2701(a) of the PHS Act must be applied by an MSPP issuer based on the portion of the premium attributable to each family member covered under the coverage in accordance with any applicable Federal or State laws and regulations implementing section 2701(a) of the PHS Act.

(c) *Age rating.* For age rating, an MSPP issuer must use the ratio established by the State in which the MSP is offered if it is less than 3:1.

(1) *Age bands.* An MSPP issuer must use the uniform age bands established under HHS regulations implementing section 2701(a) of the PHS Act.

(2) *Age curves.* An MSPP issuer must use the age curves established under HHS regulations implementing section 2701(a) of the PHS Act.

(d) *Rating areas.* An MSP must use the rating areas appropriate to the State in which the MSP is offered and established under HHS regulations implementing section 2701(a) of the PHS Act.

(e) *Tobacco rating.* An MSPP issuer must apply tobacco use as a rating factor in accordance with any applicable Federal or State laws and regulations implementing section 2701(a) of the PHS Act.

§ 800.203 Medical loss ratio.

(a) *Required medical loss ratio.* An MSPP issuer must attain:

(1) The medical loss ratio (MLR) required under section 2718 of the PHS Act and regulations promulgated by HHS; and

(2) Any MSP-specific MLR that OPM may set in the best interests of MSP enrollees or that is necessary to be consistent with a State's requirements with respect to MLR.

(b) *Consequences of not attaining required medical loss ratio.* If an MSPP issuer fails to attain an MLR set forth in paragraph (a), then OPM may take any appropriate action including, intermediate sanctions, such as suspension of marketing, but not limited to, decertifying a MSP in one or more States or terminating an MSPP issuer's contract pursuant to § 800.404.

§ 800.204 Reinsurance, risk corridors, and risk adjustment.

(a) *Transitional reinsurance program.* An MSPP issuer must comply with section 1341 of the Affordable Care Act, 45 CFR part 153, and any applicable Federal or State regulations under that section that sets forth requirements to implement the transitional reinsurance program for the individual market.

(b) *Temporary risk corridors program.* An MSPP issuer must comply with section 1342 of the Affordable Care Act, 45 CFR part 153, and any applicable Federal or State regulations under section 1342 that sets forth requirements to implement the risk corridor program.

(c) *Risk adjustment program.* An MSPP issuer must comply with participate in the risk adjustment program established pursuant to section 1343 of the Affordable Care Act, 45 CFR part 153, and any applicable Federal or State regulations under section 1343 that sets forth requirements to implement the risk adjustment program.

Subpart D—Application and Contracting Procedures

§ 800.301 Application process.

(a) *Acceptance of applications.* Without regard to section 6101(b) through (d) of title 41, United States Code, or any other statute requiring competitive bidding, OPM may consider annually applications from health insurance issuers, including groups of health insurance issuers as defined in § 800.20, to participate in the MSPP. If OPM determines that it is not beneficial for the MSPP to consider new applications for an upcoming year, OPM will issue a notice to that effect.

(b) *Form and manner of applications.* An applicant must submit to OPM, in the form and manner, and in accordance with the timeline specified by OPM, the information requested by OPM for determining whether an applicant meets the requirements of this part.

§ 800.302 Review of applications.

(a) *Determinations.* OPM will determine if an applicant meets the requirements of this part. If OPM determines that an applicant meets the requirements of this part, OPM may accept the applicant to enter into contract negotiations with OPM to participate in the MSPP.

(b) *Requests for additional information.* OPM may request additional information from an applicant before making a decision about whether to enter into contract negotiations with that applicant to participate in the MSPP.

(c) *Declination of application.* If, after reviewing an application to participate in the MSPP, OPM declines to enter into contract negotiations with the applicant, OPM will inform the applicant in writing of the reasons for that decision.

(d) *Discretion.* The decision whether to enter into contract negotiations with a health insurance issuer who has applied to participate in the MSPP is committed to OPM's discretion.

(e) *Impact on future applications.* OPM's declination of an application to participate in the MSPP will not

preclude the applicant from submitting an application for a subsequent year to participate in the MSPP.

§ 800.303 MSPP contracting.

(a) *Participation in MSPP.* To become an MSPP issuer, the applicant and the Director or his designee must sign a contract that meets the requirements of this part.

(b) *Standard contract.* OPM will establish a standard contract for the MSPP.

(c) *Premiums.* OPM and the applicant will negotiate the premiums for an MSP for each plan year in accordance with the provisions of subpart C.

(d) *Benefit packages.* OPM must approve the applicant's benefit packages for an MSP.

(e) *Additional terms and conditions.* OPM may elect to negotiate with an applicant such additional terms, conditions, and requirements that:

(1) Are in the interests of MSP enrollees; or

(2) OPM determines to be appropriate.

(f) *Certification to offer health insurance coverage.* (1) For each plan year, an MSPP contract will contain a certification that specifies the Exchanges in which the MSPP issuer is authorized to offer an MSP, as well as the specific benefit packages authorized to be offered on each Exchange and the premiums to be charged for each benefit package on each Exchange.

(2) An MSPP issuer cannot offer an MSP on an Exchange unless its MSPP contract with OPM includes a certification authorizing the MSPP issuer to offer the MSP on that Exchange in accordance with paragraph (f)(1) of this section.

§ 800.304 Term of the contract.

(a) *Term of a contract.* The term of the contract will be specified in the MSPP contract and must be for a period of at least the 12 consecutive months defined as the plan year.

(b) *Plan year.* The plan year is a consecutive 12 month period during which an MSP provides coverage for health benefits. A plan year may be a calendar year or otherwise.

§ 800.305 Contract renewal process.

(a) *Renewal.* To continue participating in the MSPP, an MSPP issuer must provide to OPM, in the form and manner, and in accordance with the timeline prescribed by OPM, the information requested by OPM for determining whether the MSPP issuer continues to meet the requirements of this part.

(b) *OPM decision.* Subject to paragraph (c) of this section, OPM will renew the MSPP contract of an MSPP issuer who timely submits the information described in paragraph (a) of this section.

(c) *OPM discretion not to renew.* OPM may decline to renew the contract of an MSPP issuer if:

(1) OPM and the MSPP issuer fail to agree on premiums and benefits for an MSP for the subsequent plan year;

(2) The MSPP issuer has engaged in conduct described in § 800.404(a); or

(3) OPM determines that the MSPP issuer will be unable to comply with a material provision of section 1334 of the Affordable Care Act or this part.

(d) *Failure to agree on premiums and benefits.* Except as otherwise provided in this part, if an MSPP issuer has complied with paragraph (a) of this section and OPM and the MSPP issuer fail to agree on premiums and benefits for an MSP on one or more Exchanges for the subsequent plan year by the date required by OPM, either party may provide notice of nonrenewal pursuant to § 800.306 or OPM may in its discretion withdraw the certification of that MSP on the Exchange or Exchanges for that plan year. In addition, if OPM and the MSPP issuer fail to agree on benefits and premiums for an MSP on one or more Exchanges by the date set by OPM and in the event of no action (no notice of nonrenewal or renewal) by either party, the MSPP contract will be renewed and the existing premiums and benefits for that MSP on that Exchange or Exchanges will remain in effect for the subsequent plan year.

§ 800.306 Nonrenewal.

(a) *Definition of nonrenewal.* As used in this subpart and subpart E of this part, "nonrenewal" means a decision by either OPM or an MSPP issuer not to renew an MSPP contract.

(b) *Notice required.* Either OPM or an MSPP issuer may decline to renew an MSPP contract by providing a written notice of nonrenewal to the other party.

(c) *MSPP issuer responsibilities.* The MSPP issuer's written notice of nonrenewal must be made in accordance with its MSPP contract with OPM. The MSPP issuer must also adhere to any requirements imposed by an Exchange with respect to the termination of a QHP, including the requirement to provide advance written notice of termination to enrollees. If an Exchange does not have requirements about advance written notice of termination to enrollees, the MSPP issuer must inform current MSP enrollees in writing of the MSP's termination no later than 90 days prior to termination, unless OPM determines that there is good cause for less than 90 days' notice.

Subpart E—Compliance

§ 800.401 Contract performance.

(a) *General.* An MSPP issuer must perform an MSPP contract with OPM in accordance with the requirements of section 1334 of the Affordable Care Act and the requirements of this part. The MSPP issuer must continue to meet such requirements while under an MSPP contract with OPM.

(b) *Specific requirements for issuers.* In addition to the requirements described in paragraph (a) of this section, the following requirements apply to each MSPP issuer:

(1) It must have, in the judgment of OPM, the financial resources to carry out its obligations under the MSPP;

(2) It must keep such reasonable financial and statistical records, and furnish to OPM such reasonable financial and statistical reports with respect to the MSP or the MSPP, as may be requested by OPM;

(3) It must permit representatives of OPM (including the OPM Office of Inspector General), the U.S. Government Accountability Office, and any other applicable Federal government auditing entities to audit and examine its records and accounts which pertain, directly or indirectly, to the MSP at such reasonable times and places as may be designated by OPM or the U.S. Government Accountability Office;

(4) It must timely submit to OPM a properly completed and signed novation or change-of-name agreement in accordance with 48 CFR part 42 subpart 42.12;

(5) It must perform the MSPP contract in accordance with prudent business practices, as described in paragraph (c) of this section; and

(6) It must not perform the MSPP contract in accordance with poor business practices, as described in paragraph (d) of this section.

(c) *Prudent business practices.* For purposes of paragraph (b)(5) of this section, prudent business practices include, but are not limited to, the following:

(1) Timely compliance with OPM instructions and directives;

(2) Legal and ethical business and health care practices;

(3) Compliance with the terms of the MSPP contract, regulations, and statutes;

(4) Timely and accurate adjudication of claims or rendering of medical services;

(5) Operating a system for accounting for costs incurred under the MSPP

contract, which includes segregating and pricing MSP medical utilization and allocating indirect and administrative costs in a reasonable and equitable manner;

(6) Maintaining accurate accounting reports of costs incurred in the administration of the MSPP contract;

(7) Applying performance standards for assuring contract quality as outlined at § 800.402; and

(8) Establishing and maintaining a system of internal controls that provides reasonable assurance that:

(i) The provision and payments of benefits and other expenses comply with legal, regulatory, and contractual guidelines;

(ii) MSP funds, property, and other assets are safeguarded against waste, loss, unauthorized use, or misappropriation; and

(iii) Data are accurately and fairly disclosed in all reports required by OPM.

(d) *Poor business practices.* For purposes of paragraph (b)(6) of this section, poor business practices include, but are not limited to, the following:

(1) Using fraudulent or unethical business or health care practices or otherwise displaying a lack of business integrity or honesty;

(2) Repeatedly or knowingly providing false or misleading information in the rate setting process;

(3) Failing to comply with OPM instructions and directives;

(4) Having an accounting system that is incapable of separately accounting for costs incurred under the contract and/or that lacks the internal controls necessary to fulfill the terms of the contract;

(5) Failing to assure that the MSP properly pays or denies claims, or if applicable, provides medical services that are inconsistent with standards of good medical practice; and

(6) Entering into contracts or employment agreements with providers, provider groups, or health care workers that include provisions or financial incentives that directly or indirectly create an inducement to limit or restrict communication about medically necessary services to any individual covered under the MSPP. Financial incentives are defined as bonuses, withholds, commissions, profit sharing or other similar adjustments to basic compensation (e.g., service fee, capitation, salary) which have the effect of limiting or reducing communication about appropriate medically necessary services.

(e) *Performance escrow account.* OPM may require MSPP issuers to pay an assessment into an escrow account to ensure contract compliance and benefit MSP enrollees.

§ 800.402 Contract quality assurance.

(a) *General.* This section prescribes general policies and procedures to ensure that services acquired under MSPP contracts conform to the contract's quality requirements.

(b) *Internal controls.* OPM will periodically evaluate the contractor's system of internal controls under the quality assurance program required by the contract and will acknowledge in writing whether or not the system is consistent with the requirements set forth in the contract. OPM's reviews do not diminish the contractor's obligation to implement and maintain an effective and efficient system to apply the internal controls.

(c) *Performance standards.* (1) OPM will issue specific performance standards for MSPP contracts and will inform MSPP issuers of the applicable performance standards prior to negotiations for the contract year. OPM may benchmark its standards against standards generally accepted in the insurance industry. OPM may authorize nationally recognized standards to be used to fulfill this requirement.

(2) MSPP issuers must comply with the performance standards issued under this section.

§ 800.403 Fraud and abuse.

(a) *Program required.* An MSPP issuer must conduct a program to assess its vulnerability to fraud and abuse *as well as to address such vulnerabilities.*

(b) *Fraud detection system.* An MSPP issuer must operate a system designed to detect and eliminate fraud and abuse by employees and subcontractors of the MSPP issuer, by providers furnishing goods or services to MSP enrollees, and by MSP enrollees.

(c) *Submission of information.* An MSPP issuer must provide to OPM (including its Office of Inspector General) such information or assistance as may be necessary for the agency to carry out the duties and responsibilities specified in sections 4 and 6 of the Inspector General Act of 1978 (5 U.S.C. App.). An MSPP issuer must provide any requested information in the form, manner, and timeline prescribed by OPM.

§ 800.404 Compliance actions.

(a) *Causes for OPM compliance actions.* The following constitute cause for OPM to impose a compliance action described in paragraph (b) of this section against an MSPP issuer:

(1) Failure by the MSPP issuer to meet the requirements described in § 800.401(a) and (b);

(2) An MSPP issuer's sustained failure to perform the MSPP contract in accordance with prudent business practices, as described in § 800.401(c);

(3) A pattern of poor conduct or evidence of poor business practices such as those described in § 800.401(d); or

(4) Such other violations of law or regulation as OPM may determine.

(b) *Compliance actions.* (1) OPM may impose a compliance action against an MSPP issuer at any time during the contract term if it determines that the MSPP issuer is not in compliance with applicable law, this part, or the terms of its contract with OPM.

(2) Compliance actions may include, but are not limited to:

(i) Establishment and implementation of a corrective action plan;

(ii) Imposition of intermediate sanctions such as suspension of marketing;

(iii) Performance incentives;

(iv) Reduction of service area or area(s);

(v) Withdrawal of the certification of the MSPP issuer to offer the MSP on one or more Exchanges;

(vi) Nonrenewal of the MSPP contract; and

(vii) Withdrawal of approval or termination of the MSPP contract.

(c) *Notice of compliance action.* (1) OPM must notify an MSPP issuer in writing of a compliance action under this section. Such notice must indicate the specific compliance action undertaken and the reason for the compliance action.

(2) For compliance actions listed in § 800.404(b)(2)(v) through (vii), such notice must include a statement that the MSPP issuer is entitled to request a reconsideration of OPM's determination to impose a compliance action pursuant to § 800.405.

(d) *Notice to enrollees.* If OPM terminates an MSPP issuer's MSPP contract with OPM, or OPM withdraws the MSPP issuer's certification to offer the MSP on an Exchange, the MSPP issuer must adhere to any requirements imposed by an Exchange in which the MSP was offered with respect to the termination of a QHP, including the requirement to provide advance written notice of termination to enrollees. If an Exchange does not have requirements about advance written notice of termination to enrollees, the MSPP issuer must inform current MSP enrollees in writing of the MSP's termination no later than 90 days prior to termination, unless OPM determines that there is good cause for less than 90 days' notice.

(e) *Definition.* As used in this subpart, "termination" means a decision by OPM to cancel an MSPP contract prior to the end of its contract term. The term includes OPM's withdrawal of approval of an MSPP contract.

§ 800.405 Reconsideration of compliance actions.

(a) *Right to request reconsideration.* An MSPP issuer may request that OPM reconsider a determination to impose one of the following compliance actions:

(1) Withdrawal of the certification of the MSPP issuer to offer the MSP on one or more Exchanges.

(2) Nonrenewal of the MSPP contract; or

(3) Termination of the MSPP contract;

(b) *Request for reconsideration and/or hearing.* (1) An MSPP issuer with a right to request reconsideration specified in paragraph (a) of this section may request a hearing in which OPM will reconsider its determination to impose a compliance action.

(2) A request under this section must be in writing and contain contact information, including the name, telephone number, email address, and mailing address of the person or persons whom OPM may contact regarding a request for a hearing with respect to the reconsideration. The request must be in such form, contain such information, and be submitted in such manner as OPM may prescribe.

(3) The request must be received by OPM within 15 calendar days after the date of the MSPP issuer's receipt of the notice of compliance action. The MSPP issuer may request that OPM's reconsideration allow a representative of the MSPP issuer to appear personally before OPM.

(4) A request under this section must include a detailed statement of the reasons that the MSPP issuer disagrees with OPM's imposition of the compliance action, and may include any additional information that will assist OPM in rendering a final decision under this section.

(5) OPM may obtain additional information relevant to the request from any source as it may, in its judgment, deem necessary. OPM will provide the MSPP issuer with a copy of any additional information it obtains and provide an opportunity for the MSPP issuer to respond (including by submission of additional information or explanation).

(6) OPM's reconsideration and hearing if requested may be conducted by the Director or a representative designated by the Director who did not participate in the initial decision that is the subject of the request for review.

(c) *Notice of final decision.* OPM will notify the MSPP issuer, in writing, of OPM's final decision on the MSPP issuer's request for reconsideration and the specific reasons for that final decision. OPM's written decision will constitute final agency action that is subject to review under the Administrative Procedure Act in the appropriate U.S. district court. Such review is limited to the record that was before OPM when it made its decision.

Subpart F—Appeals by Enrollees for Denials of Claims for Payment or Service

§ 800.501 General requirements.

(a) *Definitions.* For purposes of this subpart:

(1) *Claim* means a request for:

(i) Payment of a health-related bill; or

(ii) Provision of a health-related service or supply.

(2) *Adverse benefit determination* means an adverse benefit determination as defined in 45 CFR 147.136(a)(2)(i).

(b) *Applicability.* This subpart applies to enrollees and to other individuals or entities who are acting on behalf of an enrollee and who have the enrollee's specific written consent to pursue a remedy of an adverse benefit determination.

§ 800.502 MSPP issuer internal claims and appeals processes.

MSPP issuers are required to comply with the internal claims and appeals processes applicable to group health plans and health insurance issuers under 45 CFR 147.136(b).

§ 800.503 MSPP issuer internal claims and appeals timeframes and notice of determination.

An MSPP issuer must provide written notice to an enrollee of its determination on a claim brought under § 800.502 according to the timeframes and notification rules under 45 CFR 147.136(b) and (e), including the timeframes for urgent claims. If the MSPP issuer denies a claim (or a portion of the claim), the enrollee may appeal the adverse benefit determination to the MSPP issuer in accordance with 45 CFR 147.136(b).

§ 800.504 External review.

(a) *External review by OPM.* OPM will conduct external review of adverse benefit determinations using a process similar to OPM review of disputed claims under 5 CFR 890.105(e), subject to the standards and timeframes set forth at 45 CFR 147.136(c)(2).

(b) *Notice.* Notices to MSP enrollees regarding external review under paragraph (a) of this section must comply with 45 CFR 147.136(e), and are subject to review and approval by OPM.

(c) *Issuer obligation.* An MSPP issuer must pay a claim or provide a health-related service or supply pursuant to OPM's final decision or the final decision of an independent review organization without delay, regardless of whether the plan or issuer intends to seek judicial review of the external review decision and unless or until there is a judicial decision otherwise.

§ 800.505 Judicial review.

OPM's written decision under § 800.504(a) will constitute final agency action that is subject to review under the Administrative Procedure Act in the appropriate U.S. district court. Such review is limited to the record that was before OPM when it made its decision.

Subpart G—Miscellaneous

§ 800.601 Reservation of authority.

OPM reserves the right to implement and supplement these regulations with written operational guidelines.

§ 800.602 Consumer choice with respect to certain services.

(a) *Assured availability of varied coverage.* Consistent with § 800.104, OPM will ensure that at least one of the MSPP issuers on each Exchange in each State offers at least one MSP that does not provide coverage of services described in section 1303(b)(1)(B) of the Affordable Care Act.

(b) *State opt-out.* An MSP may not offer abortion coverage in any State where such coverage of abortion services is prohibited by State law.

Appendix A to Part 800—Applicable Provisions of Part A of Title XXVII of the PHS Act

Section 2701: Fair Health Insurance Premiums
Section 2702: Guaranteed Availability of Coverage
Section 2703: Guaranteed Renewability of Coverage
Section 2704: Prohibition of Preexisting Condition Exclusions or Other Discrimination Based on Health Status
Section 2705: Prohibiting Discrimination Against Individual Participants and Beneficiaries Based on Health Status
Section 2706: Non-Discrimination in Health Care
Section 2707: Comprehensive Health Insurance Coverage
Section 2708: Prohibition on Excessive Waiting Periods
Section 2709: Coverage for Individuals Participating in Approved Clinical Trials
Section 2709 [sic]: Disclosure of Information
Section 2711: No Lifetime or Annual Limits
Section 2712: Prohibition on Rescissions
Section 2713: Coverage of Preventive Health Services

Section 2714: Extension of Dependent Coverage
Section 2715: Development and Utilization of Uniform Explanation of Coverage Documents and Standardized Definitions
Section 2715A: Provision of Additional Information
Section 2717: Ensuring the Quality of Care
Section 2718: Bringing Down the Cost of Health Care Coverage
Section 2719: Appeals Process
Section 2719A: Patient Protections
Section 2725: Standards Relating to Benefits for Mothers and Newborns [in the Group Market]
Section 2726: Parity in Mental Health and Substance Use Disorder Benefits
Section 2727: Required Coverage for Reconstructive Surgery Following Mastectomies
Section 2728: Coverage of Dependent Students on Medically Necessary Leave of Absence
Section 2741: Guaranteed Availability of Individual Health Insurance Coverage to Certain Individuals With Prior Group Coverage
Section 2742: Guaranteed Renewability of Individual Health Insurance Coverage
Section 2743: Certification of Coverage
Section 2751: Standards Relating to Benefits for Mothers and Newborns [in the Individual Market]
Section 2752: Required Coverage for Reconstructive Surgery Following Mastectomies
Section 2753: Prohibition of Health Discrimination on the Basis of Genetic Information
Section 2753 [sic]: Coverage of Dependent Students on Medically Necessary Leave of Absence

Appendix B to Part 800—Applicable Provisions of the Affordable Care Act

Section 1302: Essential Health Benefits Requirements
Section 1303: Special Rules
Section 1304: Related Definitions
Section 1311: Affordable Choices of Health Benefit Plans
Section 1334: Multi-State Plans
Section 1341: Transitional Reinsurance Program for Individual Market in Each State
Section 1342: Establishment of Risk Corridors for Plans in Individual and Small Group Markets
Section 1343: Risk Adjustment
Section 1401: Refundable Premium Tax Credit Providing Premium Assistance for Coverage under a Qualified Health Plan
Section 1402: Reduced Cost-Sharing for Individuals Enrolling in Qualified Health Plans
Section 1412(c): Payment of Premium Tax Credits and Cost-Sharing Reductions
Section 1557: Nondiscrimination
Section 6005: Pharmacy Benefit Managers Transparency Requirements

Appendix C to Part 800—Applicable Provisions of the Internal Revenue Code

Section 36B: Internal Revenue Code of 1986

[FR Doc. 2012–29118 Filed 11–30–12; 11:15 am]
BILLING CODE 6325–64–P

FEDERAL REGISTER

Vol. 77 Wednesday,
No. 234 December 5, 2012

Part V

Department of the Treasury

Internal Revenue Service

26 CFR Part 1

Net Investment Income Tax; Proposed Rule

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–130507–11]

RIN 1545–BK44

Net Investment Income Tax

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations that provide guidance under section 1411 of the Internal Revenue Code (Code). Section 1402(a)(1) of the Health Care and Education Reconciliation Act of 2010 added new section 1411 to the Code effective for taxable years beginning after December 31, 2012. The proposed regulations affect individuals, estates, and trusts. This document also contains a notice of a public hearing on these proposed regulations.

DATES: Written or electronic comments must be received by March 5, 2013.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–130507–11), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–130507–11), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC, or sent electronically, via the Federal eRulemaking portal at *www.regulations.gov* (IRS REG–130507–11).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Michala Irons, (202) 622–3050, or David H. Kirk, (202) 622–3060; concerning submissions of comments, the hearing, and/or to be placed on the building access list to attend the hearing, Oluwafunmilayo (Funmi) Taylor, (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collection of information should be sent to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the collection of information should be received by February 4, 2013. Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the functions of the IRS, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

There are two collections of information in the proposed regulations. The first collection is in proposed § 1.1411–7(d) and the second collection is in proposed § 1.1411–10(g).

The information collected in proposed § 1.1411–7(d) is required by the IRS to verify the taxpayer's reported adjustment under section 1411(c)(4). This information will be used to determine whether the amount of tax has been reported and calculated correctly. The likely respondents are owners of interests in partnerships and S corporations.

Estimated total annual reporting and/or recordkeeping burden: 315,000 hours.

Estimated average annual burden per respondent: 5 hours.

Estimated number of respondents: 63,000.

Estimated annual frequency of responses: On occasion.

The collection of information in proposed § 1.1411–10(g) is necessary for the IRS to determine whether a taxpayer has made an election pursuant to proposed § 1.1411–10(g) and to determine whether the amount of tax has been reported and calculated correctly. The likely respondents are individuals, estates, and trusts.

Estimated total annual reporting and/or recordkeeping burden: 62,000 hours.

Estimated average annual burden per respondent: 4 hours.

Estimated number of respondents: 15,500.

Estimated annual frequency of responses: Other (one time).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by section 6103.

Background

Section 1402(a)(1) of the Health Care and Education Reconciliation Act of 2010 (Pub. L. 111–152, 124 Stat. 1029) added section 1411 to a new chapter 2A of subtitle A (Income Taxes) of the Code effective for taxable years beginning after December 31, 2012. Section 1411 imposes a 3.8 percent tax on certain individuals, estates, and trusts. See section 1411(a)(1) and (a)(2). The tax does not apply to a nonresident alien or to a trust all of the unexpired interests in which are devoted to one or more of the purposes described in section 170(c)(2)(B). See section 1411(e).

In the case of an individual, section 1411(a)(1) imposes a tax (in addition to any other tax imposed by subtitle A) for each taxable year equal to 3.8 percent of the lesser of (A) the individual's net investment income for such taxable year, or (B) the excess (if any) of (i) the individual's modified adjusted gross income for such taxable year, over (ii) the threshold amount. Section 1411(b) provides that the threshold amount is: (1) In the case of a taxpayer making a joint return under section 6013 or a surviving spouse (as defined in section 2(a)), $250,000; (2) in the case of a married taxpayer (as defined in section 7703) filing a separate return, $125,000; and (3) in any other case, $200,000. Section 1411(d) defines modified adjusted gross income as adjusted gross income increased by the excess of (1) the amount excluded from gross income under section 911(a)(1), over (2) the amount of any deductions (taken into account in computing adjusted gross income) or exclusions disallowed under section 911(d)(6) with respect to the amount excluded from gross income under section 911(a)(1).

In the case of an estate or trust, section 1411(a)(2) imposes a tax (in addition to any other tax imposed by subtitle A) for each taxable year equal to 3.8 percent of the lesser of (A) the estate's or trust's undistributed net investment income, or (B) the excess (if any) of (i) the estate's or trust's adjusted gross income (as defined in section 67(e)) for such taxable year, over (ii) the dollar amount at which the highest tax bracket in section 1(e) begins for such taxable year.

Section 1402(a)(2) of the Health Care and Education Reconciliation Act of 2010 also amended section 6654 of the Code to provide that the tax imposed under chapter 2A (which includes

section 1411) is subject to the estimated tax provisions.

The tax imposed by section 1411 is not deductible in computing any tax imposed by subtitle A of the Code. See Joint Committee on Taxation, General Explanation of Tax Legislation Enacted in the 111th Congress (JCS–2–11) (March 24, 2011), at 364 (JCT 2011 Explanation).

Amounts collected under section 1411 are not designated for the Medicare Trust Fund. The Joint Committee on Taxation in 2011 stated that "[i]n the case of an individual, estate, or trust an unearned income Medicare contribution tax is imposed. No provision is made for the transfer of the tax imposed by this provision from the General Fund of the United States Treasury to any Trust Fund." See JCT 2011 Explanation, at 363; see also Joint Committee on Taxation, Description of the Social Security Tax Base (JCX–36–11) (June 21, 2011), at 24.

Section 1411(c)(1) provides that net investment income means the excess (if any) of (A) the sum of (i) gross income from interest, dividends, annuities, royalties, and rents, other than such income derived in the ordinary course of a trade or business to which the tax does not apply, (ii) other gross income derived from a trade or business to which the tax applies, and (iii) net gain (to the extent taken into account in computing taxable income) attributable to the disposition of property other than property held in a trade or business to which the tax does not apply; over (B) the deductions allowed by subtitle A which are properly allocable to such gross income or net gain.

Section 1411(c)(1)(A) defines net investment income, in part, by reference to trades or businesses described in section 1411(c)(2). A trade or business is described in section 1411(c)(2) if such trade or business is (A) a passive activity (within the meaning of section 469) with respect to the taxpayer, or (B) a trade or business of trading in financial instruments or commodities (as defined in section 475(e)(2)).

Income on the investment of working capital is not treated as derived from a trade or business for purposes of section 1411(c)(1) and is subject to tax under section 1411. See section 1411(c)(3).

In the case of the disposition of an interest in a partnership or an S corporation, section 1411(c)(4) provides that gain or loss from such disposition is taken into account for purposes of section 1411(c)(1)(A)(iii) only to the extent of the net gain or net loss which would be so taken into account by the transferor if all property of the partnership or S corporation were sold at fair market value immediately before the disposition of such interest.

Net investment income does not include distributions from a plan or arrangement described in section 401(a), 403(a), 403(b), 408, 408A, or 457(b). Section 1411(c)(5).

Net investment income also does not include any item taken into account in determining self-employment income for a taxable year on which a tax is imposed by section 1401(b). Section 1411(c)(6).

Explanation of Provisions

1. Overview of Proposed Regulations

Proposed § 1.1411–1 provides general operating rules applicable to section 1411. Proposed § 1.1411–2 provides specific rules applicable to individuals. Proposed § 1.1411–3 provides specific rules applicable to estates and trusts. Proposed § 1.1411–4 provides rules for defining net investment income. Proposed § 1.1411–5 provides rules for net investment income derived from trades or businesses that are passive activities or trading in financial instruments or commodities. Proposed § 1.1411–6 provides rules for gross income and net gain on the investment of working capital. Proposed § 1.1411–7 provides rules for dispositions of interests in partnerships and S corporations. Proposed § 1.1411–8 provides rules for distributions from certain qualified plans. Proposed § 1.1411–9 provides rules for items taken into account in determining self-employment income. Proposed § 1.1411–10 provides rules with respect to controlled foreign corporations and passive foreign investment companies. Finally, proposed § 1.469–11(b)(3)(iv) provides a regrouping "fresh start" under section 469 for certain taxpayers.

2. In General

Section 1411 (which constitutes chapter 2A of the Code) contains terms commonly used in Federal income taxation and cross-references certain provisions of chapter 1 such as sections 67(e), 469, 401(a), and 475(e)(2). However, other than these specific cross-references to provisions of chapter 1, and certain specific definitions set forth in section 1411, section 1411 does not provide definitions of its operative phrases or terminology. Moreover, there is no indication in the legislative history of section 1411 that Congress intended, in every event, that a term used in section 1411 would have the same meaning ascribed to it for other Federal income tax purposes (such as chapter 1). Accordingly, the definitional rules set forth in the proposed regulations are designed to promote the fair administration of section 1411 while preventing circumvention of the purposes of the statute. One of the general purposes of section 1411 is to impose a tax on unearned income or investments of certain individuals, estates, and trusts.

Under these proposed regulations, except as otherwise provided, chapter 1 principles and rules apply in determining the tax under section 1411. Consistent with this general approach, except as otherwise provided in the proposed regulations, gain that is not recognized under chapter 1 for a taxable year is not recognized for that year for purposes of section 1411 (for example, gain deferred or excluded under section 453 (installment method), section 1031 (like-kind exchanges), section 1033 (involuntary conversions), or section 121 (sale of principal residence)). Deferral or disallowance provisions of chapter 1 used in determining adjusted gross income apply to the determination of net investment income (for example, section 163(d) (limitation on investment interest), section 265 (expenses and interest relating to tax-exempt income), section 465(a)(2) (at risk limitations), section 469(b) (passive activity loss limitations), section 704(d) (partner loss limitations), section 1212(b) (capital loss carryover limitations), or section 1366(d)(2) (S corporation shareholder loss limitations)). A deduction carried over to a taxable year by reason of section 163(d), section 465(a)(2), section 469(b), section 704(d), section 1212(b), or section 1366(d)(2) and allowed for that taxable year in determining adjusted gross income is also allowed for the determination of net investment income, whether or not the taxable year from which the deduction is carried precedes the effective date of section 1411.

However, the proposed regulations modify the chapter 1 rules in certain respects in order to prevent circumvention of the purposes of the statute. For example, substitute interest and dividends, which are included in gross income under chapter 1, are net investment income even though these amounts are not categorically "interest" and "dividends" under chapter 1. In addition, while an item of income that is specifically excluded from gross income under chapter 1 generally also is excluded from net investment income under section 1411 (for example, tax-exempt interest), distributions described in section 959(d) or section 1293(c), excess distributions under section 1291 that are dividends, and gains that are treated as excess distributions under section 1291 (which are discussed in

part 11.B of this preamble) are net investment income under chapter 2A.

Proposed § 1.1411–1(b) provides generally that all references to an individual's adjusted gross income shall be treated as references to adjusted gross income (as defined in section 62) and that all references to an estate's or trust's adjusted gross income shall be treated as references to adjusted gross income (as defined in section 67(e)). As provided in part 11 of this preamble, there may be adjustments to adjusted gross income as a result of investments in controlled foreign corporations and passive foreign investment companies.

The IRS will closely review transactions that manipulate a taxpayer's net investment income to reduce or eliminate the amount of tax imposed by section 1411. In appropriate circumstances, the IRS will challenge such transactions based on applicable statutes and judicial doctrines. Thus, for example, if an investment arrangement that in form gives rise to income that does not constitute net investment income is in substance properly treated for Federal tax purposes as the holding of securities by one party as agent for another, the arrangement will be taxed in accordance with its substance.

3. Application to Individuals

A. In General

Section 1411(a)(1) imposes a tax on individuals, but section 1411(e)(1) provides that section 1411 does not apply to a nonresident alien. The proposed regulations provide that the term *individual* for purposes of section 1411 is any natural person, except for natural persons who are nonresident aliens. Therefore, section 1411 applies to any citizen or resident of the United States (within the meaning of section 7701(a)(30)(A)).

The amount of the tax on individuals is equal to 3.8 percent of the lesser of two amounts: (A) An individual's net investment income for such taxable year; or (B) the excess (if any) of (i) the individual's modified adjusted gross income for such taxable year, over (ii) the threshold amount. For example, if an unmarried U.S. citizen has modified adjusted gross income (as defined in section 1411(d) and proposed § 1.1411–2(c)) of $190,000, which includes $50,000 of net investment income (as defined in section 1411(c)(1) and proposed § 1.1411–4), there is no tax imposed under section 1411 because the threshold amount for a single individual is $200,000 (see section 1411(b)(3) and proposed § 1.1411–2(d)(1)(iii)). On the other hand, if that individual has modified adjusted gross income of $220,000, which includes net investment income of $50,000, the individual has a section 1411 tax of $760 (3.8 percent times $20,000).

The proposed regulations also clarify the treatment of (1) grantor trusts (see proposed §§ 1.1411–2(a)(2)(ii), 1.1411–3(b)(5), and part 4.B.ii of this preamble), (2) certain bankruptcy estates (see proposed §§ 1.1411–2(a)(2)(iii), 1.1411–3(d)(1), and part 4.D of this preamble), and (3) bona fide residents of the U.S. territories (see proposed § 1.1411–2(a)(2)(iv) and part 3.C of this preamble).

B. Joint Returns in the Case of a Nonresident Alien Individual Married to a U.S. Citizen or Resident

Proposed § 1.1411–2(a)(2)(i) addresses certain joint returns filed by married individuals. Proposed § 1.1411–2(a)(2)(i)(A) provides that in the case of a U.S. citizen or resident who is married (as defined in section 7703) to a nonresident alien individual, the spouses will be treated as married filing separately for purposes of section 1411. For purposes of calculating the tax imposed under section 1411(a)(1), the U.S. citizen or resident spouse will be subject to the threshold amount in section 1411(b)(2) ($125,000) for a married taxpayer filing a separate return, and the nonresident alien spouse will be exempt from section 1411 taxation under section 1411(e)(1). In accordance with the rules for married taxpayers filing separate returns, the U.S. citizen or resident spouse must determine his or her own net investment income and modified adjusted gross income.

In general, section 6013(a) provides that no joint return may be made by married taxpayers if either spouse is a nonresident alien at any time during a taxable year. Section 6013(g), however, generally permits a nonresident alien individual married to a citizen or resident of the United States to elect for purposes of chapter 1 and chapter 24 of the Code to be treated as a resident of the United States. Proposed § 1.1411–2(a)(2)(i)(B) provides that married taxpayers who file a joint Federal income tax return pursuant to a section 6013(g) election can also elect to be treated as making a section 6013(g) election for purposes of chapter 2A of the Code. For purposes of calculating the tax imposed under section 1411(a)(1), the effect of such an election is to include the combined income of the U.S. citizen or resident spouse and the nonresident spouse in the section 1411(a)(1) calculation and subject that income to the threshold amount in section 1411(b)(1) ($250,000) for a taxpayer filing a joint return. Proposed § 1.1411–2(a)(2)(i)(B)(*2*) provides procedural requirements for making this election.

C. Bona Fide Residents of U.S. Territories

Proposed § 1.1411–2(a)(2)(iv) provides guidance on the application of section 1411 to individuals who are bona fide residents (within the meaning of section 937(a)) of possessions of the United States (U.S. territories) (namely, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the United States Virgin Islands). An individual who is a citizen, resident, or nonresident alien with respect to the United States may qualify as a bona fide resident of a U.S. territory.

The application of the tax under section 1411 to a bona fide resident of a U.S. territory depends on whether the U.S. territory has a mirror code system of taxation, meaning the income tax laws are generally identical to the Code (except for the substitution of the name of the relevant territory for the term "United States" where appropriate).. Three of the five U.S. territories (Guam, the Northern Mariana Islands, and the United States Virgin Islands) have a mirror code.

Bona fide residents of U.S. territories that are mirror code jurisdictions have no income tax obligation (or related return filing requirement) with the United States provided, generally, that they properly report income and pay income tax to the tax administration of their respective U.S. territory. See generally sections 932, 934, and 935. Therefore, the tax imposed by section 1411(a) generally does not apply to bona fide residents of mirror code jurisdictions because they will not have an income tax liability to the United States if they fully comply with the tax laws of the relevant territory.

Bona fide residents of non-mirror code jurisdictions (American Samoa and Puerto Rico) generally exclude territory-source income from U.S. Federal gross income under sections 931 and 933, respectively. (American Samoa currently is the only territory to which section 931 applies because it is the only territory that has entered into an implementing agreement under sections 1271(b) and 1277(b) of the Tax Reform Act of 1986.) Although territory-source income is excluded, these bona fide residents are subject to U.S. Federal income taxation, and have a related income tax return filing requirement with the United States to the extent they have U.S.-source or other non-territory source income or income from amounts paid for services performed as an

employee of the United States or any agency thereof (collectively, U.S. reportable income). See section 931(a) and (d) and section 933. Furthermore, under section 876 and § 1.876–1, bona fide residents of non-mirror code jurisdictions who are nonresident aliens with respect to the United States are subject to net-basis U.S. taxation on U.S. reportable income under sections 1 and 55, rather than to gross-basis U.S. taxation with respect to U.S.-source income under sections 871 through 879 (provisions that otherwise generally apply to nonresident aliens with respect to U.S.-source income).

Therefore, the tax imposed under section 1411(a) is applicable to bona fide residents of non-mirror code jurisdictions if they have U.S. reportable income that gives rise to both net investment income and modified adjusted gross income exceeding the threshold amount in section 1411. However, section 1411(a) does not apply if such bona fide residents are nonresident alien individuals with respect to the United States because section 1411(e)(1) and proposed § 1.1411–2(a)(1) exclude from section 1411(a) all nonresident alien individuals, which would include bona fide residents of any U.S. territory. However, nonresident alien individuals who are bona fide residents of non-mirror code jurisdictions remain subject to taxation under chapter 1 of subtitle A pursuant to section 876.

D. Modified Adjusted Gross Income

For purposes of section 1411 and the regulations thereunder, the term *modified adjusted gross income* is defined in section 1411(d) and proposed § 1.1411–2(c)(1) as adjusted gross income increased by the excess of (1) the amount excluded from gross income under section 911(a)(1), over (2) the amount of any deductions (taken into account in computing adjusted gross income) or exclusions disallowed under section 911(d)(6) with respect to the amounts excluded from gross income under section 911(a)(1). See part 11 of this preamble for additional discussion on adjustments to modified adjusted gross income with respect to the ownership of interests in controlled foreign corporations and passive foreign investment companies.

E. Threshold Amount

For purposes of section 1411(a)(1) and (b) and the regulations thereunder, the term *threshold amount* for an individual means (1) in the case of a taxpayer making a joint return under section 6013 or a surviving spouse (as defined in section 2(a)), $250,000, (2) in the case of a married taxpayer (as defined in section 7703) filing a separate return, $125,000, and (3) in any other case, $200,000. For special rules regarding a nonresident alien individual married to U.S. citizen or resident, see proposed § 1.1411–2(a)(2)(i) and part 3.B of this preamble. For rules regarding certain bankruptcy estates, see proposed §§ 1.1411–2(a)(2)(iii), 1.1411–3(d)(1), and part 4.D of this preamble. The threshold amount is not indexed for inflation.

Under the proposed regulations, the threshold amount is generally not prorated in the case of a short taxable year of an individual. However, the proposed regulations provide a special rule in the case of an individual who has a short taxable year resulting from a change of annual accounting period. Under section 443(b)(1), a taxpayer that undergoes a change in annual accounting period under section 442 and has a short period must annualize its taxable income. The taxpayer's Federal income tax is the tax computed on the annualized taxable income by multiplying the taxable income for the short period by twelve and dividing the result by the number of months in the short period. Proposed § 1.1411–2(d)(2)(ii) provides that an individual taxpayer that has a short period resulting from a change of annual accounting period shall reduce the applicable threshold amount to an amount that bears the same ratio to the full threshold amount provided under section 1411(b) as the number of months in the short period bears to twelve.

4. Application to Estates and Trusts

In general, section 1411(a)(2) imposes a tax of 3.8 percent on estates and trusts on the lesser of their undistributed net investment income or the excess of their adjusted gross income (as defined in section 67(e)) over the dollar amount at which the highest tax bracket in section 1(e) begins for such taxable year. Proposed § 1.1411–3 provides special rules for applying section 1411 to estates and trusts, including an estate or trust with a short taxable year resulting from the formation or termination of the estate or trust or a change in accounting period.

A. Trusts Subject to Section 1411

Because Congress did not provide a rule specifying the particular trusts subject to section 1411, the Treasury Department and the IRS have determined that section 1411 applies to ordinary trusts described in § 301.7701–4(a). The general rule set forth in proposed § 1.1411–3(a)(1)(i) (that section 1411 applies to all estates and trusts that are subject to the provisions of part I of subchapter J of chapter 1 of subtitle A of the Code) implements this approach. This rule excludes from the application of section 1411 business trusts described in § 301.7701–4(b), which are treated as business entities under § 301.7701–2 and as eligible entities for purposes of entity classification in § 301.7701–3. Accordingly, such trusts are not subject to section 1411 at the entity level.

In addition, the general rule excludes certain state law trusts that are subject to specific taxation regimes in chapter 1 other than part I of subchapter J. This exclusion is consistent with the exception in the entity classification regulations for entities where a specific provision of the Code provides for special treatment of that organization. See § 301.7701–1(b). Examples of these trusts include common trust funds taxed under section 584 and expressly not subject to taxation under chapter 1 (per section 584(b)) and designated settlement funds taxed under section 468B in lieu of any other taxation under subtitle A (per section 468B(b)(4)).

However, section 1411 does apply to trusts subject to the provisions of part I of subchapter J, even though such trusts may have special computational rules within those provisions. These trusts include pooled income funds described in section 642(c)(5), cemetery perpetual care funds described in section 642(i), and qualified funeral trusts described in section 685. Similarly, section 1411 applies to certain Alaska Native settlement trusts described in section 646 (if that provision is in effect after the effective date of section 1411). The Treasury Department and the IRS request comments as to whether there may be administrative reasons to exclude one or more of these types of trusts from section 1411.

B. Application to Specific Trusts

i. Tax-Exempt Trusts

Section 1411 is in subtitle A. As a result, section 1411 does not apply to any trust, fund, or other special account that is exempt from tax imposed under subtitle A. This exclusion applies even if such trust may be subject to tax under section 511 on its unrelated business taxable income (and even if the trust's unrelated business taxable income is comprised of net investment income). Accordingly, the proposed regulations provide that any account, fund, or trust that is exempt from taxation under subtitle A (for example, sections 501(a), 664(c)(1), 220(e)(1), 223(e)(1), 529(a), and 530(a)) is also exempt from section 1411.

Section 1411(e)(2) specifically excepts from the application of section 1411 a trust all of the unexpired interests in which are devoted to one or more of the purposes described in section 170(c)(2)(B). See proposed § 1.1411–3(b)(1).

ii. Grantor Trusts

A grantor trust is a trust or any portion thereof that is treated as being owned by the grantor or another person under subpart E of subchapter J (see sections 671 through 679). The owner must compute the owner's taxable income and credits by including the items of income, deduction, and credit against the tax attributable to the trust or the portion thereof treated as being owned by the owner. Thus, a grantor trust's income is not taxed as trust income but instead is treated as being the income of (and taxable to) the owner. The same rule applies for purposes of section 1411, thereby providing a consistent application of the grantor trust rules. This approach is also consistent with the IRS's position that the application of section 671 is not limited to chapter 1 of subtitle A. See Notice 97–24 (1997–1 CB 409); see § 601.601(d)(2).

Proposed § 1.1411–3(b)(5) provides that the tax under section 1411 is not imposed on a grantor trust, but if a grantor or another person is treated as the owner of all or a portion of a trust under subpart E of part I of subchapter J of chapter 1 any items of income, deduction, or credit that are included in computing taxable income of such grantor or other person under section 671 shall be treated as if such items had been received or paid directly by the grantor or other person for purposes of calculating such person's net investment income.

iii. Electing Small Business Trusts (ESBTs)

Proposed § 1.1411–3(c)(1) provides special computational rules for ESBTs. For purposes of chapter 1, section 641(c)(1) provides that (A) the portion of any ESBT which consists of stock in one or more S corporations shall be treated as a separate trust, and (B) the amount of the tax imposed by chapter 1 on such separate trust shall be determined with certain modifications detailed in section 641(c)(2). Section 1.641(c)–1(a) provides that an ESBT is treated as two separate trusts for purposes of chapter 1.

The proposed regulations preserve the chapter 1 treatment of the ESBT as two separate trusts for computational purposes but consolidates the ESBT into a single trust for determining the adjusted gross income threshold in section 1411(a)(2)(B)(ii). This rule applies a single section 1(e) threshold so as to not inequitably benefit ESBTs over other taxable trusts.

Proposed § 1.1411–3(c)(1)(ii) provides the method to determine the ESBT's section 1411 tax base. First, the ESBT will separately calculate the undistributed net investment income of the S portion and non-S portion in accordance with the general rules for trusts under chapter 1, and combine the undistributed net investment income of the S portion and the non-S portion. Second, the ESBT will determine its adjusted gross income, solely for purposes of section 1411, by adding the net income or net loss from the S portion to that of the non-S portion as a single item of income or loss. Finally, to determine whether the ESBT is subject to section 1411, and if so, the section 1411 tax base, the ESBT will compare the combined undistributed net investment income with the excess of its adjusted gross income over the section 1(e) threshold.

iv. Charitable Remainder Trusts

Proposed § 1.1411–3(c)(2) provides special computational rules for charitable remainder trusts. Although the trust itself is not subject to section 1411 as provided in proposed § 1.1411–3(b)(3), annuity and unitrust distributions may be net investment income to the non-charitable recipient beneficiary. Proposed § 1.1411–3(c)(2) provides special rules to maintain the character and distribution ordering rules of § 1.664–1(d) for purposes of section 1411. The Treasury Department and the IRS are proposing these rules to determine whether items of income allocated to annuity or unitrust payments constitute net investment income to the recipient beneficiary.

Proposed § 1.1411–3(c)(2)(i) provides that distributions from a charitable remainder trust to a beneficiary for a taxable year consist of net investment income in an amount equal to the lesser of the total amount of the distributions for that year, or the current and accumulated net investment income of the charitable remainder trust. For charitable remainder trusts with multiple annuity or unitrust beneficiaries, the trust shall apportion the net investment income among the beneficiaries based on their respective shares of the total annuity or unitrust amount paid by the trust for that taxable year.

Proposed § 1.1411–3(c)(2)(ii) defines the term *accumulated net investment income* as the total amount of net investment income received by a charitable remainder trust for all taxable years beginning after December 31, 2012, less the total amount of net investment income distributed for all prior taxable years beginning after December 31, 2012.

Thus, under proposed § 1.1411–3(c)(2), current and accumulated net investment income of the trust is deemed to be distributed before amounts that are not items of net investment income for purposes of section 1411. This classification of income as net investment income or non-net investment income is separate from, and in addition to, the four tiers under section 664(b), which continue to apply.

The Treasury Department and the IRS considered an alternative method for determining the distributed amount of net investment income in which net investment income would be determined on a class-by-class basis within each of the § 1.664–1(d)(1) enumerated categories. Under this alternative method, trustees would need to account for additional classes of income within each category, consistent with § 1.664–1(d)(1)(i), for taxable years beginning after December 31, 2012. The alternative method would create a sub-class system of net investment income and non-net investment income within each class and category of the section 664 framework. Although differentiating between net investment income and non-net investment income within each class and category might be considered more consistent with the structure created for charitable remainder trusts by section 664 and the corresponding regulations, the Treasury Department and the IRS believe that the recordkeeping and compliance burden that would be imposed on trustees by this alternative would outweigh the benefits.

C. Foreign Estates and Foreign Trusts

Section 1411 does not specifically address the treatment of foreign estates and foreign nongrantor trusts. See part 4.B.ii of this preamble for the rules that apply if the foreign trust is treated as owned by a grantor or another person under sections 671 through 679. The Treasury Department and the IRS believe that section 1411 should not apply to foreign estates and foreign trusts that have little or no connection to the United States (for example, if none of the beneficiaries is a United States person). Accordingly, proposed §§ 1.1411–3(d)(2)(i) and 1.1411–3(b)(6) provide, as a general rule, that foreign estates and foreign trusts are not subject to section 1411. The Treasury Department and the IRS believe, however, that net investment income of

a foreign estate or foreign trust should be subject to section 1411 to the extent such income is earned or accumulated for the benefit of, or distributed to, United States persons. The taxation of United States beneficiaries receiving current distributions of net investment income from a foreign estate or foreign nongrantor trust will be consistent with the general operation of subparts A through D of part I of subchapter J and will be subject to section 1411. See proposed §§ 1.1411–4(e) and 1.1411–3(e)(3).

Proposed §§ 1.1411–3(d)(2)(ii) and 1.1411–3(c)(3) reserve on the application of section 1411 to foreign estates and foreign trusts with United States beneficiaries. The Treasury Department and the IRS request comments on the application of section 1411 to net investment income of foreign estates and foreign trusts that is earned or accumulated for the benefit of United States beneficiaries, including whether section 1411 should be applied to the foreign estate or foreign trust, or to the United States beneficiaries upon an accumulation distribution. Regarding the application of section 1411 to the foreign estate or foreign trust, consideration is being given to whether the definition of a United States beneficiary should exclude contingent or future beneficiaries and to adoption of an exclusion from section 1411 for foreign pension funds that are treated as trusts for United States tax purposes. To the extent that the final regulations do not subject foreign estates or foreign trusts to tax under section 1411, the Treasury Department and IRS request comments on how section 1411 should apply to United States persons that receive accumulation distributions from foreign estates and foreign trusts, including the means by which to identify such distributions as net investment income.

D. Bankruptcy Estates

A bankruptcy estate of a debtor who is an individual is treated as an individual for purposes of computing the tax under section 1411. Section 1398 provides rules for the taxation of bankruptcy estates in chapter 7 and chapter 11 cases under the Bankruptcy Code in which the debtor is an individual. In these cases, the bankruptcy estate computes its tax in the same manner as an individual. Section 1398(c)(2) provides that the tax rate under section 1 for the bankruptcy estate is the same as that imposed on a married taxpayer filing separately, and section 1398(c)(3) provides that the bankruptcy estate is entitled to a standard deduction of a married taxpayer filing separately. Therefore, consistent with section 1398, regardless of the actual marital status of the debtor, a bankruptcy estate of a debtor who is an individual is treated as a married taxpayer filing separately for purposes of the thresholds in section 1411(b), and therefore the threshold amount applicable to such a bankruptcy estate is $125,000.

E. Calculation of Undistributed Net Investment Income

Under section 1411(a)(2), the tax under section 1411 is imposed on the lesser of (A) the undistributed net investment income of the estate or trust for such year, or (B) the excess (if any) of the adjusted gross income (as defined in section 67(e)) for the taxable year, over the dollar amount at which the highest tax bracket in section 1(e) begins for such taxable year. Thus, similar to the computation for individuals, it is the lesser of two amounts. Net investment income is defined in section 1411(c)(1) and proposed § 1.1411–4, and this same definition applies to individuals, estates, and trusts. Undistributed net investment income is a section 1411 term used solely for estates and trusts (and not individuals), and is not defined in section 1411. The proposed regulations conform the taxation of estates and trusts under section 1411 to the rules of part I of subchapter J to avoid double taxation of net investment income and the taxation of amounts distributed to charities.

The proposed regulations give effect to the provisions of subchapter J that treat an estate or trust as a conduit by reducing the estate's or trust's taxable income to take into account distributions to beneficiaries and the charitable deduction. The proposed regulations, accordingly, provide that undistributed net investment income of an estate or trust is its net investment income (as determined under proposed § 1.1411–4) reduced by the share of net investment income included in the deductions of the estate or trust under section 651 or section 661, and the share of net investment income allocated to the section 642(c) deduction of the estate or trust in accordance with § 1.642(c)–2(b) and the allocation and ordering rules under § 1.662(b)–2. The proposed regulations adopt the class system of income categorization, generally embodied in sections 651 through 663 and the regulations thereunder, to arrive at the trust's net investment income reduction in the case of distributions that are comprised of both net investment income and net excluded income items. For this purpose, the term excluded income includes items that are not includible in net investment income by either specific exclusion under chapter 1 (for example, interest on state and local bonds under section 103(a)); specific exclusion contained in section 1411 (for example, section 1411(c)(5) or (6)) or the proposed regulations; or are not specifically included in section 1411(c)(1)(A) or elsewhere in the proposed regulations.

5. Definition of Net Investment Income

Section 1411(c)(1) defines net investment income as the excess (if any) of (A) the sum of (i) gross income from interest, dividends, annuities, royalties, and rents, other than such income derived in the ordinary course of a trade or business to which the tax does not apply, (ii) other gross income from trades or businesses to which the tax applies, and (iii) net gain (to the extent taken into account in computing taxable income) attributable to the disposition of property other than property held in a trade or business to which the tax does not apply, over (B) deductions allowed by subtitle A which are properly allocable to such gross income or net gain.

If items of net investment income (including the properly allocable deductions) pass through to an individual, estate, or trust from a partnership or S corporation, the allocation of such items must be separately stated under section 702 or section 1366 and the regulations thereunder.

A. Gross Income Items Described in Section 1411(c)(1)(A)(i)

i. In General

The proposed regulations provide that net investment income includes, in part, gross income from interest, dividends, annuities, royalties, and rents. However, such income is excluded from net investment income if it is derived in the ordinary course of a trade or business not described in section 1411(c)(2). This exclusion is described in part 5.A.vi of this preamble.

ii. Interest and Dividends

(a) In General

Gross income from interest includes any item treated as interest for purposes of chapter 1, and includes substitute interest (as discussed in part 5.A.ii.(b) of this preamble).

Gross income from dividends includes any item treated as a dividend for purposes of chapter 1. This includes, but is not limited to, amounts treated as dividends pursuant to subchapter C that are included in gross income (including

constructive dividends); amounts treated as dividends under section 1248(a); amounts treated as dividends under § 1.367(b)–2(e)(2); and amounts treated as dividends under section 1368(c)(2). In addition, as discussed in part 5.A.ii.(b) and part 11 of this preamble, substitute dividends, distributions from previously taxed earnings and profits (within the meaning of section 959(d) or section 1293(c)), and certain excess distributions (within the meaning of section 1291(b)) are included in net investment income.

Gross income from notional principal contracts (within the meaning of § 1.446–3(c)) is not included in net investment income under section 1411(c)(1)(A)(i). However, if gross income from notional principal contracts is derived in a trade or business described in proposed § 1.1411–5, all of such gross income is included in net investment income under section 1411(c)(1)(A)(ii). In addition, gain on a disposition of a notional principal contract is included in net investment income under either section 1411(c)(1)(A)(ii) or section 1411(c)(1)(A)(iii) (see parts 5.B and 5.C of this preamble).

(b) Substitute Interest and Substitute Dividends

A substitute interest payment or a substitute dividend payment made to the transferor of a security in a securities lending transaction or a sale-repurchase transaction is treated as an interest payment or dividend payment, as applicable, for purposes of section 1411, and thus as net investment income for purposes of proposed § 1.1411–4(a)(1)(i). If substitute interest and substitute dividend payments were not treated in this manner, the Treasury Department and the IRS believe that taxpayers could easily avoid the section 1411 tax with respect to interest or dividend income by lending their securities over a payment date. The Treasury Department and the IRS do not believe that Congress intended the imposition of the section 1411 tax to turn on transactional formalities that are so readily manipulated by well-advised taxpayers. This approach is consistent with other contexts in which substitute interest and dividend payments have been treated in the same manner as actual interest or dividend payments in order to preclude avoidance of tax. For example, regulations under sections 861, 871, and 881 treat substitute interest and dividend payments as having the same source and the same character as the actual interest or dividend payments for which they substitute in order to preclude avoidance of nonresident withholding tax. See §§ 1.861–2(a)(7); 1.861–3(a)(6); 1.871–7(b)(2); and 1.881–2(b)(2).

In certain other contexts, substitute payments are not treated in the same manner as actual interest or dividend payments (for example, a substitute dividend payment is not eligible for the dividends received deduction or for the lower rate of tax applicable to qualified dividends under section 1(h)(11)). In those contexts, however, disparate treatment serves essentially the same purpose, that is, to preclude the avoidance of tax through the multiplication of tax benefits or tax exclusions. The Treasury Department and the IRS believe that it is appropriate to treat substitute payments in a manner that precludes their use to facilitate tax avoidance. Accordingly, these proposed regulations treat substitute interest and substitute dividends as interest and dividends for purposes of determining net investment income.

(c) Controlled Foreign Corporations and Passive Foreign Investment Companies

Special rules apply to a United States shareholder of a controlled foreign corporation or a United States person who owns stock in a passive foreign investment company. See part 11 of this preamble.

iii. Annuities

Gross income from annuities includes the amount received as an annuity under an annuity, endowment, or life insurance contract that is includible in gross income as a result of the application of section 72(a) and section 72(b), and an amount not received as an annuity under an annuity contract that is includible in gross income under section 72(e).

The Code does not define the term annuity. Section 72(a) provides that gross income includes any amount received as an annuity under an annuity, endowment, or life insurance contract. Section 72(b), however, excludes from gross income that part of an amount received as an annuity that bears the same ratio to that amount as the investment in the contract bears to the expected return under the contract (determined as of the annuity starting date).

Section 72(e) governs the treatment of amounts received under an annuity contract that are not received as an annuity (such as lump sum distributions or surrenders). Section 72(e)(2) provides in general that such amounts received on or after the annuity starting date are included in gross income, and that amounts received before the annuity starting date are included in gross income to the extent allocable to income on the contract on an income-first basis.

Gain or loss from the sale of an annuity would be treated as net investment income for purposes of section 1411. To the extent the sales price of the annuity does not exceed its surrender value, the gain recognized would be treated as gross income described in section 1411(c)(1)(A)(i) and proposed § 1.1411–4(a)(1)(i). If the sales price of the annuity exceeds its surrender value, the seller would treat the gain equal to the difference between the basis in the annuity and the surrender value as gross income described in section 1411(c)(1)(A)(i) and proposed § 1.1411–4(a)(1)(i), and would treat the excess of the sales price over the surrender value as gain from the disposition of property under section 1411(c)(1)(A)(iii) and proposed § 1.1411–4(a)(1)(iii).

iv. Royalties

Gross income from royalties includes amounts received from mineral, oil, and gas royalties, and amounts received for the privilege of using patents, copyrights, secret processes and formulas, goodwill, trademarks, tradebrands, franchises, and other like property.

v. Rents

Gross income from rents includes amounts paid or to be paid principally for the use of (or the right to use) tangible property.

vi. Ordinary Course of a Trade or Business Exception

The items described in parts 5.A.ii through 5.A.v of this preamble are not included in net investment income by reason of section 1411(c)(1)(A)(i) if the item meets the ordinary course of a trade or business exception. See proposed § 1.1411–4(b). The ordinary course of a trade or business exception is a two-part test. First, the item must be "derived in" a trade or business not described in section 1411(c)(2). Second, if the item is derived in a trade or business not described in section 1411(c)(2), then such item must also be derived in the "ordinary course" of such trade or business. As explained in part 6 of this preamble, a trade or business described in section 1411(c)(2) is either a trade or business that is (A) a passive activity (within the meaning of section 469) with respect to the taxpayer, or (B) trading in financial instruments (as defined in proposed § 1.1411–5(c)(1)) or commodities (as defined in section 475(e)(2)).

(a) Derived In

In order for an item of gross income described in section 1411(c)(1)(A)(i) to be excluded from section 1411 under the ordinary course of a trade or business exception, the income must be derived in a trade or business that is neither a passive activity with respect to the taxpayer (as described in section 1411(c)(2)(A) and the regulations thereunder) nor a trade or business of trading in financial instruments or commodities (as described in section 1411(c)(2)(B) and the regulations thereunder).

In the case of an individual who is engaged in the conduct of a trade or business directly (for example, a sole proprietor) or through ownership of an interest in an entity that is disregarded as an entity separate from the individual owner under § 301.7701–3, the determination of whether an item of gross income is derived in a trade or business described in section 1411(c)(2)(A) or (B) is made at the individual level. For example, if A, an individual, is engaged in a trade or business that is not described in section 1411(c)(2) and the trade or business has gross income (for example, royalties), such gross income is derived in A's trade or business, and therefore A meets the first part of the ordinary course of a trade or business exception. However, if A's trade or business is a passive activity with respect to A or if A's trade or business is trading in financial instruments or commodities, the ordinary course of a trade or business exception will be inapplicable because the income is derived in a trade or business described in section 1411(c)(2).

In the case of an individual, estate, or trust that owns an interest in a trade or business through one or more passthrough entities (a partnership or an S corporation), the determination of whether an item of gross income described in section 1411(c)(1)(A)(i) allocated to the individual, estate, or trust from the passthrough entity is derived in a trade or business described in section 1411(c)(2)(A) (a passive activity with respect to the taxpayer) or section 1411(c)(2)(B) (trading in financial instruments or commodities) is made in the following manner. The determination of whether the trade or business from which the income is derived is a passive activity with respect to the taxpayer is determined at the taxpayer (individual, estate, or trust) level in accordance with the general principles of section 469. For example, if A, an individual, owns an interest in PRS, a partnership, which is engaged in a trade or business, the determination of whether PRS's trade or business is a passive activity with respect to A is made in accordance with section 469 and the regulations under that section. See part 6.B of this preamble for rules to determine whether a trade or business is a passive activity with respect to a taxpayer.

On the other hand, the determination of whether the trade or business from which the income is derived is a trade or business of trading in financial instruments or commodities is made at the passthrough entity level (the partnership or S corporation level). If the passthrough entity is engaged in a trade or business of trading in financial instruments or commodities, income from such trade or business retains its character as it passes from the entity to the taxpayer. Therefore, regardless of whether the individual is directly engaged in a trade or business or whether an intervening passthrough entity is engaged in a trade or business, such income will not qualify for the ordinary course of a trade or business exception in section 1411(c)(1)(A)(i) because such income is derived in a trade or business of trading in financial instruments or commodities (as described in section 1411(c)(2)(B)). See *Example 2* of proposed § 1.1411–4(b)(3).

Conversely, if the passthrough entity is not engaged in a trade or business, income allocated to an individual from such entity will not qualify for the ordinary course of a trade or business exception even if the individual or an intervening entity is engaged in a trade or business. For example, B, an individual, owns an interest in UTP, a partnership, which is engaged in a trade or business. UTP owns an interest in LTP, also a partnership, which is not engaged in a trade or business. Any income described in section 1411(c)(1)(A)(i) passed through from LTP (through UTP) to B will not be derived in a trade or business because LTP is not engaged in a trade or business. This characterization applies even though UTP is engaged in a trade or business and even if (1) B is engaged in a trade or business, (2) B provides services with respect to UTP's trade or business, and/or (3) B provides services to LTP. See *Example 1* of proposed § 1.1411–4(b)(3).

In addition, if the passthrough entity is not engaged in a trade or business and the passthrough entity has items of income described in section 1411(c)(1)(A)(i), the individual's status under section 469 is irrelevant. For example, C, an individual, owns an interest in PRS, a partnership that is not engaged in a trade or business and earns dividends and interest. C's distributive share of dividends and interest from PRS will be subject to section 1411(c)(1)(A)(i) because they are not derived in a trade or business and therefore cannot be excluded under the ordinary course of a trade or business exception.

Similar rules regarding whether the trade or business is determined at the taxpayer level or the entity level apply in determining whether net gain is attributable to the disposition of property "held" in a trade or business subject to section 1411. See part 5.C of this preamble.

The interaction of the ordinary course of a trade or business exception and the trade or business rules under sections 1411(c)(2)(A) and 1411(c)(2)(B) can be illustrated in the following example. B, an individual, owns an interest in S, an S corporation, which is a bank. S earns interest in the ordinary course of its trade or business (which is not trading in financial instruments or commodities). Accordingly, the interest B earns through S is not derived in a trade or business described in section 1411(c)(2)(B). B will then have to determine if S's trade or business is a passive activity with respect to B. If B is passive with respect to S's banking business, then even though the interest was not subject to section 1411(c)(1)(A)(i) because of section 1411(c)(2)(B), B's pro rata share of S's interest is net investment income under section 1411(c)(1)(A)(ii) because of section 1411(c)(2)(A). See *Example 3* of proposed § 1.1411–4(b)(3).

(b) Ordinary Course

Section 1411 does not define ordinary course of a trade or business, and the proposed regulations do not provide guidance on the meaning of ordinary course. However, other regulation sections and case law provide guidance on whether an item of gross income is derived in the ordinary course of a trade or business. See, for example, *Lilly* v. *Comm'r,* 343 U.S. 90, 93 (1953), *rev'g* 188 F.2d 269 (4th Cir. 1951), *aff'g* 14 T.C. 1066 (1950) (holding that expenses incurred regularly and arising from transactions that commonly or frequently occur in the type of business involved are "ordinary"); § 1.469–2T(c)(3)(ii) (providing rules for determining whether certain portfolio income is excluded from the definition of passive activity gross income).

vii. Income From Employment

For purposes of section 1411, an employee is treated as engaged in the trade or business of being an employee. Therefore, regardless of whether such amounts are calculated by reference to

the items described in proposed § 1.1411–4(a), amounts paid by an employer to an employee that are treated as wages for purposes of section 3401 are not net investment income because such amounts are derived in the ordinary course of a trade or business to which section 1411 does not apply. For example, amounts paid to an employee under a nonqualified deferred compensation plan for such employee (or that otherwise become includible in income under section 409A, 457(f), 457A, or other Code section or tax doctrine) that include gross income from interest or other earnings are not treated as net investment income, regardless of whether such amounts are not subject to Federal Insurance Contributions Act tax due to the earlier application of section 3121(v)(2).

viii. Coordination With Portfolio Income Rules in Section 469

Because section 469 treats portfolio income (which includes, for example, gross income from interest and dividends) as not derived in the ordinary course of a trade or business, the ordinary course of a trade or business exception in section 1411(c)(1)(A)(i) does not apply to such income, and such income will be net investment income under proposed § 1.1411–4(a)(1)(i). The section 469 portfolio income rules are discussed in detail in part 6.B.i.(c).(1).(I) of this preamble.

B. Other Trade or Business Gross Income Described in Section 1411(c)(1)(A)(ii)

Net investment income also includes other gross income derived from a trade or business described in section 1411(c)(2). See section 1411(c)(1)(A)(ii). The trades or businesses described in section 1411(c)(2) are discussed in part 6 of this preamble.

For a trade or business described in section 1411(c)(2)(A), which is a trade or business that is a passive activity with respect to the taxpayer, section 1411(c)(1)(A)(ii) includes other gross income that is not gross income described in section 1411(c)(1)(A)(i) or net gain described in section 1411(c)(1)(A)(iii). Thus, if an item of gross income or net gain is subject to section 1411(c)(1)(A)(i) or (iii), it is generally not other gross income described in section 1411(c)(1)(A)(ii).

For a trade or business described in section 1411(c)(2)(B), which is a trade or business of trading in financial instruments or commodities, section 1411(c)(1)(A)(ii) includes all other gross income from such trade or business that is not gross income described in section 1411(c)(1)(A)(i). For example, any gain from marking to market under section 475(f) or section 1256 and any realized gain from the disposition of property held in the trade or business of trading in financial instruments or commodities is classified as other gross income subject to section 1411(c)(1)(A)(ii) (and not classified as net gain under section 1411(c)(1)(A)(iii)).

C. Net Gain Described in Section 1411(c)(1)(A)(iii)

Section 1411(c)(1)(A)(iii) states that net investment income includes net gain (to the extent taken into account in computing taxable income) attributable to the disposition of property other than property held in a trade or business not described in section 1411(c)(2). See part 11 of this preamble for additional discussion on net investment income with respect to controlled foreign corporations and passive foreign investment companies.

i. Disposition

1. In General

The proposed regulations provide that net investment income includes net gain (to the extent taken into account in computing taxable income) attributable to the sale, exchange, transfer, conversion, cash settlement, cancellation, termination, lapse, expiration, or other disposition (collectively, referred to as the disposition) of property other than property held in a trade or business not described in proposed § 1.1411–5. Except as otherwise provided, the income tax rules in chapter 1 generally will determine whether there has been a disposition of property under section 1411. For example, if a partner receives a distribution of money from a partnership in excess of the adjusted basis of the partner's interest in the partnership and recognizes gain under section 731(a), or if an S corporation shareholder receives a distribution of money from the S corporation in excess of the adjusted basis of the shareholder's stock in the corporation and recognizes gain under section 1368(b)(2), the gain is treated as gain from the sale or exchange of such partnership interest or S corporation stock for purposes of section 1411(c)(1)(A)(iii). As another example, if stock of an S corporation is sold and a section 338(h)(10) election is made, each shareholder's pro rata share of the deemed asset sale gain or loss may be taken into account in determining net investment income under section 1411(c)(1)(A)(iii). Furthermore, each shareholder may have additional gain or loss upon the deemed liquidation of the S corporation resulting from the section 338(h)(10) election, which gain or loss will also generally be taken into account under section 1411(c)(1)(A)(iii) in determining net investment income. In addition, capital gain dividends from regulated investment companies and real estate investment trusts described in sections 852(b)(3)(C) and 857(b)(3)(C), respectively, and undistributed capital gains described in sections 852(b)(3)(D) and 857(b)(3)(D), are included in net investment income as net gain under section 1411(c)(1)(A)(iii), and not as dividend income under section 1411(c)(1)(A)(i).

2. Mark-to-Market Rules for Non-Traders

Under certain statutory or regulatory provisions, a non-trader may (or may be required to) mark assets to market. For example, under section 1256, a taxpayer is treated as selling a section 1256 contract for fair market value at the end of the taxable year, and the taxpayer includes in gross income any gain and, in certain cases, loss recognized as a result of the deemed sale. Similarly, as further discussed in part 11 of this preamble, under section 1296, a United States person that has made a mark-to-market election with respect to stock in a passive foreign investment company recognizes income at the close of each taxable year based on the difference between the fair market value of the passive foreign investment company stock and the person's adjusted basis in such stock (or is allowed a deduction equal to the lesser of the excess of the adjusted basis of such stock over its fair market value or the unreversed mark-to-market inclusions with respect to the passive foreign investment company stock). These proposed regulations treat amounts of gain or loss recognized as a result of marking to market as net investment income. For rules regarding section 1296, see part 11 of this preamble. For rules regarding traders who mark assets to market under sections 475 and 1256, see part 5.B of this preamble.

ii. Determination of Net Gain From Disposition

Except as otherwise expressly provided in the regulations, the income tax gain and loss recognition rules in chapter 1 apply for purposes of determining net gain under section 1411. Thus, for example, to the extent gain from a like-kind exchange is not recognized for income tax purposes under section 1031, it is not recognized for purposes of determining net investment income under section 1411.

Losses properly taken into account in determining net gain include all losses deductible under section 165, to the extent they are attributable to property that is either (1) not held in a trade or business, or (2) held in a trade or business described in proposed § 1.1411–5.

The amount of net gain on the disposition of an interest in a partnership or an S corporation taken into account for purposes of section 1411(c)(1)(A)(iii) may be adjusted in accordance with proposed § 1.1411–7 (relating to the special rule in section 1411(c)(4) for the dispositions of certain interests in partnerships or S corporations).

Because section 1411(c)(1)(A)(iii) uses the term net gain (which contemplates a positive number), the proposed regulations provide that the amount of net gain included in net investment income may not be less than zero. Although capital losses in excess of capital gains are not recognized for purposes of section 1411, losses allowable under section 1211(b)(1) and (2) are permitted to offset gain from the disposition of assets other than capital assets that are subject to section 1411.

iii. Exception for Property Held in a Trade or Business Not Described in Section 1411(c)(2)

Section 1411(c)(1)(A)(iii) generally applies if the property disposed of is either not held in a trade or business, or is held in a trade or business described in section 1411(c)(2) and proposed § 1.1411–5. See part 6 of this preamble for rules relating to trades or business subject to section 1411. However, if the property disposed of is "held" in a trade or business and such trade or business is not described in proposed § 1.1411–5, net investment income would not include gain attributable to such property.

The determination of whether property is "held" in a trade or business is determined in the same manner as whether gross income is "derived in" a trade or business for purposes of section 1411(c)(1)(A)(i). These rules are described in detail in part 5.A.vi of this preamble. Thus, for individuals directly engaged in a trade or business, the determination is made at the individual level. If an individual, estate, or trust holds an interest in a passthrough entity and such entity disposes of its property, the determination of whether property is held in a trade or business that is a passive activity is made at the taxpayer level (that is, the individual, estate, or trust level), and the determination of whether property is held in a trade or business of trading in financial instruments or commodities is made at the entity level. For example, S, an S corporation, is engaged in trade or business, and A, an individual, owns stock in S. If S sells its Property 1 for a gain, the determination of whether A's gain from the disposition of S's Property 1 is subject to section 1411(c)(1)(A)(iii) depends on (1) whether S held Property 1 in its trade or business, and (2) if S held Property 1 in its trade or business, whether S's trade or business is described in proposed § 1.1411–5. If S held Property 1 in its trade or business and S's trade or business is neither a passive activity with respect to A nor trading in financial instruments or commodities with respect to S, net gain from the disposition of Property 1 will not be subject to section 1411(c)(1)(A)(iii).

D. Distributions From Trusts

The proposed regulations provide that net investment income includes a beneficiary's share of distributable net income, as described in sections 652(a) and 662(a), to the extent that, under sections 652(b) and 662(b), the character of such income constitutes net investment income, with further computations provided in proposed § 1.1411–3(e).

E. Properly Allocable Deductions

The proposed regulations provide that in determining net investment income, items of gross income and net gain are reduced by properly allocable deductions. Principles applied in determining the amount and timing of a deduction for purposes of Federal income taxation generally apply for purposes of determining a deduction under section 1411. However, only amounts paid or incurred by a taxpayer to produce gross income or net gain described in proposed § 1.1411–4 may be deducted in determining net investment income.

Net investment income for any taxable year may not be less than zero. In addition, any otherwise allowable deductions not taken into account for section 1411 purposes may only be taken into account in another taxable year to the extent allowed for chapter 1 purposes (such as a carryforward of investment interest under section 163(d), a suspended passive activity loss that is allowed in a later year under section 469(b), or a capital loss carryforward under section 1212).

Section 469(g)(1) provides special rules for the treatment of suspended passive losses when the taxpayer disposes of its entire interest in any passive activity (or former passive activity) in a fully taxable transaction to an unrelated party during the taxable year. The Treasury Department and the IRS request comments on whether the losses triggered under section 469(g)(1) upon the disposition should be considered taken into account in determining the taxpayer's net gain on the disposition of the activity under section 1411(c)(1)(A)(iii) or whether the losses should be considered properly allocable deductions to gross income and net gain described in section 1411(c)(1)(A)(i) through (iii).

The proposed regulations provide that net investment income does not take into account a net operating loss deduction. While some of the deductions included in the computation of a net operating loss may be deductions described in proposed § 1.1411–4(f), the character of each of the various deduction items that comprise a net operating loss is generally not tracked for purposes of chapter 1 once the item becomes part of a net operating loss. Thus, when an item becomes part of a net operating loss that is carried to another year, it generally is no longer properly allocable to a specific type of income, such as gross income from interest. In addition, rules to determine the portion of a net operating loss deduction properly allocable to items of gross income or net gain subject to section 1411 would be unduly complex and not administrable. This result is similar to the result for self-employment income, where section 1402(a)(4) specifically provides that the deduction for net operating losses provided in section 172 shall not be allowed in determining net earnings from self-employment. In determining a taxpayer's modified adjusted gross income (in the case of an individual) or adjusted gross income (in the case of an estate or trust), however, net operating losses continue to be taken into account. The Treasury Department and the IRS invite comments on this issue.

Gross income from rents or royalties may be reduced by deductions described in section 62(a)(4) that are allocable to such income. Net investment income also takes into account the deduction for penalties associated with the early withdrawal of savings described in section 62(a)(9).

In addition, the proposed regulations permit gross income from a trade or business described in proposed § 1.1411–5 that constitutes net investment income to be reduced by deductions described in section 62(a)(1) that are allocable to such income. However, the amount of deductions allowed under section 1411(c)(1)(B) may be reduced or eliminated by the application of the self-employment

income exception in section 1411(c)(6) and proposed § 1.1411–9.

As discussed in part 10 of this preamble, under section 1411(c)(6) and proposed § 1.1411–9(a), amounts taken into account in determining self-employment income are excluded from net investment income. Amounts not taken into account in determining self-employment income because they are excluded from net earnings from self-employment are not covered by the self-employment income exception in section 1411(c)(6), and thus may be net investment income. The application of section 1411(c)(6) and the general rule in proposed § 1.1411–9(a) to properly allocable deductions under section 1411(c)(1)(B) might produce an unintended result in the context of traders in financial instruments or commodities. In many cases, the gross income earned by a taxpayer engaged in the trade or business of trading financial instruments or commodities will be subject to section 1411 because the trading income is not taken into account in determining the taxpayer's self-employment income due to section 1402(a)(3)(A) (and in cases where the trader has made a section 475 election, due to the interaction of sections 475(f)(1)(D) and 1402(a)(3)(A)), and thus the self-employment income exception in section 1411(c)(6) does not apply to the income. However, the properly allocable deductions attributable to a trade or business of trading in financial instruments or commodities would be taken into account in determining the taxpayer's self-employment income (even though the gross income was not) and, absent an exception, would therefore not reduce the taxpayer's gross income under section 1411.

For example, assume A, an individual, is engaged in the trade or business of trading in commodities, and made an election under section 475(f)(2). A earns $500,000 of gross income (which is subject to proposed § 1.1411–4(a)(1)(ii)), and A also incurs $100,000 of expenses relating to the trading business. Under section 1402, none of the $500,000 of gross income would be taken into account in determining A's self-employment income (as provided in sections 475(f)(1)(D) and 1402(a)(3)(A)), but all of the $100,000 of expenses would be taken into account within the meaning of the general rule in proposed § 1.1411–9(a), even though there are no net earnings from self-employment and thus no self-employment income to reduce. Absent the exception described in proposed § 1.1411–9(b), the expenses also would not reduce the taxpayer's $500,000 of gross income under section 1411 because the expenses were taken into account under section 1402 in determining the taxpayer's self-employment income and would therefore be excluded under section 1411(c)(6) and the general rule in proposed § 1.1411–9(a).

The Treasury Department and the IRS believe that a trader should be able to reduce gross income described in proposed § 1.1411–4(a)(1)(ii) by properly allocable deductions if the deductions did not actually reduce net earnings from self-employment, even after aggregating net earnings from self-employment from other trades or businesses. Therefore, proposed § 1.1411–9(b) provides a special rule for traders of financial instruments or commodities. If the trader has deductions that did not reduce the taxpayer's net earnings from self-employment (that is, excess deductions), even after aggregating net earnings from self-employment from other trades or businesses, such excess deductions are properly allocable deductions under section 1411(c)(1)(B), notwithstanding the exclusion in section 1411(c)(6). This trader exception and section 1411(c)(6) are also discussed in part 10 of this preamble.

The proposed regulations also provide that several itemized deductions are properly allocable deductions under section 1411. The proposed regulations provide that investment interest allowed as a deduction by reason of section 163(d)(1), investment expenses described in section 163(d)(4)(C), and taxes imposed on investment income that are described in section 164(a)(3) are deductible in determining net investment income. In the case of taxes imposed on both investment income and non-investment income, the proposed regulations provide that the portion of taxes properly allocable to investment income may be determined by taxpayers using any reasonable method. The proposed regulations further provide that allocating the deduction based on the ratio of investment income to total gross income is an example of a reasonable method.

Under the proposed regulations, properly allocable deductions that are itemized deductions subject to the 2-percent floor on miscellaneous itemized deductions under section 67 or subject to the overall limitation on itemized deductions under section 68 may be deducted in determining net investment income only to the extent that they are deductible for income tax purposes after the application of the 2-percent floor and the overall deduction limitation. Some deductions, such as investment expenses, are subject to limitation under both sections 67 and 68, while other deductions, such as state taxes, are subject only to the limitation under section 68. It is necessary to apportion these deduction limitations between deductions properly allocable to net investment income and deductions that are not properly allocable to net investment income. The proposed regulations provide a method for apportioning these limitations to determine the amount of deductions allowed in computing net investment income after applying sections 67 and 68. This method first applies section 67 to all deductions subject to that limitation. The disallowance is applied proportionately to each deduction subject to section 67. The proposed regulations then apply a similar process to deductions subject to section 68.

Deductions for losses under section 165 are taken into account only in computing net gain. Therefore, because net gain in section 1411(c)(1)(A)(iii) cannot be less than zero, any excess of losses over gains are not allowable in the computation of net investment income. Accordingly, properly allocable deductions do not include deductions under section 165.

F. Income Inclusion From Tax-Exempt Trusts

Generally, a recipient of a distribution from a tax-exempt trust (other than non-charitable beneficiary of a charitable remainder trust as described in part 4.B.iv of this preamble) will not be liable for Federal income tax on the distribution because the distribution is tax-exempt income. Accordingly, the recipient (whether an individual, estate, or trust) will not be liable for tax under section 1411 regardless of whether the distributed amount is comprised of items of net investment income. However, there may be certain situations in which the recipient of a distribution from a tax-exempt trust is liable for Federal income tax on all or a part of the distributed amount. For example, a distribution from a qualified tuition program under section 529, a Coverdell education savings account, an Archer medical savings account (Archer MSA), or a health savings account (HSA) may be subject to Federal income tax if the distributed amounts are not used by the recipient for qualified expenses. In these situations, it is possible that a portion of the distribution may be comprised of items of net investment income generated by the trust corpus. However, in these cases, a recipient of a distribution from a tax-exempt trust will not be subject to tax under section 1411 on the distribution (even if the recipient

otherwise may be liable for Federal income tax on the distribution) because of the difficulty in determining whether the distributions from the corpus of the trust are gross income from items that may constitute net investment income (such as interest). Distributions from certain tax-exempt settlement funds covering Indian tribal governments also will not be subject to tax under section 1411, although income subsequently generated from distributed funds (for example, after deposit in an interest-bearing account) may be subject to section 1411.

6. Section 1411 Trades or Businesses

Section 1411(c)(1)(A) defines net investment income, in part, by reference to trades or businesses described in section 1411(c)(2). The trades or businesses described in section 1411(c)(2) are (A) a passive activity (within the meaning of section 469) with respect to the taxpayer, and (B) trading in financial instruments or commodities (as defined in section 475(e)(2)).

A. In General

Section 1411's statutory language and legislative history do not provide a definition of trade or business. The most established definition of trade or business is found under section 162(a), which permits a deduction for all the ordinary and necessary expenses paid or incurred in carrying on a trade or business. The rules under section 162 for determining the existence of a trade or business are well-established, and there is a large body of case law and administrative guidance interpreting section 162's meaning of trade or business. The proposed regulations incorporate the rules under section 162 for determining whether an activity is a trade or business for purposes of section 1411 and the proposed regulations. The use of the section 162 definition of trade or business facilitates administration of section 1411 and should simplify taxpayer compliance. See parts 5.A.vi and 5.C of this preamble for rules relating to the determination of whether certain items of income are derived in the ordinary course of a trade or business and whether net gain is attributable to the disposition of property held in a trade or business, respectively.

B. Trade or Business That Is a Passive Activity With Respect to the Taxpayer

As described in part 6.A of this preamble, the statutory language in sections 1411(c)(1)(A) and 1411(c)(2)(A) is intended to take into account only gross income from and net gain attributable to a passive activity (within the meaning of section 469) that involves the conduct of a trade or business (within the meaning of section 162). The definitions of trade or business and passive activity for section 1411 purposes are more restrictive than for section 469 purposes in two respects. First, section 469 and the regulations thereunder provide that a trade or business includes not only a trade or business (within the meaning of section 162), but also any activity conducted in anticipation of the commencement of a trade or business and any activity involving research or experimentation (within the meaning of section 174). See section 469(c)(5), §§ 1.469–1(e)(2), and 1.469–4(b)(1). Second, while section 469 defines passive activity as any trade or business in which the taxpayer does not materially participate, it also includes any rental activity in the definition of passive activity. See section 469(c)(1) and (2). The proposed regulations provide that the definition of trade or business for section 1411 purposes is limited to a trade or business within the meaning of section 162.

Due to the differences in the definitions for purposes of section 1411 and section 469, under the proposed regulations, in some cases gross income from activities that are passive activities under section 469 will not be taken into account for purposes of section 1411(c)(1)(A)(ii) because the gross income is derived from an activity that does not rise to the level of a trade or business (within the meaning of section 162). In such cases, the gross income will not be taken into account under section 1411 unless it is taken into account under section 1411(c)(1)(A)(i) or section 1411(c)(1)(A)(iii) and the proposed regulations. See *Example 1* of proposed § 1.1411–5(b)(2).

i. Passive Activities That Are Section 1411 Trades or Businesses

(a) In General

For purposes of section 1411(c)(2)(A) and the proposed regulations, the taxpayer must determine whether a section 162 trade or business in which the taxpayer owns an interest is a passive activity. Section 1411(c)(2)(A) provides that the term passive activity has the same meaning as section 469. Section 469(c)(1) provides that a passive activity is any activity that involves the conduct of any trade or business and in which the taxpayer does not materially participate. Section 469(c)(2) provides that, except as provided in section 469(c)(7), a passive activity also includes any rental activity (regardless of whether the taxpayer materially participates in the rental activity). See also § 1.469–1T(e)(3)(ii). For rules regarding the treatment of working interests in oil or gas property, see section 469(c)(3).

(b) Application of Existing Section 469 Rules

Section 469 and the regulations thereunder provide rules for determining whether trade or business activities and certain rental activities are passive activities with respect to a taxpayer. Generally, these rules will also apply in determining whether a section 162 trade or business is a passive activity for purposes of section 1411(c)(2)(A). Examples of this principle are discussed in this preamble, but these examples are not meant to be an exhaustive list of the rules that apply.

(1) Material Participation

Section 469(h)(1) provides that a taxpayer shall be treated as materially participating in an activity only if the taxpayer is involved in the operations of the activity on a basis which is regular, continuous, and substantial. Section 1.469–5T provides additional guidance for individuals on the meaning of "material participation." The material participation rules of section 469 will apply for purposes of determining whether a taxpayer materially participates in a section 162 trade or business for purposes of determining whether such trade or business is described in section 1411(c)(2)(A).

(2) Real Estate Professionals

Section 469(c)(7) and § 1.469–9 provide special rules for certain individual taxpayers involved in the conduct of real property trades or businesses (real estate professionals). If a taxpayer meets the requirements to be a real estate professional in section 469(c)(7)(B), the taxpayer's interests in rental real estate are no longer subject to section 469(c)(2), and the rental real estate activities of the taxpayer will not be passive activities if the taxpayer materially participates in each of those activities. However, a taxpayer who qualifies as a real estate professional is not necessarily engaged in a trade or business (within the meaning of section 162) with respect to the rental real estate activities. If the rental real estate activities are section 162 trades or businesses, the rules in section 469(c)(7) and § 1.469–9 will apply in determining whether a rental real estate activity of a real estate professional is a passive activity for purposes of section 1411(c)(2)(A). However, if the rental real

estate activities of the real estate professional are not section 162 trades or businesses, the gross income from rents derived from such activity will not be excluded under section 1411(c)(1)(A)(i) by the ordinary course of a trade or business exception. The ordinary course of a trade or business exception is inapplicable because the rents are not derived from a trade or business and will therefore be subject to section 1411. The ordinary course of a trade or business exception is described in part 5.A.vi of this preamble.

(3) Rental Activity Exceptions

Section 469(j)(8) and the regulations thereunder provide that a rental activity is any activity where payments are principally for the use of tangible property that is used or held for use by customers. Section 1.469–1T(e)(3)(ii) provides several exceptions to the definition of a rental activity. If a taxpayer's activity meets one of these exceptions, the activity is not a rental activity for purposes of section 469 (that is, it is no longer per se passive), and the activity will not be a passive activity if the taxpayer materially participates in that activity. These rental activity exceptions will also apply for determining whether the activity is a passive activity of a taxpayer for purposes of section 1411(c)(2)(A). However, a taxpayer who meets one of these exceptions is not necessarily engaged in a trade or business (within the meaning of section 162) with respect to the activity. In other words, even if the taxpayer meets one of the exceptions in § 1.469–1T(e)(3)(ii), if the taxpayer's activity is not a section 162 trade or business, gross income from rents from the activity will be subject to section 1411(c)(1)(A)(i) because the activity does not meet the ordinary course of a trade or business exception. The proposed regulations provide examples that illustrate the interaction of section 1411 and the section 469 rental activity exceptions. See *Examples 3* and *4* of proposed § 1.1411–5(b)(2).

(4) Grouping Rules

Section 1.469–4 provides rules for defining an activity for purposes of applying the passive activity loss rules of section 469 (grouping rules). The grouping rules will apply in determining the scope of a taxpayer's trade or business in order to determine whether such trade or business is a passive activity for purposes of section 1411(c)(2)(A). However, a proper grouping under § 1.469–4(d)(1) (grouping rental activities with other trade or business activities) will not convert gross income from rents into other gross income derived from a trade or business described in proposed § 1.1411–5(a)(1).

Section 1.469–4(e)(1) provides that, except as provided in §§ 1.469–4(e)(2) and 1.469–11, once a taxpayer has grouped activities, the taxpayer may not regroup those activities in subsequent taxable years. The Treasury Department and the IRS have determined on prior occasions that taxpayers should be given a "fresh start" to redetermine their groupings. The enactment of section 1411 may cause taxpayers to reconsider their previous grouping determinations, and therefore the Treasury Department and the IRS have determined that taxpayers should be given the opportunity to regroup. Thus, the proposed regulations provide that taxpayers may regroup their activities in the first taxable year beginning after December 31, 2013, in which the taxpayer meets the applicable income threshold in proposed § 1.1411–2(d) and has net investment income (as defined in proposed § 1.1411–4). The determination in the preceding sentence is made without regard to the effect of the regrouping. Taxpayers may regroup their activities in reliance on this proposed regulation for any taxable year that begins during 2013 if section 1411 would apply to such taxpayer in such taxable year. A taxpayer may only regroup activities once pursuant to § 1.469–11(b)(3)(iv)(A), and any such regrouping will apply to the taxable year for which the regrouping is done and all subsequent years.

The regrouping must comply with the existing requirements under § 1.469–4. For example, § 1.469–4(e) provides that taxpayers must comply with disclosure requirements that the Commissioner may prescribe with respect to both their original groupings and the addition and disposition of specific activities within those chosen groupings in subsequent taxable years. On January 25, 2010, the Treasury Department and the IRS published Revenue Procedure 2010–13 (2010–4 IRB 329), which requires taxpayers to report to the IRS their groupings and regroupings of activities and the addition of specific activities within their existing groupings of activities for purposes of section 469 and § 1.469–4. Thus, the disclosure requirements of § 1.469–4(e) and Revenue Procedure 2010–13 require taxpayers who regroup their activities pursuant to proposed § 1.469–11(b)(3)(iv) to report their regroupings to the IRS. See § 601.601(d)(2).

(c) Special Rules for Certain Income From Passive Activities

Section 469 and the regulations thereunder provide several rules that restrict the ability of taxpayers to artificially generate passive income from certain types of passive activities. Some rules specifically recharacterize income from a passive activity as income not from a passive activity (income recharacterization rules). Other rules recharacterize the activity itself as being a non-passive activity (activity recharacterization rules).

(1) Income Recharacterization Rules

(I) Portfolio Income

Section 469(e)(1)(A)(i)(I) provides that in determining the income or loss from any activity there shall not be taken into account any gross income from interest, dividends, annuities, or royalties not derived in the ordinary course of a trade or business (portfolio income). Thus, items of net investment income in section 1411(c)(1)(A)(i) and proposed § 1.1411–4(a)(1)(i) that are portfolio income will, by definition, be included in section 1411 because these portfolio items are not derived in the ordinary course of a trade or business. In addition, § 1.469–7 provides an exception to the portfolio income rules for self-charged interest, which is treated as passive income, and therefore, the gross income from such interest would be gross income from interest subject to proposed § 1.1411–4(a)(1)(i).

Similarly, section 469(e)(1)(A)(ii) provides that gain or loss not derived in the ordinary course of a trade or business which is attributable to the disposition of property (I) producing portfolio income, or (II) held for investment, should not be taken into account in determining income from a passive activity. Thus, gain described in section 469(e)(1)(A)(ii) will be net investment income if (1) the gain is attributable to property held in a section 162 trade or business of trading in financial instruments or commodities, or (2) the gain is attributable to property not held in a section 162 trade or business. See part 5.C of this preamble.

(II) Working Capital

Section 469(e)(1)(B) provides special rules for return on working capital. Section 1411(c)(3) provides that rules similar to section 469(e)(1)(B) also apply for purposes of section 1411. Working capital is discussed in part 7 of this preamble.

(III) Net Income Recharacterization Rules

The regulations under section 469 provide special rules that treat income from certain activities as not from a passive activity. See § 1.469–2T(f)(2) (special rule for significant participation); § 1.469–2T(f)(3) (rental of nondepreciable property); § 1.469–2T(f)(4) (net interest income from passive equity-financed lending activity); § 1.469–2(f)(5) (net income from certain property rented incidental to development activity); § 1.469–2(f)(6) (property rented to a nonpassive activity); § 1.469–2T(f)(7) (special rules applicable to the acquisition of an interest in a passthrough entity engaged in the trade or business of licensing intangible property). In most cases, these items will be subject to section 1411 if the item of income constitutes gross income from one of the items described in proposed § 1.1411–4(a)(1)(i) and the item of income is not derived in the ordinary course of a trade or business. For example, if a taxpayer has gross income from rents from an activity described in § 1.469–2(f)(6) that is not derived in the ordinary course of a trade or business, the gross income from rents will be subject to section 1411. The ordinary course of a trade or business exception is described in part 5.A.vi of this preamble.

(IV) Substantially Appreciated Property

Section 1.469–2(c)(2)(iii)(A) generally provides that if an interest in property used in an activity is substantially appreciated at the time of its disposition, any gain from the disposition shall be treated as not from a passive activity. The recharacterized gain may be taken into account under section 1411(c)(1)(A)(iii) if the gain is attributable to the disposition of property.

(2) Activity Recharacterization Rules

Section 1.469–1T(e)(6) provides that an activity of trading personal property for the account of owners of interests in the activity is not a passive activity (without regard to whether such activity is a trade or business activity). For this purpose, § 1.469–1T(e)(6)(ii) provides that the term *personal property* means personal property (within the meaning of section 1092(d), without regard to paragraph (3) thereof). Section 1092(d)(1) provides that personal property means any personal property of a type which is actively traded. While the gross income from or net gain attributable to an activity of trading or dealing in property will not be taken into account under section 1411(c)(2)(A) by virtue of § 1.469–2T(c)(3)(ii)(D), such gross income or net gain nevertheless will be taken into account under section 1411(c)(2)(B) if the activity constitutes a section 162 trade or business of trading in financial instruments or commodities. Trading in financial instruments or commodities is discussed in part 6.C of this preamble.

C. Trading in Financial Instruments or Commodities

i. Distinguishing Between Dealers, Traders, and Investors

Determining whether trading in financial instruments or commodities rises to the level of a section 162 trade or business is a question of fact. *Higgins* v. *Comm'r*, 312 U.S. 212, 217 (1941); *Estate of Yaeger* v. *Comm'r*, 889 F.2d 29, 33 (2d Cir. 1989). In general, section 475(c)(1) provides that the term *dealer in securities* means a taxpayer who (A) regularly purchases securities from or sells securities to customers in the ordinary course of a trade or business, or (B) regularly offers to enter into, assume, offset, assign, or otherwise terminate positions in securities with customers in the ordinary course of a trade or business. In contrast, a trader seeks profit from short-term market swings and receives income principally from selling on an exchange rather than from dividends, interest, or long-term appreciation. *Groetzinger* v. *Comm'r*, 771 F.2d 269, 274–275 (7th Cir. 1985), *aff'd* 480 U.S. 23 (1987); *Moller* v. *United States*, 721 F.2d 810, 813 (Fed. Cir. 1983). A person will be a trader, and therefore engaged in a section 162 trade or business, if his or her trading is frequent and substantial, which has been rephrased as "frequent, regular, and continuous." *Boatner* v. *Comm'r*, T.C. Memo. 1997–379, *aff'd in unpublished opinion* 164 F.3d 629 (9th Cir. 1998).

An investor is a person who purchases and sells securities with the principal purpose of realizing investment income in the form of interest, dividends, and gains from appreciation in value over a relatively long period of time (that is, long-term appreciation). The management of one's own investments is not considered a section 162 trade or business no matter how extensive or substantial the investments might be. See *Higgins* v. *Comm'r*, 312 U.S. 212, 217 (1941); *King* v. *Comm'r*, 89 T.C. 445 (1987). Therefore, an investor is not considered to be engaged in a section 162 trade or business of investing.

For purposes of section 1411(c)(2)(B), in order to determine whether gross income is derived from a section 162 trade or business of trading in financial instruments or commodities, the gross income must be derived from an activity that would constitute trading for purposes of chapter 1. Therefore, a person that is a trader in commodities or a trader in financial instruments is engaged in a trade or business for purposes of section 1411(c)(2)(B). The Treasury Department and the IRS emphasize that the proposed regulations do not change the state of the law with respect to classification of traders, dealers, or investors for purposes of chapter 1.

ii. Definition of Financial Instruments

Section 1411 does not define the term "financial instrument." Section 731(c)(2)(C) provides a definition of financial instrument for purposes of section 731, and this existing statutory definition is used as a guideline for the section 1411 definition. The proposed regulations define the term *financial instrument* to include stocks and other equity interests, evidences of indebtedness, options, forward or futures contracts, notional principal contracts, any other derivatives, or any evidence of an interest in any of the listed items. An evidence of an interest in any of these listed items includes, but is not limited to, short positions or partial units in any of these listed items.

iii. Definition of Commodities

In accordance with the statutory language in section 1411(c)(2)(B), the proposed regulations provide that the term *commodities* has the same meaning as that provided in section 475(e)(2).

7. Working Capital Exception

Section 1411(c)(3) provides that a rule similar to the rule of section 469(e)(1)(B) applies for purposes of section 1411 (the working capital rule). Section 469(e)(1)(B) provides that, for purposes of determining whether income is treated as from a passive activity, any income or gain attributable to an investment of working capital shall be treated as not derived in the ordinary course of a trade or business.

The term working capital is not defined in either section 469 or section 1411, but it generally refers to capital set aside for use in and the future needs of a trade or business. Because the capital may not be necessary for the immediate conduct of the trade or business, the amounts are often invested by businesses in income-producing liquid assets such as savings accounts, certificates of deposit, money market accounts, short-term government and commercial bonds, and other similar investments. These investment assets

will usually produce portfolio-type income, such as interest. Under section 469(e)(1)(B), portfolio-type income generated by working capital is not derived in the ordinary course of a trade or business, and therefore, it is not treated as passive income. Under section 1411(c)(3), gross income from and net gain attributable to the investment of working capital is not derived in the ordinary course of a trade or business, and therefore such gross income and net gain is subject to section 1411.

A taxpayer may take into account the properly allocable deductions (related to losses or deductions properly allocable to the investment of such working capital) in determining net investment income. See part 5.E of this preamble regarding properly allocable deductions.

8. Dispositions of Interests in Partnerships and S Corporations

In most cases, an interest in a partnership or S corporation is not property held in a trade or business. Therefore, gain or loss from the sale of a partnership interest or S corporation stock will be subject to section 1411(c)(1)(A)(iii). See also section 731(a) and section 1368(b)(2) (providing that the gain recognized when cash is distributed in excess of the adjusted basis of, as applicable, a partner's interest in a partnership or a shareholder's stock in an S corporation is treated as gain from the sale or exchange of such partnership interest or S corporation stock).

Section 1411(c)(4)(A) provides that, in the case of a disposition of an interest in a partnership or S corporation, gain from such disposition shall be taken into account under section 1411(c)(1)(A)(iii) only to the extent of the net gain which would be so taken into account by the transferor under section 1411(c)(1)(A)(iii) if all property of the partnership or S corporation were sold for fair market value immediately before the disposition of such interest. Section 1411(c)(4)(B) applies a similar rule to a loss from a disposition.

For purposes of section 1411, Congress intended section 1411(c)(4) to put a transferor of an interest in a partnership or S corporation in a similar position as if the partnership or S corporation had disposed of all of its properties and the accompanying gain or loss from the disposition of such properties passed through to its owners (including the transferor). However, the gain or loss upon the sale of an interest in the entity and a sale of the entity's underlying properties will not always match. First, there may be disparities between the transferor's adjusted basis in the partnership interest or S corporation stock and the transferor's share of the entity's adjusted basis in the underlying properties. See *Example-2* of proposed § 1.1411–7(e). Second, the sales price of the interest may not reflect the proportionate share of the underlying properties' fair market value with respect to the interest sold.

In order to achieve parity between an interest sale and an asset sale, section 1411(c)(4) must be applied on a property-by-property basis, which requires a determination of how the property was held in order to determine whether the gain or loss to the transferor from the hypothetical disposition of such property would have been gain or loss subject to section 1411(c)(1)(A)(iii). As described in proposed § 1.1411–4(a)(1)(iii) and proposed § 1.1411–4(d), section 1411(c)(1)(A)(iii) applies if the property disposed of is either not held in a trade or business, or held in a trade or business described in proposed § 1.1411–5. In other words, under the proposed regulations, the exception in section 1411(c)(4) is only applicable where the property is held in a trade or business not described in section 1411(c)(2). See JCT 2011 Explanation, at 364, fn. 976 (and accompanying text); Joint Committee on Taxation, Technical Explanation of the Revenue Provisions of the "Reconciliation Act of 2010," as amended, in combination with the "Patient Protection and Affordable Care Act" (JCX–18–10) (Mar. 21, 2010), at 135 fn. 286 (and accompanying text) (JCT 2010 Explanation). This means that the exception in section 1411(c)(4) does not apply where (1) there is no trade or business, (2) the trade or business is a passive activity (within the meaning of proposed § 1.1411–5(a)(1)) with respect to the transferor, or (3) where the partnership or the S corporation is in the trade or business of trading in financial instruments or commodities (within the meaning of proposed § 1.1411–5(a)(2)), because in these cases there would be no change in the amount of net gain determined under proposed § 1.1411–4(a)(1)(iii) upon an asset sale under section 1411(c)(4). For example, if the transferor is passive with respect to the entity's trade or business, the application of the deemed asset sale rule under section 1411(c)(4), as described in part 8.A of this preamble, would not adjust the transferor's section 1411(c)(1)(A)(iii) gain on the disposition of the interest. See *Example 7* of proposed § 1.1411–7(e) for a situation involving the transferor of an interest in an S corporation with two trades or businesses, only one of which is described in proposed § 1.1411–5.

A. Mechanics of Section 1411(c)(4)

i. In General

The proposed regulations provide that, for purposes of section 1411(c)(4), a transferor computes the gain or loss from the sale of the underlying properties of the partnership or S corporation using a deemed asset sale method (Deemed Sale), and then determines if, based on the Deemed Sale, there is an adjustment (either positive or negative) to the transferor's gain or loss on the disposition of the partnership or S corporation interest for purposes of section 1411(c)(1)(A)(iii). An adjustment only occurs if the underlying property is used in a trade or business not described in proposed § 1.1411–5 (a positive adjustment reduces a loss on the disposition of the interest, and a negative adjustment reduces the gain on the disposition of the interest). Because the proposed regulations apply a Deemed Sale by the passthrough entity of all its assets for cash equal to the fair market value of the entity's properties, any gain or loss on the interest sale that is not reflected in the underlying properties of the passthrough entity (as the result of an inside-outside basis disparity) would not create an adjustment. This is illustrated in *Example 2* of proposed § 1.1411–7(e).

In developing the Deemed Sale, the Treasury Department and the IRS considered existing hypothetical transactions, such as the hypothetical transaction to determine a transferee's basis adjustment under section 743(b). See § 1.743–1. The proposed regulations provide that the Deemed Sale under section 1411(c)(4) applies, in part, rules similar to § 1.743–1(d)(2). However, the Treasury Department and the IRS recognize that the Deemed Sale may impose an administrative burden on owners of partnerships and S corporations in certain circumstances. The Treasury Department and the IRS request comments on other methods that would implement the provisions of section 1411(c)(4) without imposing an undue burden on taxpayers. In addition, the IRS and the Treasury Department request comments on how to determine a partner's interest in section 1411 assets upon a distribution in which gain is recognized pursuant to section 731.

ii. Deemed Sale

The first step of the Deemed Sale is a hypothetical disposition of all the entity's properties (including goodwill) in a fully taxable transaction for cash equal to the fair market value of the entity's properties immediately before the disposition of the interest.

The second step of the Deemed Sale is to compute the gain or loss on each of the entity's properties (including goodwill). The calculation of gain or loss is determined by comparing the fair market value of each property with such property's adjusted basis. The gain or loss from each property must be computed separately.

The third step of the Deemed Sale is to allocate the gain or loss from each property determined in the second step to the transferor. In the case of a partnership, the amount of gain or loss allocated to the transferor must take into account the allocations provided in the partnership agreement and any allocations required by sections 704(b) and 704(c) (and the regulations thereunder), as well as basis adjustments under section 743 with respect to the transferor. In the case of an S corporation, the amount of gain or loss allocated to the transferor is determined under section 1366(a), and the allocation should not take into account any reduction in the transferor's distributive share in section 1366(f)(2) resulting from the hypothetical imposition of tax under section 1374 as a result of the Deemed Sale.

The fourth step of the Deemed Sale is to determine whether the amount of gain or loss allocated to the transferor with respect to each property under the Deemed Sale would have been taken into account in determining the transferor's net gain under section 1411(c)(1)(A)(iii) if it were an actual disposition. If the entity's property is either held in a trade or business described in section 1411(c)(2) with respect to the partnership, the S corporation, or the transferor, or is not held in a trade or business, there will be no adjustment under section 1411(c)(4) with respect to that property. However, if the property is held in a trade or business not described in section 1411(c)(2), there is an adjustment under section 1411(c)(4) calculated in the following manner. First, the transferor's gains or losses from such property (or properties) are aggregated to create a net gain (which will be treated as a negative adjustment) or a net loss (which will be treated as a positive adjustment). Second, based on the adjustment calculated and subject to certain limitations, the transferor then must adjust the gain or loss from the disposition of the partnership or S corporation interest determined in section 1411(c)(1)(A)(iii) (without regard to section 1411(c)(4)) by the positive or negative adjustment.

For example, if in the Deemed Sale the transferor would have been allocated a net gain from property held in a trade or business not described in section 1411(c)(2) (thus, a negative adjustment) and the transferor had a gain on the disposition of the interest, then the gain on the disposition of the interest will be reduced for purposes of determining net investment income. However, in a situation in which a transferor has a gain (determined without regard to section 1411(c)(4)) from the disposition of the partnership or S corporation interest, a negative adjustment cannot result in the transferor having a loss on the disposition of the partnership or S corporation interest for purposes of section 1411(c)(1)(A)(iii), and a positive adjustment is not taken into account. For example, if a transferor has a $100,000 gain on the disposition of S corporation stock, the section 1411(c)(4) adjustment cannot result in a gain for section 1411 purposes greater than $100,000, and cannot result in a loss for section 1411 purposes. See *Example 3* of proposed § 1.1411–7(e). Similarly, in a situation where a transferor has a loss (determined without regard to section 1411(c)(4)) from the disposition of the partnership or S corporation interest, a positive adjustment cannot result in the transferor having a gain on the disposition of the partnership or S corporation interest for purposes of section 1411(c)(1)(A)(iii), and a negative adjustment is not taken into account. For example, if a transferor has a $50,000 loss on the disposition of S corporation stock, the section 1411(c)(4) adjustment cannot result in a loss for section 1411 purposes greater than $50,000, and cannot result in a gain for section 1411 purposes.

The proposed regulations provide a special rule for property held in more than one trade or business during the twelve-month period ending on the date of the disposition. In such case, the fair market value and the adjusted basis of such property must be allocated among the trades or businesses on a basis that reasonably reflects the use of the property. This allocation rule is illustrated in *Example 7* of proposed § 1.1411–7(e).

The proposed regulations provide rules to determine the treatment of gain or loss from goodwill for purposes of section 1411(c)(4). If the entity is engaged in one trade or business, the entire gain or loss on the goodwill will be treated as gain or loss from the disposition of property held for use in that trade or business, and no portion of such gain or loss will be treated as attributable property not held for use in the trade or business. If the entity is engaged in more than one trade or business, the gain or loss on the goodwill is allocated between the trades or businesses based on the relative fair market value of the property (excluding cash) held for use in each trade or business. For example, if the entity has total assets with a fair market value of $110,000 (consisting of assets of $10,000 not held in any trade or business, $15,000 of assets held for use in Business 1, $45,000 of assets held for use in Business 2, $10,000 of cash, and goodwill of $30,000), and if the gain on the goodwill is $20,000, $5,000 of such gain is allocated to Business 1 and the remaining $15,000 gain is allocated to Business 2. See *Example 8* of proposed § 1.1411–7(e).

B. Special Situations

i. Interaction of Section 1411(c)(4) and Section 338(h)(10) Election

In the case of a disposition of stock in an S corporation with respect to which a section 338(h)(10) election is made, section 1411(c)(4) is inapplicable to the deemed asset sale and liquidation transactions that result from the section 338(h)(10) election. Under section 338(h)(10), the sale of the S corporation stock is treated as an actual asset sale by the S corporation. Section 1411(c)(4) is inapplicable to such an asset sale. In the deemed liquidation of the former S corporation, section 1411(c)(4) is also inapplicable to the shareholders because the underlying character of the gain or loss in the assets at the former S corporation level is already fully taken into account in the deemed asset sale.

ii. Installment Sales

In the case of a disposition of a partnership or S corporation interest in an installment sale transaction to which section 453 applies, proposed § 1.1411–7(b)(1)(i) provides that the adjustment to net gain will be calculated in the year of the disposition. However, under proposed § 1.1411–4(a)(1)(iii), the gain and any applicable adjustment are deferred and recognized proportionally pursuant to section 453.

In the event that the year of the disposition of the interest occurs before the effective date of section 1411, the adjustment under section 1411(c)(4) and proposed § 1.1411–7(c) will not be applicable. However, the proposed regulations allow taxpayers to elect into the rules of proposed § 1.1411–7 if they receive installment sale payments attributable to a disposition of an interest in a partnership or S corporation that occurred before the effective date of section 1411. This election allows taxpayers that sell their interests in installment sales before the effective date of section 1411 to be

treated similarly with taxpayers that sell their interests after the effective date. In submitting the required statement of adjustment (described in proposed § 1.1411–7(d)), this election will require the taxpayer to have the information (such as basis and fair market value of each property) as of the date of disposition.

iii. Sale by a Qualified Subchapter S Trust (QSST)

If an election is made pursuant to section 1361(d)(2), a QSST can be an eligible shareholder of an S corporation. Section 1.1361–1(j)(8) provides rules for coordinating the QSST rules and the grantor trust rules, and provides that the income beneficiary of the QSST is treated as the owner, for purposes of section 678(a), of that portion of the trust that consists of the stock of the S corporation for which the QSST election was made. However, solely for purposes of this rule, an income beneficiary who is a deemed section 678 owner only by reason of section 1361(d)(1) will not be treated as the owner of the S corporation stock in determining and attributing the Federal income tax consequences of a disposition of the stock by the QSST. Therefore, if the QSST sells some (or all) of its S corporation stock, any gain or loss recognized on the sale will be that of the trust, not the income beneficiary. (On the other hand, the disposition is treated as a disposition by the income beneficiary for purposes of applying sections 465 and 469 to the income beneficiary of a QSST.)

The proposed regulations do not address whether special rules are needed to coordinate the QSST rules regarding dispositions of stock in an S corporation in § 1.1361–1(j)(8) and section 1411(c)(4). The Treasury Department and the IRS request comments on whether special coordination rules are necessary.

C. Required Statements

Any transferor making an adjustment under proposed § 1.1411–7(c)(5) must attach a statement to the transferor's return for the year of disposition. The statement must include: (1) A description of the disposed-of interest; (2) the name and taxpayer identification number of the entity disposed of; (3) the fair market value of each property of the entity; (4) the entity's adjusted basis in each property; (5) the transferor's allocable share of gain or loss with respect to each property of the entity; (6) information regarding whether the property was held in a trade or business not described in section 1411(c)(2); (7) the amount of the section 1411(c)(1)(A)(iii) gain on the disposition of the interest; and (8) the computation of the adjustment under proposed § 1.1411–7(c)(5).

In cases involving partnerships without a section 754 election in effect (or where there is no mandatory section 743 adjustment) and S corporations, the transferor may not have access to the information that is necessary to make the adjustment and to file the required statements. The Treasury Department and the IRS request comments on how a transferor may acquire the required information in these cases.

9. Exception for Distributions From Qualified Plans

Section 1411(c)(5) provides that net investment income does not include any distribution from the following plans or arrangements:

(1) A qualified pension, stock bonus, or profit-sharing plan under section 401(a);

(2) A qualified annuity plan under section 403(a);

(3) A tax-sheltered annuity under section 403(b);

(4) An individual retirement account (IRA) under section 408;

(5) A Roth IRA under section 408A; or

(6) A deferred compensation plan of a State and local government or a tax-exempt organization under section 457(b).

These proposed regulations provide rules relating to whether an amount is a distribution from a plan within the meaning of section 1411(c)(5) and, thus, exempt from net investment income. First, the proposed regulations provide that, for purposes of section 1411, any amount actually distributed from a qualified plan or arrangement is a distribution within the meaning of section 1411(c)(5), and thus is not included in net investment income. The proposed regulations provide examples of actual distributions, including a rollover to an eligible retirement plan within the meaning of section 402(c)(8)(B), a distribution of a plan offset amount within the meaning of Q&A–13(b) of § 1.72(p)–1, and corrective distributions from a qualified plan or arrangement to maintain its tax-favored status. The term "corrective distribution" includes any of the following distributions: (1) A distribution of excess deferrals as described in § 1.402(g)–1(e)(3); (2) for purposes of section 408 IRAs, a distribution of excess contributions as described in § 1.408–4(c); (3) for purposes of section 408A Roth IRAs, a distribution of excess contributions as described in Q&A–1(d) of § 1.408A–6; and (4) for purposes of eligible section 457(b) plans, a distribution of excess deferrals as described in § 1.457–4(e)(2) through (4).

Second, the proposed regulations provide that, for purposes of section 1411, amounts that are deemed distributions under the Code for purposes of income tax are distributions for purposes of section 1411(c)(5), even if these distributions are not treated as actual distributions for purposes of the qualification requirements under section 401(a). Examples of deemed distributions include conversions to a Roth IRA described in section 408A and deemed distributions under section 72(p).

Third, any amount that is not treated as a distribution, but is otherwise includible in gross income pursuant to a rule relating to amounts held in a qualified plan or arrangement, is a distribution within the meaning of section 1411(c)(5), and thus is not included in net investment income. For example, any income of the trust of a qualified plan or arrangement that is applied to purchase a participant's life insurance coverage (the P.S. 58 costs) is a distribution within the meaning of section 1411(c)(5), and thus is not included in net investment income.

While distributions from qualified plans or arrangements are not includible in net investment income, as defined in section 1411(c)(1), distributions from a qualified plan or arrangement that are includible in gross income under chapter 1 are taken into account in determining the taxpayer's modified adjusted gross income or adjusted gross income for purposes of calculating the amount subject to tax under section 1411(a)(1)(B) or (a)(2)(B).

10. Exception for Items Subject to Self-Employment Tax

Section 1411(c)(6) provides that net investment income shall not include any item taken into account in determining self-employment income for such taxable year on which a tax is imposed by section 1401(b). Section 1401(b) imposes a Medicare tax on the self-employment income of individuals equal to a specified percentage (2.9 percent) of the amount of the self-employment income for such taxable year and an Additional Medicare Tax for taxable years beginning after December 31, 2012, equal to 0.9 percent of self-employment income in excess of certain threshold amounts. Section 1402(b) provides that the term *self-employment income* generally means the net earnings from self-employment (defined under section 1402(a)) derived by an individual except that such term shall not include the net earnings from self-employment if such net earnings for

the taxable year are less than $400. Section 1402(a) generally defines the term *net earnings from self-employment* as the gross income derived by an individual from any trade or business carried on by such individual, less the deductions allowed which are attributable to such trade or business, plus his distributive share (whether or not distributed) of income or loss described in section 702(a)(8) from any trade or business carried on by a partnership of which he is a member. Section 1402(a)(1) through (17) includes exceptions from the definition of net earnings from self-employment as well as other special rules.

The JCT 2011 and 2010 Explanations state that net investment income does not include "amounts subject to SECA [Self-Employment Contribution Act] tax." JCT 2011 Explanation, at 365; JCT 2010 Explanation, at 135. Therefore, the proposed regulations provide that for purposes of section 1411(c)(6), "items taken into account" in determining self-employment income means income included and deductions allowed in determining net earnings from self-employment under section 1402(a) for purposes of determining self-employment income under section 1402(b), but does not include amounts excepted from net earnings from self-employment under section 1402(a)(1) through (17). In addition, proposed § 1.1411–9(b) provides a special rule for properly allocable deductions (as defined in proposed § 1.1411–4(f)(2)(ii)) in the case of a taxpayer engaged in the trade or business of trading in financial instruments or commodities (as defined in proposed § 1.1411–5(a)(2)). This exception provides that deductions described in proposed § 1.1411–4(f)(2)(ii) that do not reduce a taxpayer's net earnings from self-employment (after aggregating the net earnings from self-employment from all of the taxpayer's trades or business) are not considered taken into account for purposes of section 1411(c)(6) and may be considered in determining the taxpayer's net investment income under section 1411. Generally, this exception will apply if the taxpayer is engaged in a trade or business of trading in financial instruments or commodities and does not have any net earnings from self-employment or the deductions from trading exceed the taxpayer's net earnings from self-employment.

11. Controlled Foreign Corporations and Passive Foreign Investment Companies

As noted in part 5 of this preamble, section 1411(c)(1) provides that net investment income includes dividends and net gain (to the extent taken into account in computing taxable income) attributable to the disposition of property other than property held in a trade or business to which the tax does not apply. Accordingly, income with respect to investments in foreign corporations generally is included in the calculation of net investment income for section 1411 purposes. Specifically, dividends and gains derived with respect to the stock of a controlled foreign corporation (within the meaning of section 957(a)) (CFC) or a passive foreign investment company (within the meaning of section 1297(a)) (PFIC) are taken into account in computing net investment income.

A. CFC or PFIC Amounts Derived From a Trade or Business Described in Proposed § 1.1411–5

The special rules described in proposed § 1.1411–10 do not apply to income derived from a trade or business described in section 1411(c)(2) and proposed § 1.1411–5 because such income is included in net investment income under section 1411(c)(1)(A)(ii) and proposed § 1.1411–4(a)(1)(ii). Thus, an amount included in gross income under section 1296(a) that is also income derived from a trade or business described in section 1411(c)(2) and proposed § 1.1411–5 is net investment income within the meaning of section 1411(c)(1)(A)(ii) and proposed § 1.1411–4(a)(1)(ii). Similarly, amounts included in income under sections 951(a) and 1293(a) that are derived from a trade or business described in section 1411(c)(2) and proposed § 1.1411–5, and therefore fall within section 1411(c)(1)(A)(ii) and proposed § 1.1411–4(a)(1)(ii), are taken into account for purposes of section 1411 when they are taken into account for purposes of chapter 1, and accordingly, the modifications described in this part of the preamble are not necessary.

B. Net Investment Income

Under subpart F of the Code, a United States shareholder (as defined in section 951(b)) of a CFC is required to include certain amounts in income currently under section 951(a) (section 951 inclusions). Section 951 inclusions are not treated as dividends unless expressly provided for in the Code, and therefore are not within any of the categories of income items that comprise net investment income (unless the amount is derived from a trade or business to which the tax applies as provided in section 1411(c)(1)(A)(ii) and proposed § 1.1411–4(a)(1)(ii)). See *Rodriguez* v. *Comm'r,* 137 T.C. 174 (2011). Similarly, a United States person owning shares in a PFIC also is required to include amounts in income currently under section 1293(a) (section 1293 inclusions) if the person makes a qualified electing fund (QEF) election under section 1295 with respect to the PFIC. Section 1293 inclusions also are not treated as dividends unless expressly provided for in the Code, and, therefore, also are not taken into account for purposes of calculating net investment income (unless the amount is derived from a trade or business to which the tax applies as provided in section 1411(c)(1)(A)(ii) and proposed § 1.1411–4(a)(1)(ii)).

The subpart F and PFIC regimes provide rules that prevent amounts that have been included in income under sections 951 and 1293 by a United States person from being subject to tax again when there is an actual distribution from the foreign corporation. Specifically, section 959(d) provides that distributions from a CFC that are excluded from gross income for purposes of chapter 1 under section 959(a) (earnings and profits attributable to section 951 inclusions) are treated for chapter 1 purposes as distributions that are not dividends. Similarly, section 1293(c) provides that distributions paid out of earnings and profits of a PFIC that are attributable to section 1293 inclusions are treated for chapter 1 purposes as distributions that are not dividends. However, in the absence of these special rules, which expressly apply for chapter 1 purposes and are intended to reflect that the relevant CFC or PFIC earnings have already been taxed for chapter 1 purposes, the actual distributions would be taxable as dividends under general Code rules applicable to corporations and their shareholders. Moreover, as is the case with dividends, such actual distributions reduce the earnings and profits of the relevant CFC or PFIC. Accordingly, the proposed regulations reflect the premise that a distribution of earnings and profits that previously were taxed pursuant to section 951(a) or section 1293(a), and which is not a dividend for chapter 1 purposes under section 959(d) or section 1293(c), remains a dividend for chapter 2A purposes, and therefore constitutes gross income from dividends for purposes of section 1411(c)(1)(A)(i) and proposed § 1.1411–4(a)(1)(i).

Nevertheless, in light of the effective date of section 1411 and the administrative burdens that would be imposed if taxpayers were required to reconstruct the tax basis of their CFC or QEF stock (and any intermediate entities) to eliminate the basis adjustments (described in this part 11) associated with pre-effective date

income inclusions under sections 951(a) and 1293(a), the proposed regulations provide a limit on the treatment of distributions of previously taxed earnings and profits of a CFC or QEF as dividends for section 1411 purposes. Specifically, under the proposed regulations, such treatment would apply only with respect to distributions of earnings and profits that previously were taxed pursuant to section 951(a) or section 1293(a) in a taxable year beginning after December 31, 2012. For purposes of determining whether a distribution is attributable to earnings and profits that previously were taxed pursuant to section 951(a) or section 1293(a) in a taxable year beginning after December 31, 2012 (and thus is treated as a dividend for section 1411 purposes), a distribution of earnings and profits that previously were taxed pursuant to section 951(a) or section 1293(a) will be considered attributable first to such earnings and profits, if any, derived from the current taxable year, and then from taxable years beginning with the most recent prior taxable year. In the case of a distribution from a CFC, such determination shall be made without regard to whether the earnings and profits are described in section 959(c)(1) or section 959(c)(2). Thus, this classification of distributions as net investment income or non-net investment income is separate from, and in addition to, the allocation of distributions to previously taxed earnings and profits that are described in sections 959(c)(1) and 959(c)(2).

Accordingly, absent an election under proposed § 1.1411–10(g) (described in part 11.F of this preamble), the timing of income derived from an investment in a CFC or a QEF may be different for chapter 1 and chapter 2A purposes. Taxpayers will not include section 951 inclusions or section 1293 inclusions in net investment income, but generally will take distributions that are not treated as dividends for chapter 1 purposes under section 959(d) or section 1293(c) into account for purposes of determining net investment income under section 1411(c)(1)(A)(i) and proposed § 1.1411–4(a)(1)(i).

Including an amount in income only for purposes of chapter 1 or chapter 2A however, requires special rules to calculate and administer the tax imposed by section 1411. For example, because the rules governing previously taxed income under chapter 1 require basis adjustments to the stock of the CFC or QEF, a United States person will be required to compute its tax basis in the stock (as well as its basis in intermediate entities through which it holds the CFC or QEF stock) differently for chapter 1 and chapter 2A purposes. As described in detail in part 11.F of this preamble, however, the proposed regulations seek to minimize complexity arising from the different treatment under chapter 1 and chapter 2A by providing an election that, if made, results in consistent treatment for chapter 1 and chapter 2A purposes with respect to stock of CFCs and QEFs. See proposed § 1.1411–10(g).

To the extent that a disposition of stock of a CFC or QEF gives rise to net gain under section 1411(c)(1)(A)(iii), such amount is included in net investment income. In the absence of an election under proposed § 1.1411–10(g), the basis increases provided in sections 961(a) and 1293(d) that apply for chapter 1 purposes for amounts included in gross income for chapter 1 purposes under sections 951(a) and 1293(a) in taxable years beginning after December 31, 2012, do not apply to the calculation of gain or loss for purposes of section 1411. Similarly, in the absence of an election, the basis decreases provided in sections 961(b) and 1293(d) that apply for chapter 1 purposes do not apply to the extent that such decreases are attributable to a distribution of post-effective date earnings and profits that is treated as a dividend for chapter 2A purposes.

In certain circumstances, section 1248 may apply for chapter 1 purposes to recharacterize all or a portion of gain recognized on the disposition of stock of a foreign corporation as dividend income. Section 1248 also may apply to determine whether any portion of the gain calculated for section 1411 purposes should be recharacterized as a dividend. If no election is made pursuant to proposed § 1.1411–10(g), the proposed regulations provide that sections 1248(d)(1) and 1248(d)(6) (relating to amounts excluded from earnings and profits for purposes of determining the amount of gain recharacterized as a dividend under section 1248) generally do not apply because the earnings and profits of the foreign corporation are not attributable to any amount previously taxed for purposes of section 1411. However, the proposed regulations provide that sections 1248(d)(1) and 1248(d)(6) do apply for purposes of section 1411 to the extent the earnings and profits of the foreign corporation are attributable to an amount that was included in chapter 1 income in a taxable year that began prior to December 31, 2012 (the effective date of section 1411).

Proposed § 1.1411–10 also provides special rules that apply to a United States shareholder of a PFIC who is subject to the tax and interest charge applicable to excess distributions under section 1291. The proposed regulations provide that the calculation of net investment income includes any distribution of earnings and profits by a PFIC that constitutes a dividend within the meaning section 316(a), or any gain from a disposition of PFIC stock, even though all or a portion of the dividend or gain may be treated as an excess distribution and allocated to prior taxable years for purposes of computing the additional amount of tax imposed under section 1291(a)(1)(C) (and hence may not be taxed as a dividend or gain for chapter 1 purposes).

In addition, the proposed regulations provide rules applicable to a United States person that has elected to mark to market its PFIC stock under section 1296. In such case, amounts that are included in gross income under section 1296(a)(1) and, correspondingly, amounts allowable as a deduction under section 1296(a)(2) are taken into account under section 1411(c)(1)(A)(iii) and proposed § 1.1411–4(a)(1)(iii) in computing net gain for purposes of section 1411.

Section 1411(c)(1)(B) provides that, in determining net investment income, items of gross income and net gain are reduced by properly allocable deductions. In the absence of an election under proposed § 1.1411–10(g), differences may occur in the timing of income derived with respect to CFCs and QEFs for chapter 1 and chapter 2A purposes. Consequently, the determination of properly allocable deductions with respect to sections 959(d) and 1293(c) dividend distributions may require special rules. For example, certain itemized deductions related to items of net investment income described in proposed § 1.1411–10(c) (such as the investment interest deduction) may require special rules to determine when these deductions are properly allocable deductions for purposes of section 1411. The Treasury Department and the IRS request comments on whether guidance is necessary to determine the deductions that are properly allocable to items of net investment income described in proposed § 1.1411–10(c) if the election under proposed § 1.1411–10(g) is not made.

C. Modified Adjusted Gross Income

Because of the different timing under chapter 1 and chapter 2A for including certain income from investments in CFCs and PFICs, the proposed regulations contain rules coordinating these provisions with the determination of the calculation of the section 1411 tax, which is based, in part, in section

1411(a)(1)(B) on an individual's modified adjusted gross income. Absent an election under proposed § 1.1411–10(g), the proposed regulations provide that an individual who owns stock in a CFC or a QEF must increase or decrease modified adjusted gross income (as defined in proposed § 1.1411–2(c)) in certain circumstances. For example, proposed § 1.1411–10(e) provides that modified adjusted gross income is increased by any section 959(d) or section 1293(c) distributions that are dividends for chapter 2A purposes. In order to avoid subjecting the same amount of income to tax twice under section 1411, section 951 inclusions and section 1293 inclusions are excluded from modified adjusted gross income under proposed § 1.1411–10(e)(1)(iii) for purposes of section 1411. In addition, modified adjusted gross income is adjusted to take into account the amount of gain or loss attributable to a disposition of stock of a CFC or QEF for section 1411 purposes, which may differ from the amount of gain or loss calculated for chapter 1 purposes. For purposes of section 1411, in the absence of an election under proposed § 1.1411–10(g), gain or loss is determined without taking into account basis increases under sections 961(a) and 1293(d) that are included in the calculation of basis for purposes of chapter 1 with respect to amounts included in gross income for chapter 1 purposes under sections 951(a) and 1293(a) in taxable years beginning after December 31, 2012. In addition, gain or loss is determined without taking into account basis decreases under sections 961(a) and 1293(d) that are included in the calculation of basis for purposes of chapter 1 to the extent the decreases are attributable to a distribution of earnings and profits that is treated as a dividend for chapter 2A purposes.

Modified adjusted gross income is also adjusted with respect to interests in PFICs that are subject to tax under section 1291. Specifically, the proposed regulations provide that modified adjusted gross income for section 1411 purposes is increased by the amount of any excess distribution (within the meaning of section 1291(b)) to the extent the distribution constitutes a dividend under section 316(a) and is not otherwise included in income for chapter 1 purposes under section 1291(a)(1)(B), and by any gain treated as an excess distribution under section 1291(a)(2) to the extent not otherwise included in income for chapter 1 purposes under section 1291(a)(1)(B).

D. Special Rules Where Stock Is Held by Partnerships or S Corporations

The proposed regulations provide rules that apply to an individual, estate, or trust that owns stock of a CFC or QEF through a domestic partnership or S corporation. Because of the different timing rules under chapter 1 and chapter 2A and the fact that partnerships and S corporations are passthrough entities, the proposed regulations provide rules on the determination for section 1411 purposes of (1) the partner's or shareholder's outside basis in his interest, and (2) the partnership's or S corporation's adjusted basis in its CFC or QEF stock. The Treasury Department and the IRS believe that the partnership or S corporation will need to separately state, in addition to a partner's distributive share of the amounts included in the partnership's income under section 951(a) or section 1293(a), a partner's distributive share of any distributions of previously taxed earnings and profits of a CFC or QEF received by the partnership or S corporation that are dividends for purposes of chapter 2A. The Treasury Department and the IRS request comments on appropriate ways to determine a partner's distributive share of a distribution of previously taxed earnings and profits given the purpose of section 1411.

The Treasury Department and the IRS request comments on improving the administrability of these provisions, including the reporting of CFC or QEF amounts through domestic partnerships or S corporations. In addition, the Treasury Department and the IRS request comments on the determination of a partner's basis adjustment under section 743 for purposes of section 1411 when the partnership holds stock in a CFC or QEF.

E. Conforming Rules for Estates and Trusts

The proposed regulations also provide conforming rules for estates, trusts, and their beneficiaries. Proposed § 1.1411–10(c)(5), (e)(2), and (f) coordinate the rules relating to the computation of net investment income and any associated increase or decrease to adjusted gross income with the distributable net income regime and other general operating rules governing the income taxation of estates and trusts contained in Subchapter J and proposed § 1.1411–3. The Treasury Department and the IRS request comments on the interaction of subchapter J and the PFIC rules in order to address consistency issues between chapter 1 and chapter 2A.

F. Election

As described in parts 11.B through 11.E of this preamble, certain adjustments, including adjustments to modified adjusted gross income for purposes of section 1411, are necessary with respect to inclusions under sections 951 and 1293. The Treasury Department and the IRS recognize that these rules may create an additional administrative burden for certain taxpayers. Thus, proposed § 1.1411–10(g) allows individuals, estates, and trusts to make an election to include inclusions under sections 951 and 1293 in net investment income in the same manner and in the same taxable year as such amounts are included in income for chapter 1 purposes. If an individual, estate, or trust makes the election, any section 959(d) or section 1293(c) distributions that are not treated as dividends for chapter 1 purposes are not treated as dividends for section 1411 purposes, and thus would not be included in net investment income for section 1411 purposes. Moreover, the separate computation of basis for section 1411 purposes would not be required, and thus distributions under sections 959(d) and 1293(c) would decrease the taxpayer's basis in its CFC or PFIC stock, and inclusions under sections 951 and 1293 would increase the taxpayer's basis in its CFC or PFIC stock, in the same manner as the taxpayer's basis is adjusted for chapter 1 purposes.

An individual, estate, or trust that wants to make the election generally must do so for the first taxable year beginning after December 31, 2013, during which (1) the individual, estate, or trust owns an interest in a CFC or PFIC, and (2) the individual, estate, or trust is subject to tax under section 1411 or would be subject to tax under section 1411 if the election under proposed § 1.1411–10(g) is made. In addition, the election may be made for a taxable year that begins before January 1, 2014. The determination of whether an individual, estate, or trust is subject to tax under section 1411 for a taxable year is based on whether the individual's modified adjusted gross, or the estate's or trust's adjusted gross income, exceeds the applicable threshold set forth in § 1.1411–2(d) or § 1.1411–3(a)(1)(ii)(B)(*2*), regardless of whether the individual, estate, or trust has an income inclusion under section 951(a) or section 1293(a), or receives a distribution of previously taxed income with respect to any CFC or QEF in that taxable year. For example, if in 2014, a single individual acquires an interest in a QEF, has a QEF inclusion of $5,000,

and has modified adjusted gross income of $150,000, the individual would not have to make an election for 2014 because section 1411 is not applicable. If, in 2015, the individual has modified adjusted gross income in excess of $200,000, and the individual would like to take QEF inclusions into account for purposes of section 1411 in the same manner and in the same taxable year as such amounts are taken into account for chapter 1 purposes, the individual must make the election for 2015 in the time and manner described in proposed § 1.1411–10(g).

Once an election is made, it applies to all interests in CFCs and PFICs, including CFCs and PFICs that subsequently are acquired by the electing taxpayer. The election cannot be revoked, except with the Commissioner's consent.

The Treasury Department and the IRS request comments on this election, including the conditions under which an automatic extension of time to make the election should be permitted.

12. Taxpayer Reliance on Proposed Regulations

These regulations are proposed to be effective for taxable years beginning after December 31, 2013, except that § 1.1411–3(c)(2) is proposed to apply to taxable years beginning after December 31, 2012. The Treasury Department and IRS intend to finalize regulations under section 1411 in 2013. Taxpayers are reminded that section 1411 is effective for taxable years beginning after December 31, 2012. Taxpayers may rely on these proposed regulations for purposes of compliance with section 1411 until the effective date of the final regulations. To the extent these proposed regulations provide taxpayers with the ability to make an election, taxpayers may make the election, including regroupings described in § 1.469–11(b)(3)(iv), provided that the election is made in the manner described in the applicable provision. Any election made in reliance on these proposed regulations will be in effect for the year of the election, and will remain in effect for subsequent taxable years. However, if final regulations provide for the same or a similar election, taxpayers who opt not to make an election in reliance on these proposed regulations will not be precluded from making that election pursuant to the final regulations.

Proposed Effective Date

These regulations are proposed to be effective for taxable years beginning after December 31, 2013, except that § 1.1411–3(c)(2) is proposed to apply to taxable years beginning after December 31, 2012.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13563. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to the proposed regulations. Pursuant to the Regulatory Flexibility Act (RFA) (5 U.S.C. chapter 6), it is hereby certified that the proposed regulations will not have a significant economic impact on a substantial number of small entities. The applicability of the proposed regulations are limited to individuals, estates, and trusts, which are not small entities as defined by the RFA (5 U.S.C. 601). Accordingly, the RFA does not apply. Therefore, a regulatory flexibility analysis is not required. Pursuant to section 7805(f) of the Code, the proposed regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Public Hearing

Before the proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The Treasury Department and the IRS request comments on all aspects of the proposed rules. All comments will be available for public inspection and copying.

A public hearing has been scheduled for Tuesday, April 2, 2013, beginning at 10:00 a.m. in the Auditorium, Internal Revenue Building, 1111 Constitution Avenue NW., Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit electronic or written comments by March 5, 2013, and an outline of the topics to be discussed and the time to be devoted to each topic (signed original and eight (8) copies) by March 5, 2013. A period of 10 minutes will be allotted to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal authors of the proposed regulations are Michala Irons and David H. Kirk, IRS Office of the Associate Chief Counsel (Passthroughs and Special Industries). However, other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par 2. Section 1.469–0 is amended by adding the following entries to the table of contents:

§ 1.469–0 Table of contents.

* * * * *

§ 1.469–11 Effective date and transition rules.

* * * * *

(b) * * *

(3) * * *

(iv) Regrouping for taxpayers subject to section 1411.

(A) In general.

(B) Effective/applicability date.

* * * * *

Par 3. Section 1.469–11 is amended by adding paragraph (b)(3)(iv) to read as follows:

§ 1.469–11 Effective date and transition rules.

* * * * *

(b) * * *

(3) * * *

(iv) *Regrouping for taxpayers subject to section 1411*—(A) *In general.* If an individual, estate, or trust has net investment income (as defined in § 1.1411–4) and such individual's (as defined in § 1.1411–2(a)) modified adjusted gross income (as defined in § 1.1411–2(c)) exceeds the applicable

threshold in § 1.1411–2(d) or such estate's or trust's (as defined in § 1.1411–3(a)(1)(i)) adjusted gross income exceeds the amount described in section 1411(a)(2)(B)(ii) and § 1.1411–3(a)(1)(ii)(B)(2), such individual, estate, or trust may, in the first taxable year beginning after December 31, 2013, in which section 1411 would apply to such taxpayer, regroup its activities without regard to the manner in which the activities were grouped in the preceding taxable year. For this purpose, the determination whether section 1411 would apply is made without regard to the effect of regrouping. A taxpayer that is an individual, estate, or trust may regroup its activities for any taxable year that begins during 2013, if section 1411 would apply to such taxpayer for such year. A taxpayer may regroup activities only once pursuant to this paragraph (b)(3)(iv), and a regrouping made pursuant to this paragraph will apply to the taxable year for which the regrouping is done and all subsequent years.

(B) *Effective/applicability date.* This section applies to taxable years beginning after December 31, 2013.

* * * * *

Par. 4. Sections 1.1411–0 through 1.1411–10 are added to read as follows:

§ 1.1411–0 Table of contents.

§ 1.1411–1 General rules.

(a) *General rule.* Except as otherwise provided, all Internal Revenue Code provisions that apply for chapter 1 purposes in determining taxable income (as defined in section 63(a)) of a taxpayer also apply in determining the tax imposed by section 1411.

(b) *Adjusted gross income.* All references to an individual's adjusted gross income shall be treated as references to adjusted gross income (as defined in section 62), and all references to an estate's or trust's adjusted gross income shall be treated as references to adjusted gross income (as defined in section 67(e)). However, there may be additional adjustments to adjusted gross income because of investments in controlled foreign corporations or passive foreign investment companies. See § 1.1411–10(e).

(c) *Effective/applicability date.* This section applies to taxable years beginning after December 31, 2013.

§ 1.1411–2 Application to individuals.

(a) *Individual defined*—(1) *Individuals to whom tax applies.* For purposes of section 1411 and the regulations thereunder, an *individual* is any natural person. However, section 1411 does not apply to nonresident alien individuals (within the meaning of section 7701(b)(1)(B)). Therefore, for purposes of section 1411 and the regulations thereunder, an individual to whom the tax imposed under section 1411(a)(1) applies is any citizen or resident of the United States (within the meaning of section 7701(a)(30)(A)). See paragraph (a)(2)(iv) of this section for special rules regarding bona fide residents of U.S. territories.

(2) *Special rules*—(i) *Joint returns in the case of a nonresident alien individual married to a U.S. citizen or resident*—(A) *Default treatment.* In the case of a U.S. citizen or resident who is married (as defined in section 7703) to a nonresident alien individual, the spouses will be treated as married filing separately for purposes of section 1411. For purposes of calculating the tax imposed under section 1411(a)(1), the U.S. citizen or resident spouse will be subject to the threshold amount for a married taxpayer filing a separate return in paragraph (d)(1)(ii) of this section, and the nonresident alien spouse will not be subject to tax under section 1411. In accordance with the rules for married individuals filing separate returns, the spouse that is a U.S. citizen or resident must determine his or her own net investment income and modified adjusted gross income.

(B) *Taxpayer election.* Married taxpayers who file a joint Federal income tax return pursuant to a section 6013(g) election for purposes of chapter 1 and chapter 24 may also elect to be treated as making a section 6013(g) election for purposes of chapter 2A (relating to the tax imposed by section 1411).

(*1*) *Effect of election.* For purposes of calculating the tax imposed under section 1411(a)(1), the effect of an election under section 6013(g) is to include the combined income of the U.S. citizen or resident spouse and the nonresident spouse in the section 1411(a)(1) calculation and apply the threshold amount for a taxpayer making a joint return as set out in paragraph (d)(1)(i) of this section.

(*2*) *Procedural requirements for making election.* Taxpayers with a section 6013(g) election for chapter 1 and chapter 24 purposes in effect for any taxable year beginning after December 31, 2012, or taxpayers making a section 6013(g) election for chapter 1 and chapter 24 purposes in any taxable year beginning after December 31, 2012, who want to apply their section 6013(g) election to chapter 2A must make the election for the first taxable year beginning after December 31, 2013, in which the U.S. taxpayer is subject to tax under section 1411. The determination of whether the U.S. taxpayer is subject to tax under section 1411 is made without regard to the effect of the section 6013(g) election described in paragraph (a)(2)(i)(B) of this section. In addition, taxpayers may elect to apply their section 6013(g) election to chapter 2A for a taxable year that begins before January 1, 2014. In all cases, the election must be made in the manner prescribed by the Secretary on a timely filed (including extensions) return, or amended return, for the taxable year for which the election is made. Further, in all cases, once made, the duration and termination of the section 6013(g) election for chapter 2A is governed by the rules of section 6013(g)(2) through (6) and the regulations thereunder.

(ii) *Grantor trusts.* For rules regarding the treatment of owners of grantor trusts, see § 1.1411–3(b)(5).

(iii) *Bankruptcy estates.* A bankruptcy estate administered under chapter 7 (relating to liquidations) or chapter 11 (relating to reorganizations) of the Bankruptcy Code (Title 11 of the United States Code) of a debtor who is an individual shall be treated as a married taxpayer filing a separate return for

purposes of section 1411. See § 1.1411–2(d)(1)(ii).

(iv) *Bona fide residents of U.S. territories*—(A) *Applicability.* An individual who is a bona fide resident of a U.S. territory is subject to the tax imposed by section 1411(a)(1) only if the individual is required to file an income tax return with the United States upon application of section 931, 932, 933, or 935 and the regulations thereunder. With respect to an individual described in this paragraph (a)(2)(iv)(A), the amount excluded from gross income under section 931 or 933 and any deduction properly allocable or chargeable against amounts excluded from gross income under section 931 or 933, respectively, is not taken into account in computing modified adjusted gross income under paragraph (c) of this section or net investment income under § 1.1411–4.

(B) *Coordination with exception for nonresident aliens.* An individual who is both a bona fide resident of a U.S. territory and a nonresident alien individual with respect to the United States is not subject to taxation under section 1411(a)(1).

(C) *Definitions.* For purposes of this section—

(*1*) *Bona fide resident.* The term *bona fide resident* has the meaning provided under section 937(a).

(*2*) *U.S. territory.* The term *U.S. territory* means American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, or the United States Virgin Islands.

(b) *Calculation of tax*—(1) *In general.* In the case of an individual described in paragraph (a)(1) of this section, the tax imposed by section 1411(a)(1) for each taxable year is equal to 3.8 percent of the lesser of—

(i) Net investment income (as defined in § 1.1411–4) for such taxable year; or

(ii) The excess (if any) of—

(A) The modified adjusted gross income (as defined in paragraph (c) of this section) for such taxable year; over

(B) The threshold amount (as defined in paragraph (d) of this section).

(2) **Example.** During Year 1 (a taxable year in which section 1411 is in effect), A, an unmarried U.S. citizen, has modified adjusted gross income (as defined in paragraph (c) of this section) of $190,000, which includes $50,000 of net investment income (as defined in § 1.1411–4). A has a zero tax imposed under section 1411 because the threshold amount for a single individual is $200,000 (as provided in paragraph (d)(1)(iii) of this section). If during Year 2, A has modified adjusted gross income of $220,000, which includes $50,000 of net investment income, then the individual has a section 1411 tax of $760 (3.8 percent multiplied by $20,000).

(c) *Modified adjusted gross income*—(1) *General rule.* For purposes of section 1411, the term *modified adjusted gross income* means adjusted gross income increased by the excess of—

(i) The amount excluded from gross income under section 911(a)(1); over

(ii) The amount of any deductions (taken into account in computing adjusted gross income) or exclusions disallowed under section 911(d)(6) with respect to the amounts described in paragraph (c)(1)(i) of this section.

(2) *Rules with respect to controlled foreign corporations and passive foreign investment companies.* Additional rules in § 1.1411–10(e)(1) apply to an individual that is a United States shareholder of a controlled foreign corporation (within the meaning of section 957(a)) or that is a United States person that directly or indirectly owns an interest in a passive foreign investment company (within the meaning of section 1297(a)).

(d) *Threshold amount*—(1) *In general.* The term *threshold amount* means—

(i) In the case of a taxpayer making a joint return under section 6013 or a surviving spouse (as defined in section 2(a)), $250,000;

(ii) In the case of a married taxpayer (as defined in section 7703) filing a separate return, $125,000; and

(iii) In any other case, $200,000.

(2) *Taxable year of less than twelve months*—(i) *General rule.* In the case of an individual who has a taxable year consisting of less than twelve months (short taxable year), the threshold amount under paragraph (d)(1) of this section is not reduced or prorated. For example, in the case of an unmarried decedent who dies on June 1, the threshold amount is $200,000 for the decedent's short taxable year that begins on January 1 and ends on June 1.

(ii) *Change of annual accounting period.* Notwithstanding paragraph (d)(2)(i) of this section, an individual who has a short taxable year resulting from a change of annual accounting period shall reduce the threshold amount to an amount that bears the same ratio to the full threshold amount provided under paragraph (d)(1) of this section as the number of months in the short taxable year bears to twelve.

(e) *Effective/applicability date.* This section applies to taxable years beginning after December 31, 2013.

§ 1.1411–3 Application to estates and trusts.

(a) *Estates and trusts to which tax applies*—(1) *In general*—(i) *General application.* Section 1411 and the regulations thereunder apply to all estates and trusts that are subject to the provisions of part I of subchapter J of chapter 1 of subtitle A of the Internal Revenue Code, unless specifically exempted by paragraph (b) of this section.

(ii) *Calculation of tax.* The tax imposed by section 1411(a)(2) for each taxable year is equal to 3.8 percent of the lesser of—

(A) The estate's or trust's undistributed net investment income for such taxable year; or

(B) The excess (if any) of—

(*1*) The estate's or trust's adjusted gross income (as defined in section 67(e) and adjusted by § 1.1411–10(e)(2), if applicable) for such taxable year; over

(*2*) The dollar amount at which the highest tax bracket in section 1(e) begins for such taxable year.

(2) *Taxable year of less than twelve months*—(i) *General rule.* In the case of an estate or trust that has a taxable year consisting of less than twelve months (short taxable year), the dollar amount described in paragraph (a)(1)(ii)(B)(*2*) of this section is not reduced or prorated.

(ii) *Change of annual accounting period.* Notwithstanding paragraph (a)(2)(i) of this section, an estate or trust that has a short taxable year resulting from a change of annual accounting period (but not from an individual's death) shall reduce the dollar amount described in paragraph (a)(1)(ii)(B)(*2*) of this section to an amount that bears the same ratio to that dollar amount as the number of months in the short taxable year bears to twelve.

(3) *Rules with respect to controlled foreign corporations and passive foreign investment companies.* Additional rules in § 1.1411–10 apply to an estate or trust that holds an interest in a controlled foreign corporation (within the meaning of section 957(a)) or a passive foreign investment (within the meaning of section 1297(a)).

(b) *Exception for certain trusts.* The following trusts are not subject to the tax imposed by section 1411:

(1) A trust all of the unexpired interests in which are devoted to one or more of the purposes described in section 170(c)(2)(B).

(2) A trust exempt from tax under section 501.

(3) A charitable remainder trust described in section 664. However, see paragraph (c)(2) of this section for special rules regarding the treatment of annuity or unitrust distributions from such trust to persons subject to tax under section 1411.

(4) Any other trust, fund, or account that is statutorily exempt from taxes imposed in subtitle A. For example, see sections 220(e)(1), 223(e)(1), 529(a), and 530(a).

(5) A trust, or a portion thereof, that is treated as a grantor trust under subpart E of part I of subchapter J of chapter 1. However, in the case of any such trust or portion thereof, each item of income or deduction that is included in computing taxable income of a grantor or another person under section 671 shall be treated as if it had been received by, or paid directly to, the grantor or other person for purposes of calculating such person's net investment income.

(6) Except to the extent provided in paragraph (c)(3) of this section, a foreign trust (as defined in section 7701(a)(31)(B) and § 301.7701–7(a)(2)).

(c) *Application to specific trusts*—(1) *Electing small business trusts (ESBTs)*—(i) *General application.* The S portion and non-S portion (as defined in § 1.641(c)–1(b)(2) and (3), respectively) of a trust that has made an ESBT election under section 1361(e)(3) and § 1.1361–1(m)(2) shall be treated as separate trusts for purposes of the computation of undistributed net investment income in the manner described in paragraph (e) of this section, but shall be treated as a single trust for purposes of determining the amount subject to tax under section 1411. If a grantor or another person is treated as the owner of a portion of the ESBT, the items of income and deduction attributable to the grantor portion (as defined in § 1.641(c)–1(b)(1)) shall be included in the grantor's calculation of net investment income and shall not be included in the ESBT's computation of tax described in paragraph (c)(1)(ii) of this section.

(ii) *Computation of tax.* This paragraph (c)(1)(ii) provides the method for an ESBT to compute the tax under section 1411. See *Example 3* in paragraph (f) of this section.

(A) *Step one:* The S portion and non-S portion shall compute each portion's undistributed net investment income as separate trusts in the manner described in paragraph (e) of this section and then combine these amounts to calculate the ESBT's undistributed net investment income.

(B) *Step two:* The ESBT will calculate its adjusted gross income (as defined in paragraph (a)(1)(ii)(B)(*1*) of this section). The ESBT's adjusted gross income is the non-S portion's adjusted gross income, increased or decreased by the net income or net loss of the S portion, after taking into account all deductions, carryovers, and loss limitations applicable to the S portion, as a single item of ordinary income (or ordinary loss).

(C) *Step three:* The ESBT will pay tax on the lesser of—

(*1*) The ESBT's total undistributed net investment income; or

(*2*) The excess of the ESBT's adjusted gross income (as calculated in paragraph (c)(1)(ii)(B) of this section) over the dollar amount at which the highest tax bracket in section 1(e) begins for the taxable year.

(2) *Special rules for charitable remainder trusts*—(i) *Treatment of annuity or unitrust distributions.* The net investment income of the beneficiary attributable to the beneficiary's annuity or unitrust distribution from a charitable remainder trust shall include an amount equal to the lesser of—

(A) The total amount of the distributions for that year; or

(B) The current and accumulated net investment income of the charitable remainder trust.

(ii) *Apportionment between multiple beneficiaries.* In the case of a charitable remainder trust with more than one annuity or unitrust beneficiary, the net investment income shall be apportioned among such beneficiaries based on their respective shares of the total annuity or unitrust amount paid by the charitable remainder trust for that taxable year.

(iii) *Accumulated net investment income.* The accumulated net investment income of a charitable remainder trust is the total amount of net investment income received by a charitable remainder trust for all taxable years that begin after December 31, 2012, less the total amount of net investment income distributed for all prior taxable years of the trust that begin after December 31, 2012.

(3) *Certain foreign trusts with United States beneficiaries.* [Reserved]

(d) *Application to specific estates*—(1) *Bankruptcy estates.* A bankruptcy estate in which the debtor is an individual is treated as a married taxpayer filing a separate return for purposes of section 1411. See §§ 1.1411–2(a)(2)(iii) and 1.1411–2(d)(1)(ii).

(2) *Foreign estates*—(i) *General rule.* Except to the extent provided in paragraph (d)(2)(ii) of this section, the tax imposed by section 1411 does not apply to a foreign estate (as defined in section 7701(a)(31)(A)).

(ii) *Certain foreign estates with United States beneficiaries.* [Reserved]

(e) *Calculation of undistributed net investment income*—(1) *In general.* This paragraph (e)(1) provides special rules for the computation of certain deductions and for the allocation of net investment income between an estate or trust and its beneficiaries. Generally, an estate's or trust's net investment income (as defined in § 1.1411–4) is calculated in the same manner as that of an individual. See § 1.1411–10(c) for special rules regarding controlled foreign corporations, passive foreign investment companies, and estates and trusts holding interests in such entities.

(2) *Undistributed net investment income.* An estate's or trust's undistributed net investment income is the estate's or trust's net investment income determined under § 1.1411–4 reduced by distributions of net investment income to beneficiaries and deductions under section 642(c) in the manner described in paragraphs (e)(3) and (e)(4) of this section.

(3) *Distributions of net investment income to beneficiaries.* (i) In computing the estate's or trust's undistributed net investment income, net investment income shall be reduced by distributions of net investment income made to beneficiaries. The deduction allowed under this paragraph (e)(3) is limited to the lesser of the amount deductible to the estate or trust under section 651 or section 661, as applicable, or the net investment income of the estate or trust. In the case of a deduction under section 651 or section 661 that consists of both net investment income and excluded income (as defined in paragraph (e)(5) of this section), the distribution must be allocated between net investment income and excluded income in a manner similar to § 1.661(b)–1 as if net investment income constituted gross income and excluded income constituted amounts not includible in gross income. See § 1.661(c)–1 and *Example 1* in paragraph (f) of this section.

(ii) If one or more items of net investment income comprise all or part of a distribution for which a deduction is allowed under paragraph (e)(3)(i) of this section, such items retain their character as net investment income under section 652(b) or section 662(b), as applicable, for purposes of computing net investment income of the recipient of the distribution who is subject to tax under section 1411. The provisions of this paragraph (e)(3)(ii) also apply to distributions to United States beneficiaries of current year income described in section 652 or section 662 from foreign nongrantor trusts.

(4) *Deduction for amounts paid or permanently set aside for a charitable purpose.* In computing the estate's or trust's undistributed net investment income, the estate or trust shall be allowed a deduction for amounts of net investment income that are allocated to amounts allowable under section 642(c). In the case of an estate or trust that has items of income consisting of both net investment income and excluded

income (as defined in paragraph (e)(5) of this section), the allowable deduction under this paragraph (e)(4) must be allocated between net investment income and excluded income in accordance with § 1.642(c)–2(b) as if net investment income constituted gross income and excluded income constituted amounts not includible in gross income. For an estate or trust with deductions under both sections 642(c) and 661, see § 1.662(b)–2 and *Example 2* in paragraph (f) of this section.

(5) *Excluded income.* The term *excluded income* means—

(i) Items of income excluded from gross income in chapter 1;

(ii) Items of income not included in net investment income, as determined under § 1.1411–4; and

(iii) Items of gross income and net gain specifically excluded by section 1411, the regulations thereunder, or other guidance published in the Internal Revenue Bulletin. See §§ 1.1411–7, –8, and –9.

(f) *Examples.* In each example, unless otherwise indicated, the taxpayer uses a calendar taxable year, the taxpayer is not a foreign trust, and Year 1 is a taxable year in which section 1411 is in effect:

Example 1. Calculation of undistributed net investment income (with no deduction under section 642(c)). (i) In Year 1, Trust has dividend income of $15,000, interest income of $10,000, capital gain of $5,000, and $60,000 of taxable income relating to a distribution from an individual retirement account (as defined under section 408). Trust has no expenses. Trust distributes $10,000 of its current year trust accounting income to A, a beneficiary of Trust. For trust accounting purposes, $25,000 of the distribution from the individual retirement account is attributable to income. Trust allocates the remaining $35,000 of taxable income from the individual retirement account and the $5,000 of capital gain to principal, and therefore these amounts do not enter into the calculation of Trust's distributable net income for Year 1.

(ii) Trust's distributable net income is $50,000 ($15,000 in dividends plus $10,000 in interest plus $25,000 of taxable income from an individual retirement account), from which the $10,000 distribution to A is paid. Trust's deduction under section 661 is $10,000. Under § 1.662(b)–1, the deduction reduces each class of income comprising distributable net income on a proportional basis. The $10,000 distribution equals 20 percent of distributable net income ($10,000 divided by $50,000). Therefore, the distribution consists of dividend income of $3,000, interest income of $2,000, and ordinary income attributable to the individual retirement account of $5,000. Because the $5,000 of capital gain allocated to principal for trust accounting purposes did not enter into distributable net income, no portion of that amount is included in the $10,000 distribution, nor does it qualify for the deduction under section 661.

(iii) Trust's net investment income is $30,000 ($15,000 in dividends plus $10,000 in interest plus $5,000 in capital gain). Trust's $60,000 of taxable income attributable to the individual retirement account is excluded income (within the meaning of paragraph (e)(5) of this section) because it is excluded from net investment income under § 1.1411–8. Trust's undistributed net investment income under paragraph (e)(2) of this section is $25,000, which is Trust's net investment income ($30,000) less the amount of dividend income ($3,000) and interest income ($2,000) distributed to A. The $25,000 of undistributed net investment income is comprised of the capital gain allocated to principal ($5,000), the remaining undistributed dividend income ($12,000), and the remaining undistributed interest income ($8,000).

(iv) Under paragraph (e)(3) of this section and pursuant to § 1.1411–4(a)(1), A's net investment income includes dividend income of $3,000 and interest income of $2,000, but does not include the $5,000 of ordinary income attributable to the individual retirement account because it is excluded from net investment income under § 1.1411–8.

Example 2. Calculation of undistributed net investment income (with deduction under section 642(c)). (i) Same facts as *Example 1*, except Trust is required to distribute $30,000 to A. In addition, Trust has a $10,000 deduction under section 642(c) (deduction for amounts paid for a charitable purpose). Trust also makes an additional discretionary distribution of $10,000 to B, a beneficiary of Trust. As in *Example 1*, Trust's net investment income is $30,000 ($15,000 in dividends plus $10,000 in interest plus $5,000 in capital gain). In accordance with §§ 1.661(b)–2 and 1.662(b)–2, the items of income must be allocated between the mandatory distribution to A, the discretionary distribution to B, and the $10,000 distribution to a charity.

(ii) For purposes of the mandatory distribution to A, Trust's distributable net income is $50,000. See § 1.662(b)–2, *Example* 1(b). Trust's deduction under section 661 for the distribution to A is $30,000. Under § 1.662(b)–1, the deduction reduces each class of income comprising distributable net income on a proportional basis. The $30,000 distribution equals 60 percent of distributable net income ($30,000 divided by $50,000). Therefore, the distribution consists of dividend income of $9,000, interest income of $6,000, and ordinary income attributable to the individual retirement account of $15,000. A's mandatory distribution thus consists of $15,000 of net investment income and $15,000 of excluded income.

(iii) Trust's remaining distributable net income is $20,000. Trust's remaining undistributed net investment income is $15,000. The $10,000 deduction under section 642(c) is allocated in the same manner as the distribution to A, where the $10,000 distribution equals 20 percent of distributable net income ($10,000 divided by $50,000). For purposes of determining undistributed net investment income, Trust's net investment income is reduced by $5,000 under paragraph (e)(4) of this section (dividend income of $3,000, interest income of $2,000, but with no reduction for amounts attributable to the individual retirement account of $5,000).

(iv) With respect to the discretionary distribution to B, Trust's remaining distributable net income is $10,000. Trust's remaining undistributed net investment income is $10,000. Trust's deduction under section 661 for the distribution to B is $10,000. The $10,000 distribution equals 20 percent of distributable net income ($10,000 divided by $50,000). Therefore, the distribution consists of dividend income of $3,000, interest income of $2,000, and ordinary income attributable to the individual retirement account of $5,000. B's distribution consists of $5,000 of net investment income and $5,000 of excluded income.

(v) Trust's undistributed net investment income is $5,000 after taking into account distribution deductions and section 642(c) in accordance with paragraphs (e)(3) and (e)(4) of this section, respectively. To arrive at Trust's undistributed net investment income of $5,000, Trust's net investment income of $30,000 is reduced by $15,000 of the mandatory distribution to A, $5,000 of the section 642(c) deduction, and $5,000 of the discretionary distribution to B.

Example 3. Calculation of an ESBT's tax for purposes of section 1411. (i) In Year 1, the non-S portion of Trust, an ESBT, has dividend income of $15,000, interest income of $10,000, and capital gain of $5,000. Trust's S portion has net rental income of $21,000 and a capital loss of $7,000. The Trustee's annual fee of $1,000 is allocated 60 percent to the non-S portion and 40 percent to the S portion. Trust makes a distribution from income to a single beneficiary of $9,000.

(ii) *Step one.* (A) Trust must compute the undistributed net investment income for the S portion and non-S portion in the manner described in paragraph (c)(1) of this section.

The undistributed net investment income for the S portion is $20,600 and is determined as follows:

Net Rental Income	$21,000
Trustee Annual Fee	(400)
Total S portion undistributed net investment income	20,600

(B) No portion of the capital loss is allowed because, pursuant to § 1.1411–4(d)(2), net gain cannot be less than zero and excess capital losses are not properly allocable deductions under § 1.1411–4(f). See *Example 1* of § 1.1411–4(h). In addition, pursuant to § 1.641(c)–1(i), no portion of the $9,000 distribution is allocable to the S portion.

The undistributed net investment income for the non-S portion is $20,400 and is determined as follows:

Dividend Income	$15,000
Interest Income	10,000
Capital Gain	5,000
Trustee Annual Fee	(600)
Distributable net income distribution	(9,000)

Total non-S portion undistributed net investment income	20,400

(C) Trust will combine the undistributed net investment income of the S portion and non-S portion from (ii)(A) and (B) to arrive at Trust's combined undistributed net investment income.

S portion's undistributed net investment income	$20,600
Non-S portion's undistributed net investment income	20,400
Combined undistributed net investment income	41,000

(iii) *Step two.* (A) The ESBT will calculate its adjusted gross income. Pursuant to paragraph (c)(1)(ii)(B) of this section, the ESBT's adjusted gross income is the non-S portion's adjusted gross income increased or decreased by the net income or net loss of the S portion.

(B) The adjusted gross income for the ESBT is $38,000 and is determined as follows:

Dividend Income	$15,000
Interest Income	10,000
Capital Gain	5,000
Trustee Annual Fee	(600)
Distributable net income distribution	(9,000)
S Portion Income (see (iii)(C))	17,600
Adjusted gross income	38,000

(C) The S portion's single item of ordinary income used in the ESBT's adjusted gross income calculation is $17,600. This item of income is determined by starting with net rental income of $21,000 and reducing it—

(*1*) By the S portion's $400 share of the annual trustee fee; and

(*2*) As allowed by section 1211(b)(1), $3,000 of the $7,000 capital loss.

(iv) *Step three.* Trust will pay tax on the lesser of—

(A) The combined undistributed net investment income ($41,000 calculated in (ii)(C)); or

(B) The excess of adjusted gross income ($38,000 calculated in (iii)(B)) over the dollar amount at which the highest tax bracket in section 1(e) applicable to a trust begins for the taxable year.

(g) *Effective/applicability date.* This section applies to taxable years beginning after December 31, 2013, except that paragraph (c)(2) of this section shall apply to taxable years of charitable remainder trusts that begin after December 31, 2012.

§ 1.1411–4 Definition of net investment income.

(a) *In general.* For purposes of section 1411 and the regulations thereunder, net investment income means the excess (if any) of—

(1) The sum of—

(i) Gross income from interest, dividends, annuities, royalties, rents, substitute interest payments, and substitute dividend payments, except to the extent excluded by the ordinary course of a trade or business exception described in paragraph (b) of this section;

(ii) Other gross income derived from a trade or business described in § 1.1411–5; and

(iii) Net gain (to the extent taken into account in computing taxable income) attributable to the disposition of property, except to the extent excluded by the exception described in paragraph (d)(3)(ii)(A) for gain or loss attributable to property held in a trade or business not described in § 1.1411–5; over

(2) The deductions allowed by subtitle A that are properly allocable to such gross income or net gain (as determined in paragraph (f) of this section).

(b) *Ordinary course of a trade or business exception.* Gross income described in paragraph (a)(1)(i) of this section is excluded from net investment income if it is derived in the ordinary course of a trade or business not described in § 1.1411–5. See § 1.1411–6 for rules regarding working capital. To determine whether gross income described in paragraph (a)(1)(i) of this section is derived in a trade or business, the following rules apply.

(1) In the case of an individual, estate, or trust that owns or engages in a trade or business directly (or indirectly through ownership of an interest in an entity that is disregarded as an entity separate from its owner under § 301.7701–3), the determination of whether gross income described in paragraph (a)(1)(i) of this section is derived in a trade or business is made at the individual level.

(2) In the case of an individual, estate, or trust that owns an interest in a trade or business through one or more passthrough entities for Federal tax purposes (for example, through a partnership or S corporation), the determination of whether gross income described in paragraph (a)(1)(i) of this section is—

(i) Derived in a trade or business described in § 1.1411–5(a)(1) is made at the owner level; and

(ii) Derived in a trade or business described in § 1.1411–5(a)(2) is made at the entity level.

(3) The following examples illustrate the provisions of this paragraph (b).

Example 1. Multiple passthrough entities. A, an individual, owns an interest in UTP, a partnership, which is engaged in a trade or business. UTP owns an interest in LTP, also a partnership, which is not engaged in a trade or business. LTP receives $10,000 in dividends, $5,000 of which is allocated to A through UTP. The $5,000 of dividends is not derived in a trade or business because LTP is not engaged in a trade or business. This is true even though UTP is engaged in a trade or business. Accordingly, the ordinary course of a trade or business exception described in paragraph (b) of this section does not apply, and A's $5,000 of dividends is net investment income under paragraph (a)(1)(i) of this section.

Example 2. Entity engaged in trading in financial instruments. B, an individual, owns an interest in PRS, a partnership, which is engaged in a trade or business of trading in financial instruments (as defined in § 1.1411–5(a)(2)). PRS' trade or business is not a passive activity (within the meaning of section 469) with respect to B. In addition, B is not directly engaged in a trade or business of trading in financial instruments or commodities. PRS earns interest of $50,000, and B's distributive share of the interest is $25,000. Because PRS is engaged in a trade or business described in § 1.1411–5(a)(2), the ordinary course of a trade or business exception described in paragraph (b) of this section does not apply, and B's $25,000 distributive share of the interest is net investment income under paragraph (a)(1)(i) of this section.

Example 3. Application of ordinary course of a trade or business exception. C, an individual, owns stock in S corporation, S. S is engaged in a banking trade or business (that is not a trade or business of trading in financial instruments or commodities), and S's trade or business is not a passive activity (within the meaning of section 469) with respect to C. S earns $100,000 of interest in the ordinary course of its trade or business, of which $5,000 is C's pro rata share. Because S is not engaged in a trade or business described in § 1.1411–5(a)(2) and because S's trade or business is not a passive activity with respect to C (as described in § 1.1411–5(a)(1)), the ordinary course of a trade or business exception described in paragraph (b) of this section applies, and C's $5,000 of interest is not included under paragraph (a)(1)(i) of this section.

(c) *Other gross income from a trade or business described in § 1.1411–5*—(1) *Passive activity.* For a trade or business described in § 1.1411–5(a)(1), paragraph (a)(1)(ii) of this section includes other gross income that is not gross income described in paragraph (a)(1)(i) of this section or net gain described in paragraph (a)(1)(iii) of this section. Thus, for a trade or business described in § 1.1411–5(a)(1), if an item of gross income or net gain is subject to paragraph (a)(1)(i) or (iii) of this section, it is generally not other gross income described in paragraph (a)(1)(ii) of this section.

(2) *Trading in financial instruments or commodities.* For a trade or business described in § 1.1411–5(a)(2)), paragraph (a)(1)(ii) of this section includes all other gross income that is not gross income described in paragraph (a)(1)(i) of this section. For example, any gain from marking to market under section 475(f) or section 1256 and any realized gain from the disposition of

property held in the trade or business is classified as other gross income subject to paragraph (a)(1)(ii) of this section (and not classified as net gain under paragraph (a)(1)(iii) of this section).

(d) *Net gain.* This paragraph (d) describes special rules for purposes of paragraph (a)(1)(iii) of this section.

(1) *Definition of disposition.* For purposes of section 1411 and the regulations thereunder, the term *disposition* means a sale, exchange, transfer, conversion, cash settlement, cancellation, termination, lapse, expiration, or other disposition.

(2) *Limitation.* The calculation of net gain shall not be less than zero. Losses allowable under section 1211(b) are permitted to offset gain from the disposition of assets other than capital assets that are subject to section 1411.

(3) *Net gain attributable to the disposition of property*—(i) *In general.* Net gain attributable to the disposition of property is the gain described in section 61(a)(3) recognized from the disposition of property reduced, but not below zero, by losses deductible under section 165, including losses attributable to casualty, theft, and abandonment or other worthlessness. The rules in subchapter O of chapter 1 and the regulations thereunder apply. See, for example, § 1.61–6(b). Net gain shall include gain or loss attributable to the disposition of property from the investment of working capital. See § 1.1411–6.

(ii) *Exception for gain or loss attributable to property held in a trade or business not described in § 1.1411–5*—(A) *General rule.* Net gain shall not include gain or loss attributable to property (other than property from the investment of working capital (as described in § 1.1411–6)) held in a trade or business not described in § 1.1411–5.

(B) *Special rules for determining whether property is held in a trade or business.* To determine whether net gain described in paragraph (a)(1)(iii) of this section is from property held in a trade or business—

(*1*) A partnership interest or S corporation stock generally is not property held in a trade or business. Therefore, gain from the sale of a partnership interest or S corporation stock is generally gain described in paragraph (a)(1)(iii) of this section. See § 1.1411–7 for rules relating to dispositions of interests in partnerships or S corporations.

(*2*) In the case of an individual, estate, or trust that owns or engages in a trade or business directly (or indirectly through ownership of an interest in an entity that is disregarded as an entity separate from its owner under § 301.7701–3), the determination of whether net gain described in paragraph (a)(1)(iii) of this section is attributable to property held in a trade or business is made at the individual level.

(*3*) In the case of an individual, estate, or trust that owns an interest in a trade or business through one or more passthrough entities for Federal tax purposes (for example, through a partnership or S corporation), the determination of whether net gain described in paragraph (a)(1)(iii) of this section from such entity is attributable to—

(*i*) Property held in a trade or business described in § 1.1411–5(a)(1) is made at the owner level; and

(*ii*) Property held in a trade or business described in § 1.1411–5(a)(2) is made at the entity level.

(C) *Example. Gain from rental activity.* A, an unmarried individual, rents a boat to B for $100,000 in Year 1. A's rental activity does not involve the conduct of a section 162 trade or business, but under section 469(c)(2), A's rental activity is a passive activity. In Year 2, A sells the boat to B, and A realizes and recognizes taxable gain attributable to the disposition of the boat of $500,000. Because the exception provided in paragraph (d)(3)(ii)(A) of this section requires a trade or business, this exception is inapplicable, and therefore, A's $500,000 gain will be taken into account under § 1.1411–4(a)(1)(iii).

(iii) *Adjustments to gain or loss attributable to the disposition of interests in a partnership or S corporation.* Net gain shall be adjusted as provided in § 1.1411–7 in the case of the disposition of an interest in a partnership or S corporation.

(e) *Distributions from estates and trusts.* Net investment income includes a beneficiary's share of distributable net income, as described in sections 652(a) and 662(a), to the extent that, under sections 652(b) and 662(b), the character of such income constitutes gross income from items described in paragraph (a)(1)(i) and (ii) of this section or net gain attributable to items described in paragraph (a)(1)(iii) of this section, with further computations consistent with the principles of this section, as provided in § 1.1411–3(e).

(f) *Properly allocable deductions*—(1) *General rule*—(i) *In general.* Unless specifically stated otherwise, only properly allocable deductions described in this paragraph (f) may be taken into account in determining net investment income.

(ii) *Limitations and carryovers.* Deductions allowed under this paragraph (f) shall not exceed the total amount of gross income and net gain described in paragraph (a)(1) of this section. Any deductions described in this paragraph (f) in excess of such gross income and net gain shall not be taken into account in determining net investment income in any other taxable year, except as allowed under chapter 1. However, in no event will a net operating loss deduction allowed under section 172 be taken into account in determining net investment income for any taxable year. See *Example 3* of paragraph (h) of this section.

(2) *Properly allocable deductions described in section 62*—(i) *Deductions allocable to gross income from rents and royalties.* Deductions described in section 62(a)(4) allocable to rents and royalties described in paragraph (a)(1)(i) of this section (and that therefore constitute net investment income) shall be taken into account in determining net investment income.

(ii) *Deductions allocable to gross income from trades or businesses described in § 1.1411–5.* Deductions described in section 62(a)(1) allocable to income from a trade or business described in § 1.1411–5 shall be taken into account in determining net investment income to the extent the deductions have not been taken into account in determining self-employment income within the meaning of § 1.1411–9.

(iii) *Penalty on early withdrawal of savings.* Net investment income shall take into account deductions described in section 62(a)(9).

(3) *Properly allocable deductions described in section 63(d)*—(i) *In general.* Net investment income shall take into account the following itemized deductions:

(A) *Investment interest expense.* Investment interest (as defined in section 163(d)(3)) to the extent allowed under section 163(d)(1). Any investment interest not allowed under section 163(d)(1) shall be treated as investment interest paid or accrued by the taxpayer in the succeeding taxable year.

(B) *Investment expenses.* Investment expenses (as defined in section 163(d)(4)(C)).

(C) *Taxes described in section 164(a)(3).* In the case of taxes that are deductible under section 164(a)(3) and imposed on both gross income (including net gain) described in § 1.1411–4(a)(1) and gross income (as defined under section 61(a)) that is not described in § 1.1411–4(a)(1), the portion of the deduction that is properly allocable to gross income (including net gain) described in § 1.1411–4(a)(1) may be determined by taxpayers using any reasonable method. For purposes of the prior sentence, an allocation of the deduction based on the ratio of the

amount of a taxpayer's gross income (including net gain) described in § 1.1411–4(a)(1) to the amount of the taxpayer's gross income (as defined under section 61(a)) is an example of a reasonable method.

(ii) *Application of limitations under sections 67 and 68.* Any deductions described in this paragraph (f)(3) that are subject to section 67 (the 2-percent floor on miscellaneous itemized deductions) or section 68 (the overall limitation on itemized deductions) are allowed in determining net investment income only to the extent the items are deductible for chapter 1 purposes after the application of sections 67 and 68. For this purpose, section 67 is applied before section 68. The amounts that may be deducted in determining net investment income after the application of sections 67 and 68 shall be determined as described in paragraph (f)(3)(ii)(A) and (B) of this section.

(A) *Deductions subject to section 67.* The amount of miscellaneous itemized deductions tentatively deductible in determining net investment income after applying section 67 (but before applying section 68) is determined by multiplying a taxpayer's miscellaneous itemized deductions otherwise allowable under this paragraph (f)(3) by a fraction. The numerator of the fraction is the total miscellaneous itemized deductions allowed after the application of section 67, but before the application of section 68. The denominator of the fraction is the total miscellaneous itemized deductions before the application of sections 67 and 68. See *Example 6* of paragraph (h) of this section.

(B) *Deductions subject to section 68.* The amount of itemized deductions allowed in determining net investment income after applying sections 67 and 68 is determined by multiplying a taxpayer's itemized deductions otherwise allowable under this paragraph (f)(3), after the application of section 67, by a fraction. The numerator of the fraction is the total itemized deductions allowed after the application of sections 67 and 68. The denominator of the fraction is the total itemized deductions allowed after the application of section 67, but before the application of section 68. For this purpose, the term itemized deductions does not include any deduction described in section 68(c).

(4) *Loss deductions.* Deductions allowed under this paragraph (f) do not include losses described in section 165, whether described in section 62 or section 63(d). Losses deductible under section 165 are deductible only in determining net gain under paragraph (d) of this section, and only to the extent of gains.

(g) *Special rules for controlled foreign corporations and passive foreign investment companies.* For purposes of calculating net investment income, additional rules in § 1.1411–10(c) apply to an individual, an estate, or a trust that is a United States shareholder that owns an interest in a controlled foreign corporation (within the meaning of section 957(a)) or that is a United States person that directly or indirectly owns an interest in passive foreign investment companies (within the meaning of section 1297(a)).

(h) *Examples.* The following examples illustrate the provisions of this section. In each example, unless otherwise indicated, the taxpayer uses a calendar taxable year, the taxpayer is a U.S. citizen, and Year 1 is a taxable year in which section 1411 is in effect.

Example 1. Calculation of net gain. (i) In Year 1, A, an unmarried individual, realizes a capital loss of $40,000 on the sale of P stock and realizes a capital gain of $10,000 on the sale of Q stock, resulting in a net capital loss of $30,000. Both P and Q are C corporations. A has no other capital gain or capital loss in Year 1. In addition, A receives wages of $300,000 and earns $5,000 of gross income from interest. For income tax purposes, under section 1211(b), A may use $3,000 of the net capital loss against other income. Under section 1212(b)(1), the remaining $27,000 is a capital loss carryover. For purposes of determining A's Year 1 net gain under paragraph (a)(1)(iii) of this section, A's gain of $10,000 on the sale of the Q stock is reduced by A's loss of $40,000 on the sale of the P stock. However, because net gain may not be less than zero, A may not reduce net investment income by the $3,000 of the excess of capital losses over capital gains allowed for income tax purposes under section 1211(b).

(ii) In Year 2, A has a capital gain of $30,000 on the sale of Y stock. Y is a C corporation. A has no other capital gain or capital loss in Year 2. For income tax purposes, A may reduce the $30,000 gain by the Year 1 section 1212(b) $27,000 capital loss carryover. For purposes of determining A's Year 2 net gain under paragraph (a)(1)(iii) of this section, A's $30,000 gain may also be reduced by the $27,000 capital loss carryover from Year 1. Therefore, in Year 2, A has $3,000 of net gain for purposes of paragraph (a)(1)(iii) of this section.

Example 2. Calculation of net gain. The facts are the same as in *Example 1*, except that in Year 1, A also realizes a gain of $20,000 on the sale of Rental Property D, all of which is treated as ordinary income under section 1250. For income tax purposes, under section 1211(b), A may use $3,000 of the net capital loss against other income. Under section 1212(b)(1) the remaining $27,000 is a capital loss carryover. For purposes of determining A's net gain under paragraph (a)(1)(iii) of this section, A's gain of $10,000 on the sale of the Q stock is reduced by A's loss of $40,000 on the sale of the P stock. A's $20,000 gain on the sale of Rental Property D is reduced to the extent of the $3,000 loss allowed under section 1211(b). Therefore, A's net gain for Year 1 is $17,000 ($20,000 gain treated as ordinary income on the sale of Rental Property D reduced by $3,000 loss allowed under section 1211).

Example 3. Section 172 net operating loss deduction. (i) In Year 1, A, an unmarried individual, has the following items of income and deduction: $60,000 in wages, $20,000 in gross income from a trade or business of trading in financial instruments or commodities (as defined in § 1.1411–5(a)(2)) (trading activity), $70,000 in loss from his sole proprietorship (which is not a trade or business described in § 1.1411–5), and $30,000 in trading activity expense deductions. As a result, for income tax purposes A sustains a section 172(c) net operating loss of $20,000. A makes an election under section 172(b)(3) to waive the carryback period for this net operating loss.

(ii) For purposes of section 1411, A's net investment income for Year 1 is the excess (if any) of the $20,000 in gross income from the trading activity over the $30,000 deduction for the trading activity expenses. Net investment income cannot be less than zero for a taxable year. Therefore, A's net investment income for Year 1 is $0.

(iii) For Year 2, A has $200,000 of wages, $100,000 of gross income from the trading activity, $80,000 of income from his sole proprietorship, and $10,000 in trading activity expense deductions. For income tax purposes, A's $20,000 net operating loss carryover from Year 1 will be allowed as a deduction. In addition, under § 1.1411–2(c), A's Year 1 $20,000 net operating loss will be allowed as a deduction in computing A's Year 2 modified adjusted gross income.

(iv) For purposes of section 1411, A's $20,000 net operating loss carryover from Year 1 is not allowed in computing A's Year 2 net investment income. As a result, A's Year 2 net investment income is $90,000 ($100,000 gross income from the trading activity minus the $10,000 of trading activity expenses).

Example 4. Section 121(a) exclusion. (i) In Year 1, A, an unmarried individual, sells a house that he has owned and used as his principal residence for five years and realizes $200,000 in gain. In addition to the gain realized from the sale of his principal residence, A also realizes $7,000 in long-term capital gain. A has a $5,000 short-term capital loss carryover from a year preceding the effective date of section 1411.

(ii) For income tax purposes, under section 121(a), A excludes the $200,000 gain realized from the sale of his principal residence from his Year 1 gross income. In determining A's Year 1 adjusted gross income, A also reduces the $7,000 capital gain by the $5,000 capital loss carryover allowed under section 1211(b).

(iii) For section 1411 purposes, under section 121(a), A excludes the $200,000 gain realized from the sale of his principal residence from his Year 1 gross income and, consequently, net investment income. In determining A's Year 1 net gain under paragraph (a)(1)(iii) of this section, A reduces the $7,000 capital gain by the $5,000 capital loss carryover allowed under section 1211(b).

Example 5. Section 163(d) limitation. (i) In Year 1, A, an unmarried individual, pays interest of $4,000 on debt incurred to purchase stock. Under § 1.163–8T, this interest is allocable to the stock and is investment interest within the meaning of section 163(d)(3). A has no investment income as defined by section 163(d)(4). A has $10,000 of income from a trade or business that is a passive activity (as defined in § 1.1411–5(a)(1)) with respect to A. For income tax purposes, under section 163(d)(1) A may not deduct the $4,000 investment interest in Year 1. Under section 163(d)(2), the $4,000 investment interest is a carryforward of disallowed interest that is treated as investment interest paid by A in the succeeding taxable year. Similarly, for purposes of determining A's Year 1 net investment income, A may not deduct the $4,000 investment interest.

(ii) In Year 2, A has $5,000 of section 163(d)(4) net investment income. For both income tax purposes and for determining section 1411 net investment income, A's $4,000 carryforward of interest expense disallowed in Year 1 may be deducted in Year 2.

Example 6. Sections 67 and 68 limitations on itemized deductions. (i) A, an unmarried individual, has adjusted gross income in Year 1 as follows:

Wages	$1,600,000
Interest income	400,000
Adjusted gross income	2,000,000

In addition, A has the following items of expense qualifying as itemized deductions:

Investment expenses	$70,000
Job-related expenses	30,000
Investment interest expense	80,000
State income taxes	120,000

A's investment expenses and job-related expenses are miscellaneous itemized deductions. In addition, A's investment interest expense and investment expenses are properly allocable to net investment income (within the meaning of this section). A's job-related expenses are not properly allocable to net investment income. Of the state income tax expense, $20,000 is properly allocable to net investment income and $100,000 is not properly allocable to net investment income.

(ii) A's 2-percent floor under section 67 is $40,000 (2 percent of $2,000,000). For Year 1, assume the section 68 limitation starts at adjusted gross income of $200,000. The section 68 overall limitation disallows $54,000 of A's itemized deductions that are subject to section 68 (3 percent of the excess of $2,000,000 adjusted gross income over the $200,000 limitation threshold).

(iii)(A) A's total miscellaneous itemized deductions allowable before the application of section 67 is $100,000 ($70,000 in investment expenses plus $30,000 in job-related expenses), and the total miscellaneous deductions allowed after the application of section 67 is $60,000 ($100,000 minus $40,000).

(B) The amount of the deduction allowed for investment expenses after the application of section 67 is computed as follows:

$$\$70{,}000 \times \frac{\$60{,}000}{\$100{,}000} = \$42{,}000$$

(C) The amount of the deduction allowed for job-related expenses after the application of section 67 is computed as follows:

$$\$30{,}000 \times \frac{\$60{,}000}{\$100{,}000} = \$18{,}000$$

(iv)(A) Under section 68, the $80,000 deduction for the investment interest expense is not subject to the section 68 limitation on itemized deductions.

(B) A's itemized deductions subject to the limitation under section 68 and allowed after application of section 67, but before the application of section 68, are the following:

Investment expenses	$42,000
Job-related expenses	18,000
State income tax	120,000
Deductions subject to section 68	180,000

(C) Of A's itemized deductions that are subject to the limitation under section 68, the amount allowed after the application of section 68 is $126,000 ($180,000 minus the $54,000 disallowed in paragraph (ii) of this *Example 6*).

(D) The amount of the investment expense deduction allowed after the application of section 68 is determined as follows:

$$\$42{,}000 \times \frac{\$126{,}000}{\$180{,}000} = \$29{,}400$$

(E) The amount of the state income tax deduction allowed after the application of section 68 and properly allocable to net investment income is determined as follows:

$$\$20{,}000 \times \frac{\$126{,}000}{\$180{,}000} = \$14{,}000$$

(F) The itemized deductions allowed after applying sections 67 and 68 and properly allocable to A's net investment income are the following:

Investment interest expense	$80,000
Investment expenses	29,400
State income taxes	14,000
Itemized deductions properly allocable to net investment income	123,400

(G) The amount of the state income tax deduction allowed after the application of section 68 and not properly allocable to net investment income is determined as follows:

$$\$100{,}000 \times \frac{\$126{,}000}{\$180{,}000} = \$70{,}000$$

(H) The job-related expenses deduction and $70,000 of the state income tax deduction are not properly allocable deductions for purposes of section 1411.

Example 7. Section 1031 like-kind exchange. (i) In Year 1, A, an unmarried individual who is not a dealer in real estate, purchases Greenacre, a piece of undeveloped land, for $10,000. A intends to hold Greenacre for investment.

(ii) In Year 3, A enters into an exchange in which he transfers Greenacre, now valued at $20,000, and $5,000 cash for Blackacre, another piece of undeveloped land, which has a fair market value of $25,000. The exchange is a transaction for which no gain or loss is recognized under section 1031.

(iii) In Year 3, for income tax purposes A does not recognize any gain from the exchange of Greenacre for Blackacre. A's basis in Blackacre is $15,000 ($10,000 substituted basis in Greenacre plus $5,000 additional cost of acquisition). For purposes of section 1411, A's net investment income for Year 3 does not include any realized gain from the exchange of Greenacre for Blackacre.

(iv) In Year 5, A sells Blackacre to an unrelated party for $35,000 in cash.

(v) In Year 5, for income tax purposes B recognizes capital gain of $20,000 ($35,000 sale price minus $15,000 basis). For purposes of section 1411, A's net investment income includes the $20,000 gain recognized from the sale of Blackacre.

(i) *Effective/applicability date.* This section applies to taxable years beginning after December 31, 2013.

§ 1.1411–5 Trades or businesses to which tax applies.

(a) *In general.* A trade or business is described in this section if such trade or business involves the conduct of a trade or business (within the meaning of section 162), and such trade or business is either—

(1) A passive activity (within the meaning of paragraph (b) of this section) with respect to the taxpayer; or

(2) The trade or business of a trader trading in financial instruments (as defined in paragraph (c)(1) of this section) or commodities (as defined in paragraph (c)(2) of this section).

(b) *Passive activity*—(1) *In general.* A passive activity is described in this section if—

(i) Such activity is a trade or business (within the meaning of section 162); and

(ii) Such trade or business is a passive activity within the meaning of section 469 and the regulations thereunder.

(2) *Examples.* The following examples illustrate the principles of paragraph (b)(1) of this section and the ordinary course of a trade or business exception in § 1.1411–4(b). In each example, unless otherwise indicated, the taxpayer uses a calendar taxable year, the taxpayer is a U.S. citizen, and Year 1 is a taxable year in which section 1411 is in effect:

Example 1. Rental activity. A, an unmarried individual, rents a commercial building to B for $50,000 in Year 1. A's rental activity does not involve the conduct of a section 162 trade or business, but under section 469(c)(2), A's rental activity is a passive activity. Because paragraph (b)(1)(i) of this section is not satisfied, A's rental income of $50,000 is not derived from a trade or business described in paragraph (b)(1) of this section. However, A's rental income of $50,000 will still constitute gross income from rents within the meaning of § 1.1411–4(a)(1)(i) because § 1.1411–4(a)(1)(i) does not require a trade or business.

Example 2. Application of grouping rules under section 469. In Year 1, A, an unmarried individual, owns an interest in PRS, a partnership for Federal income tax purposes. PRS is engaged in two activities, X and Y, which constitute trades or businesses (within the meaning of section 162), and neither of which constitute trading in financial instruments or commodities (within the meaning of paragraph (a)(2) of this section). Pursuant to § 1.469–4, A has properly grouped X and Y (the grouped activity). A participates in X for more than 500 hours during Year 1 and would be treated as materially participating in the activity within the meaning of § 1.469–5T(a)(1). A only participates in Y for 50 hours during Year 1, and, but for the grouping of the two activities together, A would not be treated as materially participating in Y within the meaning of § 1.469–5T(a). However, pursuant to §§ 1.469–4 and 1.469–5T(a)(1), A materially participates in the grouped activity, and therefore, for purposes of paragraph (b)(1)(ii) of this section, neither X nor Y is a passive activity with respect to A. Accordingly, with respect to A, neither X nor Y is a trade or business described in paragraph (b)(1) of this section.

Example 3. Application of the rental activity exceptions. B, an unmarried individual, is a partner in PRS, which is engaged in an equipment leasing activity. The average period of customer use of the equipment is seven days or less (and therefore meets the exception in § 1.469–1T(e)(3)(ii)(A)). B materially participates in the equipment leasing activity (within the meaning of § 1.469–5T(a)). The equipment leasing activity constitutes a trade or business within the meaning of section 162. In Year 1, B has modified adjusted gross income (as defined in § 1.1411–2(c)) of $300,000, all of which is derived from PRS. All of the income from PRS is derived in the ordinary course of the equipment leasing activity, and all of PRS's property is held in the equipment leasing activity. Of B's allocable share of income from PRS, $275,000 constitutes gross income from rents (within the meaning of § 1.1411–4(a)(1)(i)). While $275,000 of the gross income from the equipment leasing activity meets the definition of rents in § 1.1411–4(a)(1)(i), the activity meets one of the exceptions to rental activity in § 1.469–1T(e)(3)(ii) and B materially participates in the activity. Therefore, the trade or business is not a passive activity with respect to B for purposes of paragraph (b)(1)(ii) of this section, and because the rents are derived in the ordinary course of a trade or business not described in paragraph (a) of this section, the ordinary course of a trade or business exception in § 1.1411–4(b) applies, which means that the rents are not subject to § 1.1411–4(a)(1)(i). Furthermore, because the equipment leasing trade or business is not a trade or business described in paragraph (a)(1) or (a)(2) of this section, the $25,000 of other gross income is not subject to § 1.1411–4(a)(1)(ii). Finally, gain or loss from the sale of the property held in the equipment leasing activity will not be subject to § 1.1411–4(a)(1)(iii) because although it is attributable to a trade or business, it is not a trade or business to which the section 1411 tax applies.

Example 4. Application of section 469 and other gross income under § 1.1411–4(a)(1)(ii). Same facts as *Example 3,* except B does not materially participate in the equipment leasing trade or business and therefore the trade or business is a passive activity with respect to B for purposes of paragraph (b)(1)(ii) of this section. Accordingly, the $275,000 of gross income from rents is subject to § 1.1411–4(a)(1)(i) because the rents are derived from a trade or business described in paragraph (a)(1) of this section (that is, the ordinary course of a trade or business exception in § 1.1411–4(b) is inapplicable). Furthermore, the $25,000 of other gross income from the equipment leasing trade or business is subject to § 1.1411–4(a)(1)(ii) because the gross income is derived from a trade or business described in paragraph (a)(1) of this section. Finally, gain or loss from the sale of the property used in the equipment leasing trade or business is subject to § 1.1411–4(a)(1)(iii) because the trade or business is a passive activity with respect to B, as described in paragraph (b)(1)(ii) of this section.

Example 5. Application of the portfolio income rule and section 469. C, an unmarried individual, is a partner in PRS, a partnership engaged in a trade or business (within the meaning of section 162) that does not involve a rental activity. C does not materially participate in PRS within the meaning of § 1.469–5T(a), and therefore the trade or business of PRS is a passive activity with respect to C for purposes of paragraph (a)(1) of this section. C's $500,000 allocable share of PRS's income consists of $450,000 of gross income from a trade or business and $50,000 of gross income from dividends and interest (within the meaning of § 1.1411–4(a)(1)(i)) that is not derived in the ordinary course of the trade or business of PRS. Thus, under

section 469(e)(1)(A)(i)(I) and the regulations thereunder, C's allocable share of gross income from dividends and interest consists of portfolio income. Therefore, C's $500,000 allocable share of PRS's income is subject to section 1411. C's $50,000 allocable share of PRS's income from dividends and interest is subject to § 1.1411–4(a)(1)(i) because the share is gross income from dividends and interest that is not derived in the ordinary course of a trade or business (that is, the ordinary course of a trade or business exception in § 1.1411–4(b) is inapplicable). C's $450,000 allocable share of PRS's income is subject to § 1.1411–4(a)(1)(ii) because it is gross income from a trade or business that is a passive activity.

(c) *Trading in financial instruments or commodities*—(1) *Definition of financial instruments.* For purposes of section 1411 and the regulations thereunder, the term *financial instruments* includes stocks and other equity interests, evidences of indebtedness, options, forward or futures contracts, notional principal contracts, any other derivatives, or any evidence of an interest in any of the items described in this paragraph (c)(1). An evidence of an interest in any of the items described in this paragraph (c)(1) includes, but is not limited to, short positions or partial units in any of the items described in this paragraph (c)(1).

(2) *Definition of commodities.* For purposes of section 1411 and the regulations thereunder, the term *commodities* refers to items described in section 475(e)(2).

(d) *Effective/applicability date.* This section applies to taxable years beginning after December 31, 2013.

§ 1.1411–6 Income on investment of working capital subject to tax.

(a) *General rule.* For purposes of section 1411, any item of gross income from the investment of working capital will be treated as not derived in the ordinary course of a trade or business, and any net gain that is attributable to the investment of working capital will be treated as not derived in the ordinary course of a trade or business. In determining whether any item is gross income from or net gain attributable to an investment of working capital, principles similar to those described in § 1.469–2T(c)(3)(iii) apply. See § 1.1411–4(f) for rules regarding properly allocable deductions with respect to an investment of working capital; § 1.1411–7 for rules relating to the adjustment to net gain on the disposition of interests in a partnership or S corporation.

(b) *Example.* A, an unmarried individual, operates a restaurant, which is a section 162 trade or business but is not a trade or business described in § 1.1411–5(a)(1) with respect to A. A owns and conducts the restaurant business through S, an S corporation wholly-owned by A. S is able to pay all of the restaurant's current obligations with cash flow generated by the restaurant. S utilizes an interest-bearing checking account at a local bank to make daily deposits of cash receipts generated by the restaurant, and also to pay the recurring ordinary and necessary business expenses of the restaurant. The average daily balance of the checking account is approximately $2,500, but at any given time the balance may be significantly more or less than this amount depending on the short-term cash flow needs of the business. In addition, S has set aside $20,000 for the potential future needs of the business in case the daily cash flow into and from the checking account becomes insufficient to pay the restaurant's recurring business expenses. S does not currently need to spend or use the $20,000 capital to conduct the restaurant business, and S deposits and maintains the $20,000 in an interest-bearing savings account at a local bank. Both the $2,500 average daily balance of the checking account and the $20,000 savings account balance constitute working capital and, pursuant to paragraph (a) of this section, the interest generated by this working capital will not be treated as derived in the ordinary course of S's restaurant business. Accordingly, the interest income derived by S from its checking and savings accounts and allocated to A under section 1366 will be subject to tax under § 1.1411–4(a)(1)(i).

(c) *Effective/applicability date.* This section applies to taxable years beginning after December 31, 2013.

§ 1.1411–7 Exception for dispositions of interests in partnerships and S corporations.

(a) *In general*—(1) *General application.* In the case of a disposition of an interest in a partnership or S corporation described in paragraph (a)(2) of this section, the gain or loss from such disposition taken into account under § 1.1411–4(a)(1)(iii) shall be adjusted in accordance with paragraph (c) of this section. The adjustment reflects the net gain or net loss that would have been taken into account by the transferor if all property of the partnership or S corporation were sold for fair market value immediately before the disposition of such interest (a deemed sale).

(2) *Interests to which exception applies*—(i) *In general.* The adjustment provided by this section applies only to dispositions of interests in partnerships or S corporations if—

(A) The partnership or S corporation is engaged in one or more trades or businesses (within the meaning of section 162), and at least one of its trades or businesses is not described in § 1.1411–5(a)(2) (trading in financial instruments or commodities); and

(B) With respect to the partnership or S corporation interest disposed of, the transferor is engaged in at least one trade or business that is not described in § 1.1411–5(a)(1) (passive activity with respect to the transferor).

(ii) *Nonapplication.* This section does not apply to the disposition of stock in an S corporation if an election under section 338(h)(10) is made.

(b) *Special rules*—(1) *Installment sales*—(i) *Installment sales on or after the effective date of section 1411.* In the case of a disposition of an interest in a partnership or S corporation in an installment sale to which section 453 applies, any adjustment to net gain under this section is determined in the year of disposition and shall be taken into account in the same proportion of the total gain as is taken into account under section 453.

(ii) *Installment sales prior to the effective date of section 1411.* In the case of a disposition before the effective date of section 1411 of an interest in a partnership or S corporation in an installment sale to which section 453 applies, taxpayers that want to make an irrevocable election to have this section apply must file the computational statement required by paragraph (d) of this section with the taxpayer's original or amended return for the first taxable year beginning after December 31, 2013, in which the taxpayer is subject to tax under section 1411. The determination of whether the taxpayer is subject to tax under section 1411 is made without regard to the effect of the election. In addition, a taxpayer may make an irrevocable election to have this section apply for a taxable year that begins before January 1, 2014, by filing the computational statement required by paragraph (d) of this section with the taxpayer's original or amended return for the taxable year. If the election is made under this section, the taxpayer shall calculate the gain or loss adjustment under this section and such adjustment shall be taken into account under § 1.1411–4(a)(1)(iii).

(2) *Sale of an interest by a Qualified Subchapter S Trust.* [Reserved]

(c) *Deemed sale*—(1) *In general.* In the case of a disposition of an interest in a partnership or S corporation described in paragraph (a)(2)(i) of this section, the amount of gain or loss from such disposition taken into account for purposes of § 1.1411–4(a)(1)(iii) must be adjusted in accordance with this paragraph (c).

(2) *Step one: deemed sale of properties.* The partnership or S corporation is deemed to dispose of all of the entity's properties in a fully taxable transaction (in a manner similar

to § 1.743–1(d)(2)) for cash equal to the fair market value of the entity's properties immediately before the disposition of the partnership or S corporation interest.

(3) *Step two: determination of gain or loss.* The partnership or S corporation determines the amount of gain or loss attributable to each property by comparing the fair market value of each property with the adjusted basis of each property. The gain or loss for each property must be treated as a separate item.

(4) *Step three: allocation of gain or loss.* Applying the rules of chapter 1, the partnership or S corporation determines the amount of gain or loss for each property that is allocable to the interest disposed of by the transferor. An allocation of gain or loss to a transferor partner must comply with the requirements in sections 704(b) and 704(c) and the regulations thereunder, and basis adjustments under section 743 with respect to the transferor must be taken into account. In the case of an S corporation, the amount of gain or loss allocated to the transferor is determined under section 1366(a), and the allocation should not take into account any reduction in the transferor's distributive share in section 1366(f)(2) resulting from the hypothetical imposition of tax under section 1374 as a result of the deemed sale. See § 1.460–4(k)(3)(v)(B) for a rule relating to the computation of income or loss that would be allocated to the transferor from a contract accounted for under a long-term contract method of accounting as a result of the deemed sale of properties.

(5) *Step four: adjustment to gain or loss*—(i) *In general.* If the amount of gain or loss allocable to the transferor in paragraph (c)(4) of this section is attributable to property held (as modified by paragraph (c)(5)(ii) of this section, if applicable) in a trade or business not described in § 1.1411–5(a), such gain or loss is aggregated to create a net gain (which results in a negative adjustment) or a net loss (which results in a positive adjustment). Then, in accordance with paragraph (c)(5)(iii) or (iv) of this section, the transferor must adjust the transferor's gain or loss from the disposition of the partnership or S corporation interest as determined in § 1.1411–4(a)(1)(iii) (without application of this section).

(ii) *Special rules*—(A) *Property used in more than one trade or business.* In the case of the disposition of a partnership or S corporation interest in which property of the partnership or S corporation is held in more than one trade or business during the twelve-month period ending on the date of the disposition, the fair market value and the adjusted basis of such property must be allocated among such trades or businesses on a basis that reasonably reflects the use of such property during such twelve-month period. See *Example 7* of paragraph (e) of this section regarding multiple trades or businesses.

(B) *Goodwill attributable to property.* If the transferor is allocated gain or loss from goodwill in the deemed sale under paragraph (c)(4) of this section and if the entity is engaged in a trade or business, the transferor shall treat such gain or loss as gain or loss from the disposition of property held in that trade or business. If the entity is engaged in more than one trade or business, the transferor's gain or loss from goodwill will be attributable to the entity's trades or businesses based on the relative fair market value of the property (other than cash) held in each trade or business. See *Example 8* of paragraph (e) of this section.

(iii) *Negative adjustment*—(A) *General rule.* Subject to the limitations described in paragraph (c)(5)(iii)(B) of this section, if the amount determined under paragraph (c)(5)(i) of this section is a net gain, a negative adjustment of such amount shall be taken into account in computing the amount of the transferor's net gain in § 1.1411–4(a)(1)(iii).

(B) *Limitations.* If the transferor has a gain (determined without regard to section 1411(c)(4) and this paragraph (c)) from the disposition of the partnership or S corporation interest, the negative adjustment taken into account is limited to the amount of the gain (determined without regard to section 1411(c)(4) and this paragraph (c)). If the transferor has a loss (determined without regard to section 1411(c)(4) and this paragraph (c)) from the disposition of the partnership or S corporation interest, the negative adjustment shall not be taken into account.

(iv) *Positive adjustment*—(A) *General rule.* Subject to the limitations described in paragraph (c)(5)(iv)(B) of this section, if the amount determined under paragraph (c)(5)(i) of this section is a net loss, a positive adjustment of such amount shall be taken into account in computing the amount of the transferor's net gain in § 1.1411–4(a)(1)(iii).

(B) *Limitations.* If the transferor has a loss (determined without regard to section 1411(c)(4) and this paragraph (c)) from the disposition of the partnership or S corporation interest, the positive adjustment taken into account is limited to the amount of the loss (determined without regard to section 1411(c)(4) and this paragraph (c)). If the transferor has a gain (determined without regard to section 1411(c)(4) and this paragraph (c)) from the disposition of the partnership or S corporation interest, the positive adjustment shall not be taken into account.

(d) *Required statement of adjustment.* Any transferor making an adjustment under paragraph (c) of this section must attach a statement to the transferor's return for the year of disposition. The statement must include—

(1) A description of the disposed-of interest;

(2) The name and taxpayer identification number of the entity disposed of;

(3) The fair market value of each property of the entity;

(4) The entity's adjusted basis in each property;

(5) The transferor's allocable share of gain or loss with respect to each property of the entity;

(6) Information regarding whether the property was held in (or attributable to) a trade or business not described in § 1.1411–5;

(7) The amount of the net gain under § 1.1411–4(a)(1)(iii) on the disposition of the interest; and

(8) The computation of the adjustment under paragraph (c) of this section.

(e) *Examples.* The following examples illustrate the principles of this section. In each example, unless otherwise indicated, the taxpayer uses a calendar taxable year, the taxpayer is a U.S. citizen, the partnership (PRS) or S corporation (S) is not engaged in a trade or business of trading in financial instruments or commodities (as defined in § 1.1411–5(a)(2)), and Year 1 is a taxable year in which section 1411 is in effect:

Example 1. Basic application. (i) *Facts.* Individuals A and B are shareholders of S Corporation (S). A owns 75 percent of the stock in S, and B owns 25 percent of the stock in S. During Year 1, S is engaged in a single trade or business. With respect to S's trade or business, A is not engaged in a trade or business described in § 1.1411–5(a)(1), and B is engaged in a trade or business described in § 1.1411–5(a)(1). S has three properties (1, 2, and 3) held exclusively in S's trade or business that have an aggregate fair market value of $120,000. On September 1 of Year 1, A and B sell their S stock to C for the fair market value of S's properties (that is, A sells for $90,000 and B sells for $30,000). At the time of the disposition, A's adjusted basis in his S stock is $75,000, and B's adjusted basis in his S stock is $25,000. S's properties have the following adjusted bases and fair market values immediately before the disposition:

Property	Adjusted basis	Fair market value
1	$10,000	$50,000
2	70,000	30,000
3	20,000	40,000

(ii) *Calculation of net gain under § 1.1411–4(a)(1)(iii).* On the stock sale to C, A recognizes a gain of $15,000 ($90,000 minus $75,000), which is subject to § 1.1411–4(a)(1)(iii), and B recognizes a gain of $5,000 ($30,000 minus $25,000), which is subject to § 1.1411–4(a)(1)(iii).

(iii) *Application of section 1411(c)(4)*—(A) *In general.* Section 1411(c)(4) is applicable to A because with respect to S's trade or business, A is not engaged in a trade or business described in § 1.1411–5(a)(1). On the other hand, with respect to B, S's trade or business is described in § 1.1411–5(a)(1) because it is a passive trade or business with respect to B within the meaning of § 1.1411–5(a)(1). Accordingly, section 1411(c)(4) is inapplicable to B, and B may not make any adjustment to his $5,000 gain upon the stock disposition.

(B) *Deemed sale—(1) Step one: deemed sale of properties.* Upon a hypothetical disposition of S's properties for cash equal to fair market value, S would receive $50,000 for Property 1, $30,000 for Property 2, and $40,000 for Property 3.

(2) *Step two: determination of gain or loss.* The determination of gain or loss on the deemed sale of S's properties is as follows:

Property	Adjusted basis	Fair market value	Gain or loss
1	$10,000	$50,000	$40,000
2	70,000	30,000	(40,000)
3	20,000	40,000	20,000

(3) *Step three: allocation of gain or loss.* Under section 1366, A is allocated $30,000 gain from Property 1, $30,000 loss from Property 2, and $15,000 gain from Property 3.

(4) *Step four: adjustment to net gain.* Because all three properties are held in S's trade or business, A must make an adjustment under paragraph (c)(5) of this section to the amount of net gain determined under § 1.1411–4(a)(1)(iii). The gain or loss on each of the three properties are added together ($30,000 minus $30,000 plus $15,000), resulting in a negative adjustment of $15,000. Under paragraph (c)(5) of this section, A's gain of $15,000 on the disposition of the interest under § 1.1411–4(a)(1)(iii) is reduced by $15,000, and A has zero gain with respect to the stock disposition for purposes of § 1.1411–4(a)(1)(iii).

Example 2. Inside-outside basis disparity. (i) *Facts.* Same facts as *Example 1,* except that A's adjusted basis in his S stock is $70,000.

(ii) *Analysis.* On the stock sale to C, A recognizes a gain of $20,000 ($90,000 minus $70,000), which is subject to § 1.1411–4(a)(1)(iii). The deemed sale would result in a negative adjustment of $15,000 ($30,000 minus $30,000 plus $15,000). Under paragraph (c)(5) of this section, A's net gain of $20,000 on the disposition of the interest under § 1.1411–4(a)(1)(iii) is reduced by $15,000, and A has $5,000 net gain with respect to the stock disposition for purposes of § 1.1411–4(a)(1)(iii).

Example 3. Limitation of adjustment. (i) *Facts.* Same facts as *Example 1,* except that A's adjusted basis in his S stock is $80,000.

(ii) *Analysis.* On the stock sale to C, A recognizes a gain of $10,000 ($90,000 minus $80,000), which is subject to § 1.1411–4(a)(1)(iii). The deemed sale would result in a negative adjustment of $15,000 ($30,000 minus $30,000 plus $15,000). Under paragraph (c)(5) of this section, A's net gain of $10,000 on the disposition of the interest under § 1.1411–4(a)(1)(iii) is reduced by the negative adjustment, but the negative adjustment under § 1.1411–7(c)(5)(iii)(B) is limited to $10,000 (the amount of A's gain determined without regard to § 1.1411–7). As a result, A has zero net gain with respect to the stock disposition for purposes of § 1.1411–4(a)(1)(iii).

Example 4. Loss on disposition. (i) *Facts.* Same facts as *Example 1,* except that (A) A's adjusted basis in his stock is $105,000, (B) Property 3 has an adjusted basis of $60,000 and fair market value of $10,000, and (C) A sells his interest for $67,500.

(ii) *Analysis.* On the stock sale to C, A recognizes a loss of $37,500 ($67,500 minus $105,000), which is subject to § 1.1411–4(a)(1)(iii). In the deemed sale, A would be allocated $30,000 gain from Property 1, $30,000 loss from Property 2, and $37,500 loss from Property 3. The deemed sale would result in a positive adjustment of $37,500 ($30,000 minus $30,000 minus $37,500). Under paragraph (c)(5) of this section, A's loss of $37,500 on the disposition of the interest under § 1.1411–4(a)(1)(iii) is increased by the positive adjustment of $37,500, and A has zero loss with respect to the stock disposition for purposes of § 1.1411–4(a)(1)(iii).

Example 5. Property not held in trade or business. (i) *Facts.* Same facts as *Example 1,* except that S owns a fourth property (adjusted basis of $20,000 and fair market value of $100,000) that is not held in S's trade or business and only A sells his S stock to C for A's proportionate share of the fair market value of S's properties. At the time of the disposition, A's adjusted basis in his S stock is $90,000.

(ii) *Calculation of net gain under § 1.1411–4(a)(1)(iii).* On the stock sale to C, A recognizes a gain of $75,000 ($165,000 minus $90,000), which is subject to § 1.1411–4(a)(1)(iii).

(iii) *Application of section 1411(c)(4)*—(A) *In general.* Section 1411(c)(4) is applicable to A because S's trade or business is not a trade or business described in § 1.1411–5(a)(1) with respect to A.

(B) *Deemed sale—(1) Step one: deemed sale of properties.* Upon a hypothetical disposition of S's properties for cash equal to fair market value, S would receive $50,000 for Property 1, $30,000 for Property 2, $40,000 for Property 3, and $100,000 for Property 4.

(2) *Step two: determination of gain or loss.* The determination of gain or loss on the deemed sale of S's properties is as follows:

Property	Adjusted basis	Fair market value	Gain or loss
1	$10,000	$50,000	$40,000
2	70,000	30,000	(40,000)
3	20,000	40,000	20,000
4	20,000	100,000	80,000

(3) *Step three: allocation of gain or loss.* Under section 1366, A is allocated $30,000 gain from Property 1, $30,000 loss from Property 2, $15,000 gain from Property 3, and $60,000 gain from Property 4.

(4) *Step four: adjustment to net gain.* Because S's trade or business is not a trade or business described in § 1.1411–5(a)(1) with respect to A, A must make an adjustment under paragraph (c)(5) of this section to the amount of gain determined under § 1.1411–4(a)(1)(iii). Because Property 4 is not held in S's trade or business, A's $60,000 gain from Property 4 is not taken into account under paragraph (c)(5) of this section. The gain or loss on Property 1, Property 2, and Property 3 are added together ($30,000 minus $30,000 plus $15,000), resulting in a negative adjustment of $15,000. Under paragraph (c)(5) of this section, A's net gain of $75,000 under § 1.1411–4(a)(1)(iii) on the disposition of the interest is reduced by $15,000, and A has $60,000 net gain with respect to the stock disposition for purposes of § 1.1411–4(a)(1)(iii).

Example 6. Calculation of gain in general. (i) *Facts.* D and E are equal partners in PRS, a partnership, and PRS's partnership agreement provides that allocations are 50 percent to D and 50 percent to E. PRS is engaged in a single trade or business. D contributed Property 1 with an adjusted basis of $100,000 and a fair market value of $200,000 at the time of the contribution. E contributed Property 2 with an adjusted basis of $120,000 and a fair market value of $200,000 at the time of the contribution. PRS is engaged in a single trade or business in which both Property 1 and Property 2 are used. PRS's trade or business is not a trade or business described in § 1.1411–5(a)(1) with respect to D. On November 1 of Year 1, D sells his interest in PRS to F for $320,000, which is based on the fair market value of PRS's properties. At the time of the sale, D has an adjusted basis in his partnership interest of $100,000 and the properties of PRS have the following adjusted bases and fair market values:

Property	Adjusted basis	Fair market value
1	$100,000	$240,000
2	120,000	400,000

(ii) *Calculation of net gain under § 1.1411–4(a)(1)(iii).* D recognizes $220,000 ($320,000 minus $100,000) of gain on the sale of his partnership interest to F, and such gain is subject to § 1.1411–4(a)(1)(iii).

(iii) *Application of section 1411(c)(4)*—(A) *In general.* Section 1411(c)(4) is applicable to D because PRS's trade or business is not a trade or business described in § 1.1411–5(a)(1) with respect to A.

(B) *Deemed sale—(1) Step one: deemed sale of properties.* Upon a hypothetical

disposition of PRS's properties for cash equal to fair market value, PRS would receive $240,000 for Property 1 and $400,000 for Property 2.

(2) *Step two: determination of PRS's gain or loss.* The determination of gain or loss on the deemed sale of PRS's properties is as follows:

Property	Adjusted basis	Fair market value	Gain or loss
1	$100,000	$240,000	$140,000
2	120,000	400,000	280,000

(3) *Step three: allocation of gain or loss.* Pursuant to section 704(c), D is allocated $120,000 gain from the deemed sale of Property 1 and $100,000 gain from the deemed sale of Property 2.

(4) *Step four: adjustment to net gain.* Because both properties are used in PRS's in trade or business, D must make an adjustment under paragraph (c)(5)(i) of this section to the amount of net gain determined under § 1.1411–4(a)(1)(iii). The total gain allocated to D in the deemed sale is $220,000 ($120,000 plus $100,000), resulting in a negative adjustment of $220,000. Under paragraph (c)(5) of this section, D's net gain of $220,000 under § 1.1411–4(a)(1)(iii) on the disposition of the interest is reduced by $220,000, and D has zero net gain with respect to the partnership interest disposition for purposes of § 1.1411–4(a)(1)(iii).

Example 7. Multiple trades or businesses. (i) *Facts.* Individuals A and B are shareholders of an S corporation (S). A owns 50 percent of the stock in S. During Year 2, S is engaged in two trades or businesses (Business X and Business Y). With respect to Business X, A is not engaged in a trade or business described in § 1.1411–5(a)(1), but with respect to Business Y, A is engaged in a trade or business is described in § 1.1411–5(a)(1). S has five properties. Property 1 and Property 2 are held exclusively in Business X, and Property 3 and Property 4 are held exclusively in Business Y. Property 5 is used half of the time in Business X and the rest of the time in Business Y. On December 1 of Year 2, A sells his S stock to C for A's proportionate share of the fair market value of S's properties. At the time of the disposition, A's adjusted basis in his S stock is $110,000. S's properties have the following adjusted bases and fair market values immediately before the disposition:

Property	Adjusted basis	Fair market value
1	$10,000	$30,000
2	70,000	30,000
3	20,000	40,000
4	20,000	100,000
5	100,000	120,000

(ii) *Calculation of gain under § 1.1411–4(a)(1)(iii).* On the stock sale to C, A recognizes a gain of $50,000 ($160,000 minus $110,000), which is subject to § 1.1411–4(a)(1)(iii).

(iii) *Application of section 1411(c)(4)*—(A) *In general.* Section 1411(c)(4) is applicable to A. However, any adjustment will only relate to property held in Business X and not to property held in Business Y (because Business Y is a trade or business described in § 1.1411–5(a)(1) with respect to A).

(B) *Deemed sale*—(*1*) *Step one: deemed sale of properties.* Upon a hypothetical disposition of S's properties for cash equal to fair market value, S would receive $30,000 for Property 1, $30,000 for Property 2, $40,000 for Property 3, $100,000 for Property 4, and $120,000 for Property 5.

(*2*) *Step two: determination of gain or loss.* The determination of gain or loss on the deemed sale of S's properties is as follows:

Property	Adjusted basis	Fair market value	Gain or loss
1	$10,000	$30,000	$20,000
2	70,000	30,000	(40,000)
3	20,000	40,000	20,000
4	20,000	100,000	80,000
5	100,000	120,000	20,000

(*3*) *Step three: allocation of gain or loss.* Under section 1366, A is allocated $10,000 gain from Property 1, $20,000 loss from Property 2, $10,000 gain from Property 3, $40,000 gain from Property 4, and $10,000 gain from Property 5.

(*4*) *Step four: adjustment to net gain.* A must make an adjustment under paragraph (c)(5) of this section to the amount of net gain determined under § 1.1411–4(a)(1)(iii), but only with respect to the gain or loss on the properties used in Business X (that is, Property 1, Property 2, and a portion of Property 5). Because Property 5 is used 50 percent of the time in Business X, under paragraph (c)(5)(ii)(A) of this section, 50 percent of the gain would be attributable to Business X (and A's share would be $5,000). The gain or loss on Property 1, Property 2, and Property 5 are added together ($10,000 minus $20,000 plus $5,000), and results in a positive adjustment of $5,000. Under paragraph (c)(5)(iv)(B) of this section, because A had a gain of $50,000 on the stock disposition, A does not take the positive adjustment of $5,000 into account and A has a $50,000 gain for purposes of § 1.1411–4(a)(1)(iii).

Example 8. Goodwill and multiple trades or businesses. (i) *Facts.* Individuals A and B are shareholders of an S corporation (S). A owns 50 percent of the stock in S. During Year 2, S is engaged in two trades or businesses (Business X and Business Y). With respect to Business X, A is not engaged in a trade or business described in § 1.1411–5(a)(1), but with respect to Business Y, A is engaged in a trade or business described in § 1.1411–5(a)(1). In addition to cash and goodwill, S has five properties. Property 1 and Property 2 are used exclusively in Business X. Property 3 is not held for use in either Business X or Business Y. Property 4 and Property 5 are used exclusively in Business Y. On June 1 of Year 2, A sells his S stock to C for A's proportionate share of the fair market value of S's properties. At the time of the disposition, A's adjusted basis in his S stock is $30,000. S's properties have the following adjusted basis and fair market value immediately before the disposition:

Property	Adjusted basis	Fair market value
1	$5,000	$10,000
2	5,000	5,000
3	0	10,000
4	20,000	30,000
5	10,000	15,000
Cash	10,000	10,000
Goodwill	10,000	30,000

(ii) *Calculation of gain under § 1.1411–4(a)(1)(iii).* On the stock sale to C, A recognizes a gain of $25,000 ($55,000 minus $30,000), which is subject to § 1.1411–4(a)(1)(iii).

(iii) *Application of section 1411(c)(4)*—(A) *In general.* Section 1411(c)(4) is applicable to A. However, any adjustment will only relate to property used in Business X and not to property used in Business Y (because Business Y is a trade or business described in § 1.1411–5(a)(1) with respect to A).

(B) *Deemed sale*—(*1*) *Step one: deemed sale of properties.* Upon a hypothetical disposition of S's properties for cash equal to fair market value, S would receive $10,000 for Property 1, $5,000 for Property 2, $10,000 for Property 3, $30,000 for Property 4, $15,000 for Property 5, $10,000 for the cash, and $30,000 for goodwill.

(*2*) *Step two: determination of gain or loss.* The determination of gain or loss on the deemed sale of S's properties is as follows:

Property	Adjusted basis	Fair market value	Gain or loss
1	$5,000	$10,000	5,000
2	5,000	5,000	0
3	0	10,000	10,000
4	20,000	30,000	10,000
5	10,000	15,000	5,000
Cash	10,000	10,000	0
Goodwill	10,000	30,000	20,000

(*3*) *Step three: allocation of gain or loss.* Under section 1366, A is allocated a $25,000 gain ($2,500 gain from Property 1, $0 gain from Property 2, $5,000 gain from Property 3, $5,000 gain from Property 4, $2,500 gain from Property 5, $0 from cash, and $10,000 from goodwill).

(*4*) *Step four: adjustment to net gain.* A must make an adjustment under paragraph (c)(5) of this section to the amount of net gain determined under § 1.1411–4(a)(1)(iii), but only with respect to the gain or loss on the properties used in Business X (that is, Property 1, Property 2, and a portion of the goodwill). Under paragraph (c)(5)(ii)(B) of this section, the goodwill is allocated to Business X and Business Y based on the relative fair market value of the property (other than cash) held for use in each trade or business. For this purpose, the fair market value of the property held for use in Business X is $15,000, and the fair market value of the property held for use in Business Y is $45,000. Therefore, 25 percent of A's gain on the goodwill is attributable to Business X (or $2,500). A's share of the gain on Property 1, Property 2, and goodwill are added together ($2,500 plus zero plus $2,500), which results in a negative adjustment of $5,000. Under

paragraph (c)(5) of this section, A takes into account the negative adjustment of $5,000, and A has a $20,000 gain ($25,000 minus $5,000 adjustment) for purposes of § 1.1411–4(a)(1)(iii).

(f) *Effective/applicability date.* This section applies to taxable years beginning after December 31, 2013.

§ 1.1411–8 Exception for distributions from qualified plans.

(a) *General rule.* Net investment income (as defined in § 1.1411–4) does not include any distribution from a qualified plan or arrangement. For this purpose, the term qualified plan or arrangement means any plan or arrangement described in section 401(a), 403(a), 403(b), 408, 408A, or 457(b).

(b) *Rules relating to distributions.* This paragraph (b) provides rules for purposes of paragraph (a) of this section. For purposes of section 1411(c)(5) and this section, a distribution means the following:

(1) *Actual distributions.* Any amount actually distributed from a qualified plan or arrangement, as defined in paragraph (a) of this section, is a distribution within the meaning of section 1411(c)(5), and thus is not included in net investment income. Examples include a rollover to an eligible retirement plan within the meaning of section 402(c)(8)(B), a distribution of a plan loan offset amount within the meaning of Q&A–13(b) of § 1.72(p)–1, and certain corrective distributions under the Internal Revenue Code.

(2) *Amounts treated as distributed.* Any amount that is treated as distributed from a qualified plan or arrangement under the Internal Revenue Code for purposes of income tax is a distribution within the meaning of section 1411(c)(5), and thus is not included in net investment income. Examples include a conversion to a Roth IRA described in section 408A and a deemed distribution under section 72(p).

(3) *Amounts includible in gross income.* Any amount that is not treated as a distribution but is otherwise includible in gross income pursuant to a rule relating to amounts held in a qualified plan or arrangement described in paragraph (a) of this section is a distribution within the meaning of section 1411(c)(5), and thus is not included in net investment income. For example, any income of the trust of a qualified plan or arrangement that is applied to purchase a participant's life insurance coverage (the P.S. 58 costs) is a distribution within the meaning of section 1411(c)(5), and thus is not included in net investment income.

(c) *Effective/applicability date.* This section applies to taxable years beginning after December 31, 2013.

§ 1.1411–9 Exception for self-employment income.

(a) *General rule.* Except as provided in paragraph (b) of this section, net investment income (as defined in § 1.1411–4) does not include any item taken into account in determining self-employment income that is subject to tax under section 1401(b) for such taxable year. For purposes of section 1411(c)(6) and this section, *taken into account* means income included and deductions allowed in determining net earnings from self-employment. However, amounts excepted in determining net earnings from self-employment under section 1402(a)(1)–(17), and thus excluded from self-employment income under section 1402(b), are not taken into account in determining self-employment income and thus may be included in net investment income if such amounts are described in § 1.1411–4. Except as provided in paragraph (b) of this section, if net earnings from self-employment consist of income or loss from more than one trade or business, all items taken into account in determining the net earnings from self-employment with respect to these trades or businesses (see § 1.1402(a)–2(c)) are considered taken into account in determining the amount of self-employment income that is subject to tax under section 1401(b) and therefore not included in net investment income.

(b) *Special rule for traders.* In the case of gross income described in § 1.1411–4(a)(1)(ii) derived from a trade or business of trading in financial instruments or commodities (as described in § 1.1411–5(a)(2)), the deductions described in § 1.1411–4(f)(2)(ii) properly allocable to the taxpayer's trade or business of trading in financial instruments or commodities are taken into account in determining the taxpayer's self-employment income only to the extent that such deductions reduce the taxpayer's net earnings from self-employment (after aggregating under § 1.1402(a)–2(c) the net earnings from self-employment from any trade or business carried on by the taxpayer as an individual or as a member of a partnership). Any deductions described in § 1.1411–4(f)(2)(ii) that exceed the amount of net earnings from self-employment, in the aggregate (if applicable), shall be allowed in determining the taxpayer's net investment income under section 1411 and the regulations thereunder.

(c) *Examples.* The following examples illustrate the provisions of this section:

Example 1. Exclusion from self-employment income. A is a general partner in PRS, a partnership carrying on a trade or business that is not a trade or business of trading in financial instruments or commodities (within the meaning of § 1.1411–5(a)(2)). During Year 1, A's distributive share from PRS is $1 million, $300,000 of which is attributable to the gain on the sale of PRS's capital assets. Section 1402(a)(3)(A) provides an exclusion from net earnings from self-employment for any gain or loss from the sale or exchange of a capital asset. For Year 1, A has $700,000 self-employment income subject to self-employment tax. This $700,000 subject to self-employment tax is not included as part of net investment income. However, the $300,000 attributable to the gain on PRS's sale of a capital asset is excluded from net earnings from self-employment and self-employment income and thus is not covered by the exception in section 1411(c)(6). The $300,000 attributable to the gain on PRS's sale of a capital asset is included as part of net investment income if the other requirements of section 1411 are satisfied.

Example 2. Two trades or businesses. B is an individual engaged in two trades or businesses, Business X and Business Y, neither of which is the trade or business of trading in financial instruments or commodities (as described in § 1.1411–5(a)(2)). B carries on Business X as a sole proprietor and B is also a general partner in a partnership that carries on Business Y. During Year 1, B had net earnings from self-employment consisting of the aggregate of a $50,000 loss (that is, after application of the exclusions under section 1402(a)(1)–(17)) from Business X that is attributable to passive activities, and $70,000 in income (after application of the exclusions under section 1402(a)(1)–(17)) from B's distributive share from the partnership from carrying on Business Y. Thus, B's net earnings from self-employment in Year 1 are $20,000. For Year 1, all of B's income, deductions, gains, and losses from Business X and distributive share from the partnership carrying on Business Y, other than those amounts excluded due to application of section 1402(a)(1)–(17), are taken into account in determining B's net earnings from self-employment and self-employment income for such taxable year. Accordingly, in calculating B's net investment income (as defined in § 1.1411–4) for Year 1, the items of income, loss, gain, and deduction that comprise B's $50,000 loss attributable to Business X (after application of the exclusions under section 1402(a)(1)–(17)), and the items of income, loss, gain, and deduction that comprise B's $70,000 distributable share attributable to B's general partnership interest (after application of the exclusions under section 1402(a)(1)–(17)), are not considered. Rather, only items of income, loss, gain, and deduction from the two separate businesses that were excluded from the calculation of B's net earnings from self-employment income due to the application of the exclusions under section 1402(a)(1)–(17), such as any capital gains and losses excluded under section 1402(a)(3), are considered for

purposes of calculating B's net investment income for Year 1 in connection with these two trades or businesses.

Example 3. Special rule for trader with single trade or business. D is an individual engaged in the trade or business of trading in commodities (as described in § 1.1411–5(a)(2)). D made an election under section 475(f)(2). D derives $400,000 of gross income described in § 1.1411–4(a)(1)(ii) and $150,000 of expenses described in § 1.1411–4(f)(2)(ii) from carrying on the trade or business. Pursuant to sections 475(f)(1)(D) and 1402(a)(3)(A), none of the gross income is taken into account in determining D's net earnings from self-employment and self-employment income, and therefore, under paragraph (a) of this section, the $400,000 of gross income is not covered by the exception in section 1411(c)(6). Under paragraph (b) of this section and § 1.1411–4(f)(2)(ii), because the $150,000 of deductions did not reduce D's net earnings from self-employment (because D had $0 net earnings from self-employment), for purposes of section 1411(c)(6), the $150,000 of deductions are not taken into account in determining D's net earnings from self-employment and self-employment income, and therefore the $150,000 of deductions may reduce D's gross income of $400,000 for purposes of section 1411.

Example 4. Special rule for trader with multiple trades or businesses. E is an individual engaged in two trades or businesses. Business X (which is not a trade or business of trading in financial instruments or commodities) and Business Y (which is a trade or business of trading in financial instruments or commodities (as described in § 1.1411–5(a)(2))). E has made an election under section 475(f) with respect to Business Y. During Year 1, E had net earnings from self-employment from Business X of $35,000. During Year 1, E also had $300,000 of gross income described in § 1.1411–4(a)(1)(ii) and $75,000 of expenses described in § 1.1411–4(f)(2)(ii) from Business Y. E's $300,000 of gross income from Business Y is excluded from net earnings from self-employment and self-employment income pursuant to sections 475(f)(1)(D) and 1402(a)(3)(A). E's $75,000 of deductions from Business Y reduce E's $35,000 of net earnings from self-employment from Business X to $0. Pursuant to paragraph (b) of this section and § 1.1411–4(f)(2)(ii), the remaining $40,000 of deductions from Business Y are taken into account in determining E's net investment income (by reducing E's gross income of $300,000 from Business Y to $260,000) for purposes of section 1411.

(d) *Effective/applicability date.* This section applies to taxable years beginning after December 31, 2013.

§ 1.1411–10 Controlled foreign corporations and passive foreign investment companies.

(a) *In general.* This section provides rules that apply to an individual, estate, or trust that is a United States shareholder (within the meaning of section 951(b)) of a controlled foreign corporation (within the meaning of section 957(a)), or that is a United States person that directly or indirectly owns an interest in a passive foreign investment company (within the meaning of section 1297(a)). In addition, this section provides rules that apply to an individual, estate, or trust that owns an interest in a domestic partnership or an S corporation that either is a United States shareholder of a controlled foreign corporation or that has made an election under section 1295 to treat a passive foreign investment company as a qualified electing fund.

(b) *Amounts derived from a trade or business described in § 1.1411–5.* An amount included in gross income under section 951(a) or section 1293(a) that is income derived from a trade or business described in section 1411(c)(2) and § 1.1411–5 is taken into account as net investment income under section 1411(c)(1)(A)(ii) and § 1.1411–4(a)(1)(ii) for purposes of section 1411 when it is taken into account for purposes of chapter 1, and the rules in paragraphs (c) through (g) of this section do not apply to such amounts. For purposes of section 1411, an amount included in gross income under section 1296(a) that is also income derived from a trade or business described in section 1411(c)(2) and § 1.1411–5 is net investment income within the meaning of section 1411(c)(1)(A)(ii) and § 1.1411–4(a)(1)(ii), and the rules in paragraphs (c) through (f) of this section do not apply to such amount.

(c) *Calculation of net investment income*—(1) *In general.* For purposes of section 1411 and the regulations thereunder, *net investment income* means net investment income as defined in § 1.1411–4, adjusted pursuant to the rules described in this paragraph (c).

(2) *Dividends.* For purposes of section 1411(c)(1)(A)(i) and § 1.1411–4(a)(1)(i), net investment income is calculated by taking into account the amount of dividends described in this paragraph (c)(2).

(i) *Distributions of previously taxed earnings and profits.* If no election is made pursuant to paragraph (g) of this section, a distribution of earnings and profits that is not treated as a dividend for chapter 1 purposes under section 959(d) or section 1293(c) is a dividend for purposes of section 1411(c)(1)(A)(i) and § 1.1411–4(a)(1)(i) if the distribution is attributable to amounts that are or have been included in gross income for chapter 1 purposes under section 951(a) or section 1293(a) in a taxable year beginning after December 31, 2012. For this purpose, distributions of earnings and profits attributable to amounts that are or have been included in gross income for chapter 1 purposes under section 951(a) or section 1293(a) shall be considered first attributable to such earnings and profits, if any, derived from the current taxable year, and then from prior taxable years beginning with the most recent prior taxable year. With respect to such distributions from controlled foreign corporations, a distribution shall be attributable first to earnings and profits derived from the current taxable year and then from prior taxable years beginning with the most recent prior taxable year, without regard to whether the earnings and profits are described in section 959(c)(1) or section 959(c)(2).

(ii) *Excess distributions constituting dividends.* To the extent an excess distribution within the meaning of section 1291(b) constitutes a dividend within the meaning of section 316(a), the amount is included in net investment income for purposes of section 1411(c)(1)(A)(i) and § 1.1411–4(a)(1)(i).

(3) *Net gain.* For purposes of section 1411(c)(1)(A)(iii) and § 1.1411–4(a)(1)(iii), the rules in this paragraph (c)(3) apply in determining net gain attributable to the disposition of property.

(i) *Gains treated as excess distributions.* Gains treated as excess distributions under section 1291(a)(2) are included in determining net gain attributable to the disposition of property for purposes of section 1411(c)(1)(A)(iii) and § 1.1411–4(a)(1)(iii).

(ii) *Inclusions and deductions with respect to section 1296 mark to market elections.* Amounts included in gross income under section 1296(a)(1) and amounts allowed as a deduction under section 1296(a)(2) are taken into account in determining net gain attributable to the disposition of property for purposes of section 1411(c)(1)(A)(iii) and § 1.1411–4(a)(1)(iii).

(iii) *Gain or loss attributable to the disposition of stock of controlled foreign corporations and qualified electing funds.* If no election is made pursuant to paragraph (g) of this section, for purposes of calculating net gain in §§ 1.1411–4(a)(1)(iii) and 1.1411–4(d)(3) attributable to the direct or indirect disposition of stock of a controlled foreign corporation or qualified electing fund (including for purposes of determining gain or loss on the direct or indirect disposition of stock of a controlled foreign corporation or a qualified electing fund by a domestic partnership or S corporation), basis shall be determined in accordance with

the provisions of paragraph (d) of this section.

(iv) *Gain or loss attributable to the disposition of interests in domestic partnerships or S corporations that own directly or indirectly stock of controlled foreign corporations or qualified electing funds.* If no election is made pursuant to paragraph (g) of this section, for purposes of calculating net gain in §§ 1.1411–4(a)(1)(iii) and 1.1411–4(d)(3) attributable to the disposition of an interest in a domestic partnership or S corporation that directly or indirectly owns stock of a controlled foreign corporation or a qualified electing fund, basis shall be determined in accordance with the provisions of paragraph (d) of this section.

(4) *Application of section 1248.* If no election is made pursuant to paragraph (g) of this section, for purposes of section 1411 and § 1.1411–4:

(i) For purposes of determining the gain recognized on the sale or exchange of a foreign corporation for section 1248(a) purposes, basis is determined in accordance with the provisions of paragraph (d) of this section; and

(ii) Section 1248(a) applies without regard to the exclusion for certain earnings and profits under section 1248(d)(1) and (d)(6), except that such exclusions will apply with respect to the earnings and profits of a foreign corporation that are attributable to amounts previously included in gross income for chapter 1 purposes under section 951(a) or section 1293(a) in a taxable year beginning before December 31, 2012, and that have not yet been distributed. For this purpose, the determination of whether earnings and profits attributable to amounts previously taxed in a taxable year beginning before December 31, 2012, have been distributed shall be determined based on the rules described in paragraph (c)(2)(i) of this section.

(5) *Amounts distributed by an estate or trust.* Net investment income of a beneficiary of an estate or trust includes the beneficiary's share of distributable net income, as described in sections 652 and 662 and as modified by paragraph (f) of this section, to the extent that the beneficiary's share of distributable net income includes items that, if they had been received directly by the beneficiary, would have been described in this paragraph (c).

(d) *Conforming basis adjustments*—(1) *Basis adjustments under sections 961 and 1293*—(i) *Stock held by individuals, estates, or trusts.* If no election is made by an individual, estate or trust pursuant to paragraph (g) of this section:

(A) The basis increases made by the individual, estate or trust pursuant to sections 961(a) and 1293(d) for amounts included in gross income for chapter 1 purposes under sections 951(a) and 1293(a) in taxable years beginning after December 31, 2012, are not taken into account for purposes of section 1411; and

(B) The basis decreases made by the individual, estate or trust pursuant to sections 961(b) and 1293(d) attributable to distributions treated as dividends for purposes of section 1411 under paragraph (c)(2)(i) of this section are not taken into account for purposes of section 1411.

(ii) *Stock held by domestic partnerships or S corporations.* If an individual, estate, or trust is a shareholder of an S corporation, or if an individual, estate, or trust directly, or through one or more tiers of passthrough entities (including an S corporation), owns an interest in a domestic partnership, the domestic partnership or S corporation. as the case may be, will not take into account for purposes of section 1411 the basis increases made by the domestic partnership or S corporation pursuant to sections 961(a) and 1293(d) for amounts included in gross income for chapter 1 purposes under sections 951(a) and 1293(a) for taxable years beginning after December 31, 2012, and the basis decreases made by the domestic partnership or S corporation pursuant to sections 961(b) and 1293(d) attributable to amounts that are treated as dividends for section 1411 purposes under paragraph (c)(2)(i) of this section (the section 1411 recalculated basis). If the domestic partnership or S corporation disposes of its stock of a controlled foreign corporation or qualified electing fund, the section 1411 recalculated basis will be used to determine the distributive share or pro rata share of the gain or loss for section 1411 purposes for partners or shareholders that do not make an election pursuant to paragraph (g) of this section. If a partner or shareholder makes an election pursuant to paragraph (g) of this section, the partner's distributive share or the shareholder's pro rata share of the gain or loss for section 1411 purposes is the same as the distributive share or pro rata share of the gain or loss calculated for chapter 1 purposes. See *Example 6* of paragraph (h) of this section.

(2) *Special rules for partners that own interests in domestic partnerships that own directly or indirectly stock of controlled foreign corporations or qualified electing funds.* If no election is made by a partner pursuant to paragraph (g) of this section, the basis increases provided in section 705(a)(1)(A) to that partner for chapter 1 purposes that are attributable to amounts that a domestic partnership included in gross income under section 951(a) or section 1293(a) for a taxable year beginning after December 31, 2012, are not taken into account for purposes of section 1411. In such case, the partner's adjusted basis in the partnership interest is increased by the distributions to the partnership from the controlled foreign corporation or qualified electing fund that are treated as dividends for purposes of section 1411 under paragraph (c)(2)(i) of this section. The amount of the basis increase is calculated based on the partner's share of the distribution received by the domestic partnership. Similar rules apply when the stock of the controlled foreign corporation or qualified electing fund is held in a tiered partnership structure. For purposes of determining net investment income under section 1411 and the regulations thereunder, the partner's adjusted basis in the partnership interest as calculated under this paragraph (d)(2) shall be used to determine all tax consequences related to tax basis (for example, loss limitation rules and the characterization of partnership distributions).

(3) *Special rules for S corporation shareholders that own interests in S corporations that own directly or indirectly stock of controlled foreign corporations or qualified electing funds.* If no election is made by a shareholder pursuant to paragraph (g) of this section, the basis increases provided in section 1367(a)(1)(A) to the shareholder for chapter 1 purposes that are attributable to amounts that an S corporation included in gross income for chapter 1 purposes under section 951(a) or section 1293(a) for taxable years beginning after December 31, 2012, are not taken into account for purposes of section 1411. In such case, the shareholder's adjusted basis of stock in the S corporation is increased by the distributions to the S corporation from the controlled foreign corporation or qualified electing fund that are treated as dividends for purposes of section 1411 under paragraph (c)(2)(i) of this section. The amount of the basis increase is calculated based on the shareholder's pro rata share of the distribution received by the S corporation. Similar rules apply when the S corporation holds an interest in a controlled foreign corporation or qualified electing fund through a partnership. For purposes of determining net investment income under section 1411 and the regulations thereunder, the shareholder's adjusted

basis in the stock of the S corporation as calculated under this paragraph (d)(3) shall be used to determine all tax consequences related to tax basis (for example, loss limitation rules and the characterization of S corporation distributions).

(e) *Conforming adjustments to modified adjusted gross income and adjusted gross income*—(1) *Individuals.* Solely for purposes of section 1411(a)(1)(B)(i) and the regulations thereunder, the term *modified adjusted gross income* means modified adjusted gross income as defined in § 1.1411–2(c)(1)—

(i) Increased by amounts included in net investment income under paragraphs (c)(2)(i), (c)(2)(ii), (c)(3)(i), and (c)(5) of this section that are not otherwise included in gross income for chapter 1 purposes;

(ii) Increased or decreased, as applicable, by the difference between the amount calculated with respect to a disposition under paragraphs (c)(3)(iii) and (c)(3)(iv) of this section and the amount of the gain or loss attributable to the relevant disposition as calculated for chapter 1 purposes; and

(iii) Decreased by any amount included in gross income for chapter 1 purposes under section 951(a) or section 1293(a) if no election is made pursuant to paragraph (g) of this section.

(2) *Estates and trusts.* Solely for purposes of section 1411(a)(2)(B)(i) and the regulations thereunder, the term *adjusted gross income* means adjusted gross income as defined in § 1.1411–3(a)(1)(ii)(B)(*1*) adjusted by the following amounts to the extent those amounts are not distributed by the estate or trust—

(i) Increased by amounts included in net investment income under paragraphs (c)(2)(i), (c)(2)(ii), (c)(3)(i), and (c)(5) of this section that are not otherwise included in gross income for chapter 1 purposes;

(ii) Increased or decreased, as applicable, by the difference between the amount calculated with respect to a disposition under paragraphs (c)(3)(iii) and (c)(3)(iv) of this section and the amount of the gain or loss attributable to the relevant disposition as calculated for chapter 1 purposes; and

(iii) Decreased by any amount included in gross income for chapter 1 purposes under section 951(a) or section 1293(a) if no election is made pursuant to paragraph (g) of this section.

(f) *Application to estates and trusts.* All of the items described in paragraph (c) of this section shall be included in the net investment income of an estate or trust or its beneficiaries. The amounts described in paragraphs (e)(2)(i), (e)(2)(ii), and (e)(2)(iii) of this section, regardless of whether the estate or trust receives those amounts directly or indirectly through another estate or trust, shall increase or decrease, as applicable, the estate's or trust's distributable net income. The estate or trust, or the beneficiaries thereof, shall take such amounts into account in a manner reasonably consistent with the general operating rules for estates and trusts in § 1.1411–3 and subchapter J in computing the undistributed net investment income of the estate or trust and the net investment income of the beneficiaries.

(g) *Election with respect to controlled foreign corporations and qualified electing funds*—(1) *In general.* An individual, estate, or trust may make an election under this paragraph (g) with respect to all interests in controlled foreign corporations and qualified electing funds held directly or indirectly by the individual, estate, or trust (other than as provided in paragraph (b) of this section) in the year of the election or acquired in subsequent years. The election, if made, for an estate or trust shall be made by the fiduciary of that estate or trust. If the election is made, amounts included in gross income under section 951(a) or section 1293(a)(1)(A) in taxable years beginning with the year for which the election is made are treated as net investment income for purposes of § 1.1411–4(a)(1)(i), and amounts included in gross income under section 1293(a)(1)(B) in taxable years beginning with the year for which the election is made are taken into account in calculating net gain attributable to the disposition of property under § 1.1411–4(a)(1)(iii).

(2) *Revocation of election.* An election under paragraph (g) of this section may only be revoked if the Commissioner, in the Commissioner's discretion, consents to the individual's, estate's, or trust's request to revoke the election.

(3) *Time and manner for making election.* Except as otherwise provided in this paragraph (g)(3), an individual, estate, or trust that wants to make the election under this paragraph (g) must make the election for the first taxable year beginning after December 31, 2013, during which the individual, estate, or trust directly or indirectly holds stock of a controlled foreign corporation or qualified electing fund and the individual, estate, or trust is subject to tax under section 1411 or would be subject to tax under section 1411 if the election were made with respect to the stock of the controlled foreign corporation or qualified electing fund. In addition, an individual, estate, or trust may make an election under this paragraph (g)(3) for a taxable year that begins before January 1, 2014. In all cases, the election must be made in the manner prescribed by the Secretary on or before the due date, determined with regard to any extension of time, for filing the individual's, estate's, or trust's income tax return for the taxable year for which the election is made. Further, in all cases, once made, the election applies to the taxable year for which it is made and all subsequent years unless revoked pursuant to paragraph (g)(2) of this section.

(h) *Examples.* The following examples illustrate the rules of this section. In each example, unless otherwise indicated, the individuals, the foreign corporation (FC), the qualified electing fund (QEF), and the partnership (PRS) use a calendar taxable year. Further, the gross income or gain with respect to an interest in FC is not derived in a trade or business described in § 1.1411–5.

Example 1. (i) *Facts.* A, a U.S. citizen, is the sole shareholder of FC, a controlled foreign corporation (within the meaning of section 957). A is a United States shareholder (within the meaning of section 951(b)) with respect to FC. On December 31, 2012, A's basis in the stock of FC for chapter 1 purposes is $500,000, which includes an increase to basis under section 961(a) of $40,000.The amount of FC's earnings and profits that are described in section 959(c)(2) is $40,000, the amount of FC's earnings and profits that are described in section 959(c)(3) is $20,000, and FC does not have any earnings and profits that are described in section 959(c)(1). No election is made pursuant to paragraph (g) of this section. During 2013, A does not include any amounts in income under section 951(a) with respect to FC, A does not receive any distributions from FC, and there is no change in the amount of FC's earnings and profits. In 2014, A includes $10,000 in gross income for chapter 1 purposes under section 951(a)(1)(A) with respect to FC. As a result, A's basis in the stock of FC for chapter 1 purposes increases by $10,000 to $510,000 pursuant to section 961(a). During 2015, FC distributes $30,000 to A, which is not treated as a dividend for purposes of chapter 1 under section 959(d). As a result, A's basis in the stock of FC for chapter 1 purposes is decreased by $30,000 to $480,000 pursuant to section 961(b).

(ii) *Results for section 1411 purposes.* In 2014, A does not include the $10,000 section 951(a) income inclusion in A's net investment income under section 1411(c)(1)(A)(i) and § 1.1411–4(a)(1)(i). Pursuant to paragraph (e)(1)(iii) of this section, A decreases A's modified adjusted gross income for section 1411 purposes by $10,000 in 2014, and pursuant to paragraph (d)(1)(i) of this section, A's adjusted basis is not increased by $10,000 and remains at $500,000. In 2015, pursuant to paragraph (c)(2)(i) of this section, A includes $10,000 of the distribution of previously taxed earnings and profits as a dividend for purposes of

determining A's net investment income because $10,000 of the $30,000 distribution is attributable to amounts that A included in gross income for chapter 1 purposes under section 951(a) in a tax year that began after December 31, 2012. Pursuant to paragraph (e)(1)(i) of this section, A increases A's modified adjusted gross income for section 1411 purposes by $10,000 in 2015. Under paragraph (d)(1)(i) of this section, A's adjusted basis is not decreased by the $10,000 that is treated as a dividend for section 1411 purposes, and thus, A's adjusted basis in FC for section 1411 purposes is decreased under section 961 only by $20,000 to $480,000.

Example 2. (i) *Facts.* Same facts as *Example 1.* In addition, during 2016, A includes $15,000 in gross income for chapter 1 purposes under section 951(a)(1)(A) with respect to FC. As a result, A's basis in the stock of FC for chapter 1 purposes increases by $15,000 to $495,000 pursuant to section 961(a). During 2017, A sells all of A's shares of FC for $550,000 and, prior to the application of section 1248, recognizes $55,000 ($550,000 minus $495,000) of long-term capital gain for chapter 1 purposes. For purposes of calculating the amount included in income as a dividend pursuant to section 1248(a) for chapter 1 purposes, the earnings and profits of FC attributable to A's shares in FC which were accumulated after December 31,1962 and during the period which A held the stock while FC was a controlled foreign corporation is $55,000, $35,000 of which is excluded pursuant to section 1248(d)(1). Therefore, after the application of section 1248, for chapter 1 purposes, upon the sale of the FC stock, A recognizes $35,000 of long-term capital gain and a $20,000 dividend.

(ii) *Results for section 1411 purposes.* (A) In 2016, A does not include the $15,000 section 951(a)(1)(A) income inclusion in A's net investment income under section 1411(c)(1)(A)(i) and § 1411(c)(1)(A)(i). Pursuant to paragraph (e)(1)(ii) of this section, A decreases A's modified adjusted gross income for section 1411 purposes by $15,000, and, pursuant to paragraph (d)(1)(i) of this section, A's adjusted basis remains at $480,000.

(B) During 2017, prior to the application of section 1248, A recognizes $70,000 ($550,000 minus $480,000) of gain for section 1411 purposes. Pursuant to paragraph (c)(4) of this section, for section 1411 purposes, section 1248(a) applies to the gain on the sale of FC calculated for section 1411 purposes ($70,000) and section 1248(d)(1) does not apply, except with respect to the $20,000 of earnings and profits of FC that are attributable to amounts previously included in income for chapter 1 purposes under section 951 for a taxable year beginning before December 31, 2012. Accordingly, for purposes of calculating the amount of income includible as a dividend under section 1248(a), A has $55,000 of earnings and profits, $20,000 of which is excluded pursuant to section 1248(d)(1). Therefore, after the application of section 1248, for section 1411 purposes A has $35,000 of long term capital gain and a $35,000 dividend. For purposes of calculating net investment income in 2016, A includes $35,000 as a dividend under section 1411(c)(1)(A)(i) and § 1.1411–4(a)(1)(i) and $35,000 as a gain under section 1411(c)(1)(A)(iii) and § 1.1411–4(a)(1)(iii).

Example 3. (i) *Facts.* Same facts as *Example 2*, except that A timely makes an election pursuant to paragraph (g) of this section for 2014 (and thus for all subsequent years).

(ii) *Results for section 1411 purposes.* A does not have any adjustments to A's modified adjusted gross income for section 1411 purposes for 2014, 2015, 2016 or 2017 because the election under paragraph (g) of this section was timely made. Pursuant to paragraph (g)(1) of this section, for purposes of calculating A's net investment income in 2014, the $10,000 that A included in income for chapter 1 purposes under section 951(a) is net investment income for purposes of section 1411(c)(1)(A)(i) and § 1.1411–4(a)(1)(i). A has no amount of net investment income with respect to FC in 2015. Pursuant to paragraph (g)(1) of this section, for purposes of calculating A's net investment income in 2016, the $15,000 that A included in income for chapter 1 purposes under section 951(a) is net investment income for purposes of section 1411(c)(1)(A)(i) and § 1.1411–4(a)(1)(i). For purposes of calculating A's net investment income in 2017, the amount of gain on the disposition of the FC shares is the same as the amount calculated for chapter 1 purposes. Applying section 1248, A includes $35,000 as a gain under section 1411(c)(1)(A)(iii) and § 1.1411–4(a)(1)(iii), and $20,000 as a dividend under section 1411(c)(1)(A)(i) and § 1.1411–4(a)(1)(i).

Example 4. Domestic partnership holding QEF stock. (i) *Facts.* (A) C, a U.S. citizen, owns a 50 percent interest in PRS, a domestic partnership. D, a U.S. citizen, and E, a U.S. citizen, each own a 25 percent interest in PRS. All allocations of partnership income and losses are pro rata based on ownership interests. PRS owns an interest in QEF, a foreign corporation that is a passive foreign investment company (within the meaning of section 1297(a)). PRS, a United States person, made an election under section 1295 with respect to QEF applicable to the first year of its holding period in QEF. As of December 31, 2012, for chapter 1 purposes, C's basis in his partnership interest is $100,000, D's basis in his partnership interest is $50,000, E's basis in his partnership interest is $50,000, and PRS's adjusted basis in its QEF stock is $80,000, which includes an increase in basis under section 1293(d) of $40,000. As of December 31, 2012, the amount of QEF's earnings that have been included in income by PRS under section 1293(a), but have not been distributed by QEF, is $40,000. PRS also has cash of $60,000 and domestic C corporation stock with an adjusted basis of $60,000. During 2013, PRS does not include any amounts in income under section 1293(a) with respect to QEF, PRS does not receive any distributions from QEF, and there are no adjustments to the basis of C, D, or E in their interests in PRS.

(B) During 2014, PRS has income of $40,000 under section 1293(a) with respect to QEF and has no other partnership income. C makes an election under paragraph (g) of this section, and D and E do not make an election under paragraph (g) of this section.

(C) During 2015, QEF distributes $60,000 to PRS. PRS has no income for the year.

(ii) *Results for 2014.* (A) For chapter 1 purposes, as a result of the $40,000 income inclusion under section 1293(a), PRS's basis in its QEF stock is increased by $40,000 under section 1293(d)(1) to $120,000. Under § 1.1293–1(c)(1) and section 702, C's, D's, and E's distributive shares of the section 1293(a) income inclusion are $20,000, $10,000, and $10,000, respectively. Under section 705(a)(1)(A), C increases his adjusted basis in his partnership interest by $20,000 to $120,000, and D and E each increase his adjusted basis in his partnership interest by $10,000 to $60,000.

(B) For section 1411 purposes, pursuant to paragraph (d)(1)(ii) of this section, PRS's basis in QEF is not increased by the $40,000 income inclusion (it remains at $80,000). Because C made an election under paragraph (g) of this section, C has net investment income of $20,000 as a result of the income inclusion, and his adjusted basis in his interest in PRS is increased by $20,000 to $120,000. C does not make any adjustments to his modified adjusted gross income. Because D and E did not make an election under paragraph (g) of this section, D and E do not have net investment income with respect to the income inclusion, and pursuant to paragraph (d)(2) of this section, they do not increase their adjusted bases in their interests in PRS (each remains at $50,000). Pursuant to paragraph (e)(1)(ii) of this section, D and E each reduce their modified adjusted gross income by $10,000.

(iii) *Results for 2015.* (A) For chapter 1 purposes, the distribution of $60,000 from QEF to PRS is not a dividend under section 1293(c), and PRS decreases its basis in QEF by $60,000 under section 1293(d)(2) to $60,000.

(B) Pursuant to paragraph (c)(2)(i) of this section, $40,000 of the distribution is a dividend for section 1411 purposes because PRS included $40,000 in gross income for chapter 1 purposes under section 1293(a) in a tax year that began after December 31, 2012. For section 1411 purposes, pursuant to paragraph (d)(1)(ii) of this section, section 1293(d) will not apply to reduce PRS's basis in QEF to the extent of the $40,000 of the distribution that is treated as a dividend under paragraph (c)(2)(i) of this section. Thus, PRS's basis in QEF is decreased only by $20,000 for purposes of section 1411 and is $60,000. The $40,000 distribution of previously taxed earnings and profits that is treated as a dividend for section 1411 purposes is allocated $20,000 to C, $10,000 to D, and $10,000 to E. Because C made an election under paragraph (g) of this section, C has zero net investment income as a result of the distribution of previously taxed amounts of $20,000, his adjusted basis in his interest in PRS remains at $120,000, and he does not make any adjustments to his modified adjusted gross income. Because D and E did not make an election under paragraph (g) of this section, pursuant to paragraph (c)(2)(i) of this section, D and E each has $10,000 of net investment income as a result of the distribution by QEF, and

pursuant to paragraph (d)(2) of this section, D and E each increases his adjusted basis in PRS by $10,000 to $60,000. Pursuant to paragraph (e)(1)(i) of this section, D and E each increases his modified adjusted gross income by $10,000.

Example 5. Sale of partnership interest. (i) *Facts.* Same facts as *Example 4.* In addition, in 2016, D sells his entire interest in PRS to F for $100,000.

(ii) *Results for 2016.* For chapter 1 purposes, D has a gain of $40,000 ($100,000 minus $60,000). For section 1411 purposes, D has a gain of $40,000 ($100,000 minus $60,000), and thus, has net investment income of $40,000. No adjustments to modified adjusted gross income are necessary under paragraph (e) of this section.

Example 6. Domestic partnership's sale of QEF stock. (i) *Facts.* Same facts as *Example 4.* In addition, in 2016 PRS has income of $60,000 under section 1293(a) with respect to QEF, and in 2017, PRS sells its entire interest in QEF for $170,000.

(ii) *Results for 2016.* (A) For chapter 1 purposes, as a result of the $60,000 income inclusion under section 1293(a), PRS's basis in its QEF stock is increased by $60,000 under section 1293(d)(1) to $120,000. Under § 1.1293–1(c)(1) and section 702, C's, D's, and E's distributive shares of the section 1293(a) income inclusion are $30,000, $15,000, and $15,000 respectively. Under section 705(a)(1)(A), C increases his adjusted basis in his partnership interest by $30,000 to $150,000, and D and E each increases his adjusted basis in his partnership interest by $15,000 to $75,000.

(B) For section 1411 purposes, pursuant to paragraph (d)(1)(ii) of this section, PRS's basis in QEF is not increased by the $60,000 income inclusion (it remains at $60,000). Because C made an election under paragraph (g) of this section, C has net investment income of $30,000 as a result of the income inclusion, and his adjusted basis in his interest in PRS is increased by $30,000 to $150,000. C does not make any adjustments to his modified adjusted gross income. Because D and E did not make an election under paragraph (g) of this section, D and E do not have net investment income with respect to the income inclusion, and pursuant to paragraph (d)(2) of this section, they do not increase their adjusted bases in their interests in PRS (each remains at $60,000). Pursuant to paragraph (e)(1)(ii) of this section, D and E each reduce their modified adjusted gross income by $15,000.

(iii) *Results for 2017.* (A) For chapter 1 purposes, PRS has a gain of $50,000 ($170,000 minus $120,000), which is allocated 50 percent ($25,000) to C, 25 percent ($12,500) to D, and 25 percent ($12,500) to E.

(B) Based on PRS's basis in the stock of QEF for section 1411 purposes, PRS has a gain for section 1411 purposes of $110,000 ($170,000 minus $60,000), which in the absence of a partner election under paragraph (g) of this section, would result in gain of $55,000 to C, $27,500 to D, and $27,500 to E. However, pursuant to paragraph (d)(1)(ii) of this section, because C made an election under paragraph (g) of this section, C's gain for section 1411 purposes is the same as his gain for chapter 1 purposes ($25,000). Because neither D nor E made an election under paragraph (g) of this section, D and E each have a gain of $27,500 and therefore net investment income of $27,500. Pursuant to paragraph (e)(1)(ii) of this section, D and E each increase their modified adjusted gross income by $15,000.

(i) *Effective/applicability date.* This section applies to taxable years beginning after December 31, 2013.

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2012–29238 Filed 11–30–12; 2:00 pm]

BILLING CODE 4830–01–P

FEDERAL REGISTER

Vol. 77 Wednesday,
No. 234 December 5, 2012

Part VI

Department of Agriculture

Office of Procurement and Property Management

7 CFR Part 3201

Designation of Product Categories for Federal Procurement; Proposed Rule

DEPARTMENT OF AGRICULTURE

Office of Procurement and Property Management

7 CFR Part 3201

RIN 0599–AA16

Designation of Product Categories for Federal Procurement

AGENCY: Office of Procurement and Property Management, USDA.

ACTION: Notice of proposed rulemaking.

SUMMARY: The U.S. Department of Agriculture (USDA) is proposing to amend the Guidelines for Designating Biobased Products for Federal Procurement (Guidelines) to add eight sections that will designate the following product categories within which biobased products would be afforded Federal procurement preference: Aircraft and boat cleaners; automotive care products; engine crankcase oil; gasoline fuel additives; metal cleaners and corrosion removers; microbial cleaning products; paint removers; and water turbine bearing oils. USDA is also proposing to add the following subcategories to previously designated product categories: Countertops to the composite panels category; and wheel bearing and chassis grease to the greases category. USDA is also proposing minimum biobased contents for each of these product categories and subcategories.

DATES: USDA will accept public comments on this proposed rule until February 4, 2013.

ADDRESSES: You may submit comments by any of the following methods. All submissions received must include the agency name and Regulatory Information Number (RIN). The RIN for this rulemaking is 0599–AA16. Also, please identify submittals as pertaining to the "Proposed Designation of Product Categories."

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: biopreferred@usda.gov.* Include RIN number 0599–AA16 and "Proposed Designation of Product Categories" on the subject line. Please include your name and address in your message.
- *Mail/commercial/hand delivery:* Mail or deliver your comments to: Ron Buckhalt, USDA, Office of Procurement and Property Management, Room 361, Reporters Building, 300 7th St. SW., Washington, DC 20024.
- Persons with disabilities who require alternative means for communication for regulatory information (Braille, large print, audiotape, etc.) should contact the USDA TARGET Center at (202) 720–2600 (voice) and (202) 690–0942 (TTY).

FOR FURTHER INFORMATION CONTACT: Ron Buckhalt, USDA, Office of Procurement and Property Management, Room 361, Reporters Building, 300 7th St. SW., Washington, DC 20024; email: *biopreferred@usda.gov;* phone (202) 205–4008. Information regarding the Federal preferred procurement program (one part of the BioPreferred Program) is available on the Internet at *http://www.biopreferred.gov.*

SUPPLEMENTARY INFORMATION: The information presented in this preamble is organized as follows:

I. Authority

The designation of these product categories is proposed under the authority of section 9002 of the Farm Security and Rural Investment Act of 2002 (FSRIA), as amended by the Food, Conservation, and Energy Act of 2008 (FCEA), 7 U.S.C. 8102 (referred to in this document as "section 9002").

II. Background

Section 9002 provides for the preferred procurement of biobased products by Federal procuring agencies and is referred to hereafter in this **Federal Register** notice as the "Federal preferred procurement program." The definition of "procuring agency" in section 9002 includes both Federal agencies and "a person that is a party to a contract with any Federal agency, with respect to work performed under such a contract." Thus, Federal contractors, as well as Federal agencies, are expressly subject to the procurement preference provisions of section 9002.

The term "product category" is used in the designation process to mean a generic grouping of specific products that perform a similar function, such as the various brands of paint removers or engine crankcase oils. Once USDA designates a product category, procuring agencies are required generally to purchase biobased products within these designated product categories where the purchase price of the procurement product exceeds $10,000 or where the quantity of such products or the functionally equivalent products purchased over the preceding fiscal year equaled $10,000 or more. Procuring agencies must procure biobased products within each product category unless they determine that products within a product category are not reasonably available within a reasonable period of time, fail to meet the reasonable performance standards of the procuring agencies, or are available only at an unreasonable price. As stated in 7 CFR part 3201—"Guidelines for Designating Biobased Products for Federal Procurement" (Guidelines), biobased products that are merely incidental to Federal funding are excluded from the Federal preferred procurement program; that is, the requirements to purchase biobased products do not apply to such purchases if they are unrelated to or incidental to the purpose of the Federal contract. In implementing the Federal preferred procurement program for biobased products, procuring agencies should follow their procurement rules and Office of Federal Procurement Policy guidance on buying non-biobased products when biobased products exist and should document exceptions taken for price, performance, and availability.

USDA recognizes that the performance needs for a given application are important criteria in making procurement decisions. USDA is not requiring procuring agencies to limit their choices to biobased products that fall under the product categories

proposed for designation in this proposed rule. Rather, the effect of the designation of the product categories is to require procuring agencies to determine their performance needs, determine whether there are qualified biobased products that fall under the designated product categories that meet the reasonable performance standards for those needs, and purchase such qualified biobased products to the maximum extent practicable as required by section 9002.

Section 9002(a)(3)(B) requires USDA to provide information to procuring agencies on the availability, relative price, performance, and environmental and public health benefits of such products and to recommend, where appropriate, the minimum level of biobased content to be contained in the procured products.

Subcategorization. Most of the product categories USDA is considering for designation for Federal preferred procurement cover a wide range of products. For some product categories, there are subgroups of products that meet different requirements, uses and/or different performance specifications. For example, within the product category "hand cleaners and sanitizers," products that are used in medical offices may be required to meet performance specifications for sanitizing, while other products that are intended for general purpose hand washing may not need to meet these specifications. Where such subgroups exist, USDA intends to create subcategories. Thus, for example, for the product category "hand cleaners and sanitizers," USDA determined that it was reasonable to create a "hand cleaner" subcategory and a "hand sanitizer" subcategory. Sanitizing specifications are applicable to the latter subcategory, but not the former. In sum, USDA looks at the products within each product category to evaluate whether there are groups of products within the category that have different characteristics or that meet different performance specifications and, where USDA finds these types of differences, it intends to create subcategories with the minimum biobased content based on the tested products within the subcategory.

For some product categories, however, USDA may not have sufficient information at the time of proposal to create subcategories. For example, USDA may know that there are different performance specifications that metal cleaners and corrosion remover products are required to meet, but it may have information on only one type of metal cleaner and corrosion remover product. In such instances, USDA may either designate the product category without creating subcategories (i.e., defer the creation of subcategories) or designate one subcategory and defer designation of other subcategories within the product category until additional information is obtained. Once USDA has received sufficient additional information to justify the designation of a subcategory, the subcategory will be designated through the proposed and final rulemaking process.

Within today's proposed rule, USDA is proposing to subcategorize three of the product categories. Those product categories are: Aircraft and boat cleaners; metal cleaners and corrosion removers; and microbial cleaning products. The proposed subcategories for the aircraft and boat cleaners product category are: Aircraft cleaners and boat cleaners. For the metal cleaners and corrosion removers product category, the proposed subcategories are: Stainless steel cleaners; other metal cleaners; and corrosion removers. For the microbial cleaning products category, the proposed subcategories are: Drain maintenance products; general cleaners; and wastewater maintenance products. USDA is also proposing to add a subcategory for countertops to the composite panels product category designated in Round 2 (73 FR 27954, May 14, 2008) and a subcategory for wheel bearing and chassis grease to the greases product category designated in Round 3 (73 FR 27974, May 14, 2008). In addition, public comments and additional data are being requested for several other product categories and subcategories may be created in a future rulemaking.

Minimum Biobased Contents. The minimum biobased contents being proposed with today's rule are based on products for which USDA has biobased content test data. Because the submission of product samples for biobased content testing is on a strictly voluntary basis, USDA was able to obtain samples only from those manufacturers who volunteered to invest the resources required to submit the samples. USDA has, however, begun to receive biobased content data associated with manufacturer's applications for certification to use the USDA Certified Biobased Product label. As discussed later in this preamble, these test results will also be considered when proposing the minimum biobased content levels for designated product categories.

In addition to considering the biobased content test data for each product category, USDA also considers other factors including product performance information. USDA evaluates this information to determine whether some products that may have a lower biobased content also have unique performance or applicability attributes that would justify setting the minimum biobased content at a level that would include these products. For example, a lubricant product that has a lower biobased content than others within a product category but is formulated to perform over a wider temperature range than the other products may be more desirable to Federal agencies. Thus, it would be beneficial to set the minimum biobased content for the product category at a level that would include the product with superior performance features.

USDA also considers the overall range of the tested biobased contents within a product category, groupings of similar values, and breaks (significant gaps between two groups of values) in the biobased content test data array. For example, the biobased contents of 7 tested products within a product category being proposed for designation today range from 17 to 100 percent, as follows: 17, 41, 78, 79, 94, 98, and 100 percent. Because this is a very wide range, and because there is a significant gap in the data between the 41 percent biobased product and the 78 percent biobased product, USDA reviewed the product literature to determine whether subcategories could be created within this product category. USDA found that the available product information did not justify creating a subcategory based on the 17 percent product or the 41 percent biobased content product. Further, USDA did not find any performance claims that would justify setting the minimum biobased content based on either the 17 percent or the 41 percent biobased content products. Thus, USDA is proposing to set the minimum biobased content for this product category based on the product with a tested biobased content of 78 percent. USDA believes that this evaluation process allows it to establish minimum biobased contents based on a broad set of factors to assist the Federal procurement community in its decisions to purchase biobased products.

USDA makes every effort to obtain biobased content test data on multiple products within each product category. For most designated product categories, USDA has biobased content test data on more than one product within the category. However, in some cases, USDA has been able to obtain biobased content data for only a single product within a designated product category. As USDA obtains additional data on the

biobased contents of products within these designated product categories or their subcategories, USDA will evaluate whether the minimum biobased content for a designated product category or subcategory will be revised.

USDA anticipates that the minimum biobased content for a product category that is based on a single product is more likely to change as additional products within that category are identified and tested. In today's proposed rule, the proposed minimum biobased content for the water turbine bearing oils category is based on a single tested product.

Where USDA receives additional biobased content test data for products within these proposed product categories during the public comment period, USDA will take that information into consideration when establishing the minimum biobased content when the product categories are designated in the final rulemaking.

Overlap with EPA's Comprehensive Procurement Guideline program for recovered content products under the Resource Conservation and Recovery Act (RCRA) Section 6002. Some of the products that are within biobased product categories designated for Federal preferred procurement under this program may also be within categories the Environmental Protection Agency (EPA) has designated under the EPA's Comprehensive Procurement Guideline (CPG) for products containing recovered materials. In situations where it believes there may be an overlap, USDA is asking manufacturers of qualifying biobased products to make additional product and performance information available to Federal agencies conducting market research to assist them in determining whether the biobased products in question are, or are not, the same products for the same uses as the recovered content products. Manufacturers are asked to provide information highlighting the sustainable features of their biobased products and to indicate the various suggested uses of their product and the performance standards against which a particular product has been tested. In addition, depending on the type of biobased product, manufacturers are being asked to provide other types of information, such as whether the product contains fossil energy-based components (including petroleum, coal, and natural gas) and whether the product contains recovered materials. Federal agencies also may review available information on a product's biobased content and its profile against environmental and health measures and life-cycle costs (the ASTM Standard D7075,"Standard Practice for Evaluating and Reporting Environmental Performance of Biobased Products," or the Building for Environmental and Economic Sustainability (BEES) analysis for evaluating and reporting on environmental performance of biobased products). Federal agencies may then use this information to make purchasing decisions based on the sustainability features of the products. Detailed information on ASTM Standard D7075, and other ASTM standards, can be found on ASTM's Web site at *http://www.astm.org*. Information on the BEES analytical tool can be found on the Web site *http://www.bfrl.nist.gov/oae/software/bees.html*.

Section 6002 of RCRA requires a procuring agency procuring a product designated by EPA generally to procure such a product composed of the highest percentage of recovered materials content practicable. However, a procuring agency may decide not to procure such a product based on a determination that it fails to meet the reasonable performance standards or specifications of the procuring agency. A product with recovered materials content may not meet reasonable performance standards or specifications, for example, if the use of the product with recovered materials content would jeopardize the intended end use of the product.

Where a biobased product is used for the same purposes and to meet the same Federal agency performance requirements as an EPA-designated recovered content product, the Federal agency must purchase the recovered content product. For example, if a biobased hydraulic fluid is to be used as a fluid in hydraulic systems and because "lubricating oils containing re-refined oil" has already been designated by EPA for that purpose, then the Federal agency must purchase the EPA-designated recovered content product, "lubricating oils containing re-refined oil." If, on the other hand, that biobased hydraulic fluid is to be used to address a Federal agency's certain environmental or health performance requirements that the EPA-designated recovered content product would not meet, then the biobased product should be given preference, subject to reasonable price, availability, and performance considerations.

This proposed rule designates one product category for Federal preferred procurement for which there may be overlap with an EPA-designated recovered content product. The product category is engine crankcase oils, which may overlap with the EPA-designated recovered content product "Re-refined lubricating oils." EPA provides recovered materials content recommendations for these recovered content products in Recovered Materials Advisory Notice (RMAN) I. The RMAN recommendations for these CPG products can be found by accessing EPA's Web site *http://www.epa.gov/epaoswer/non-hw/procure/products.htm* and then clicking on the appropriate product name.

Federal Government Purchase of Sustainable Products. The Federal government's sustainable purchasing program includes the following three statutory preference programs for designated products: the BioPreferred Program, the EPA's Comprehensive Procurement Guideline for products containing recovered materials, and the Environmentally Preferable Purchasing program. The Office of the Federal Environmental Executive (OFEE) and the Office of Management and Budget (OMB) encourage agencies to implement these components comprehensively when purchasing products and services.

Procuring agencies should note that not all biobased products are "environmentally preferable." For example, unless cleaning products contain no or reduced levels of metals and toxic and hazardous constituents, they can be harmful to aquatic life, the environment, and/or workers. Household cleaning products that are formulated to be disinfectants are required, under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), to be registered with EPA and must meet specific labeling requirements warning of the potential risks associated with misuse of such products. When purchasing environmentally preferable cleaning products, many Federal agencies specify that products must meet Green Seal standards for institutional cleaning products or that the products have been reformulated in accordance with recommendations from the EPA's Design for the Environment (DfE) program. Both the Green Seal standards and the DfE program identify chemicals of concern in cleaning products. These include zinc and other metals, formaldehyde, ammonia, alkyl phenol ethoxylates, ethylene glycol, and volatile organic compounds. In addition, both require that cleaning products have neutral or less caustic pH.

In contrast, some biobased products may be more environmentally preferable than some products that meet Green Seal standards for institutional cleaning products or that have been reformulated in accordance with EPA's DfE program. To fully compare products, one must look at the "cradle-to-grave" impacts of

the manufacture, use, and disposal of products. Biobased products that will be available for Federal preferred procurement under this program have been assessed as to their "cradle-to-grave" impacts.

One consideration of a product's impact on the environment is whether (and to what degree) it introduces new, fossil carbon into the atmosphere. Fossil carbon is derived from non-renewable sources (typically fossil fuels such as coal and oil), whereas renewable biomass carbon is derived from renewable sources (biomass). Qualifying biobased products offer the user the opportunity to manage the carbon cycle and reduce the introduction of new fossil carbon into the atmosphere.

Manufacturers of qualifying biobased products designated under the Federal preferred procurement program will be able to provide, at the request of Federal agencies, factual information on environmental and human health effects of their products, including the results of the ASTM D7075, or the comparable BEES analysis, which examines 12 different environmental parameters, including human health. Therefore, USDA encourages Federal procurement agencies to consider that USDA has already examined all available information on the environmental and human health effects of biopreferred products when making their purchasing decisions.

Other Federal Preferred Procurement Programs. Federal procurement officials should also note that biobased products may be available for purchase by Federal agencies through the AbilityOne Program (formerly known as the Javits-Wagner-O'Day (JWOD) program). Under this program, members of organizations including the National Industries for the Blind (NIB) and NISH offer products and services for preferred procurement by Federal agencies. A search of the AbilityOne Program's online catalog (*www.abilityone.gov*) indicated that products within three of the product categories, or subcategories, being proposed today are available through the AbilityOne Program. These are: Composite Panels—Countertops, Metal Cleaners and Corrosion Removers—Stainless Steel Cleaners, and Metal Cleaners and Corrosion Removers—Other Metal Cleaners. While there is no specific product within these product categories identified in the AbilityOne online catalog as being a biobased product, it is possible that such biobased products are available or will be available in the future. Also, because additional categories of products are frequently added to the AbilityOne Program, it is possible that biobased products within other product categories being proposed for designation today may be available through the AbilityOne Program in the future. Procurement of biobased products through the AbilityOne Program would further the objectives of both the AbilityOne Program and the Federal preferred procurement program.

Outreach. To augment its own research, USDA consults with industry and Federal stakeholders to the Federal preferred procurement program during the development of the rulemaking packages for the designation of product categories. USDA consults with stakeholders to gather information used in determining the order of product category designation and in identifying: Manufacturers producing and marketing products that fall within a product category proposed for designation; performance standards used by Federal agencies evaluating products to be procured; and warranty information used by manufacturers of end user equipment and other products with regard to biobased products.

Future Designations. In making future designations, USDA will continue to conduct market searches to identify manufacturers of biobased products within product categories. USDA will then contact the identified manufacturers to solicit samples of their products for voluntary submission for biobased content testing. Based on these results, USDA will then propose new product categories for designation for Federal preferred procurement.

USDA has developed a preliminary list of product categories for future designation and has posted this preliminary list on the BioPreferred Web site. While this list presents an initial prioritization of product categories for designation, USDA cannot identify with certainty which product categories will be presented in each of the future rulemakings. In response to comments from other Federal agencies, USDA intends to give increased priority to those product categories that contain the highest biobased content. In addition, as the program matures, manufacturers of biobased products within some industry segments have become more responsive to USDA's requests for technical information than those in other segments. Thus, product categories with high biobased content and for which sufficient technical information can be obtained quickly may be added or moved up on the prioritization list. USDA intends to update the list of product categories for future designation on the Biopreferred Web site every six months, or more often if significant changes are made to the list.

III. Summary of Today's Proposed Rule

USDA is proposing to designate the following product categories for Federal preferred procurement: Aircraft and boat cleaners; automotive care products; engine crankcase oil; gasoline fuel additives; metal cleaners and corrosion removers; microbial cleaning products; paint removers; and water turbine bearing oils. USDA is also proposing to add the following subcategories to previously designated product categories: "countertops" to the composite panels category and "wheel bearing and chassis grease" to the greases category. In addition, USDA is proposing a minimum biobased content for each of these product categories and subcategories. Lastly, USDA is proposing a date by which Federal agencies must incorporate these designated product categories into their procurement specifications (see Section IV.E).

In today's proposed rule, USDA is providing information on its findings as to the availability, economic and technical feasibility, environmental and public health benefits, and life-cycle costs for each of the designated product categories. Information on the availability, relative price, performance, and environmental and public health benefits of individual products within each of these product categories is not presented in this notice. Further, USDA has reached an understanding with manufacturers not to publish their names in conjunction with specific product data published in the **Federal Register** when designating product categories. This understanding was reached to encourage manufacturers to submit products for testing to support the designation of a product category. Once a product category has been designated, USDA will encourage the manufacturers of products within the product category to voluntarily make their names and other contact information available for the BioPreferred Web site.

Warranties. Some of the product categories being proposed for designation today may affect original equipment manufacturers' (OEMs) warranties for equipment in which the product categories are used. For example, the manufacturer of a piece of equipment that requires lubrication typically includes a list of recommended lubricants in the owner/operators manual that accompanies the equipment when purchased. If the purchaser of the equipment uses a lubricant (including a biobased

lubricant) that is not among the lubricants recommended by the equipment manufacturer, the manufacturer may cite that as a reason not to honor the warranty on the equipment. At this time, USDA does not have information available as to the extent that OEMs have included, or will include, biobased products among their recommended lubricants (or other similar operating components). This does not necessarily mean that use of biobased products will void warranties, only that USDA does not currently have such information. USDA is requesting comments and information on this topic, but cannot be held responsible if damage were to occur. USDA encourages manufacturers of biobased products to test their products against all relevant standards, including those that affect warranties, and to work with OEMs to ensure that biobased products are accepted and recommended for use. Whenever manufacturers of biobased products find that existing performance standards for warranties are not relevant or appropriate for biobased products, USDA is willing to assist them in working with the appropriate OEMs to develop tests that are relevant and appropriate for the end uses in which biobased products are intended. In addition to outreach to biobased product manufacturers and Federal Agencies, USDA will, as time and resources allow, work with OEMs on addressing any effect the use of biobased products may have on their warranties. If, in spite of these efforts, there is insufficient information regarding the use of a biobased product and its effect on warranties, the procurement agent would not be required to buy such a product. As information is available on warranties, USDA will make such information available on the BioPreferred Web site.

Additional Information. USDA is working with manufacturers and vendors to make all relevant product and manufacturer contact information available on the BioPreferred Web site before a procuring agency asks for it, in order to make the Federal preferred procurement program more efficient. Steps USDA has implemented, or will implement, include: Making direct contact with submitting companies through email and phone conversations to encourage completion of product listing; coordinating outreach efforts with intermediate material producers to encourage participation of their customer base; conducting targeted outreach with industry and commodity groups to educate stakeholders on the importance of providing complete product information; participating in industry conferences and meetings to educate companies on program benefits and requirements; and communicating the potential for expanded markets beyond the Federal government, to include State and local governments, as well as the general public markets. Section V provides instructions to agencies on how to obtain this information on products within these product categories through the following Web site: *http://www.biopreferred.gov.*

Comments. USDA invites comment on the proposed designation of these product categories, including the definition, proposed minimum biobased content, and any of the relevant analyses performed during the selection of these product categories. In addition, USDA invites comments and information in the following areas:

1. We have attempted to identify relevant and appropriate performance standards and other relevant measures of performance for each of the proposed product categories. If you know of other such standards or relevant measures of performance for any of the proposed product categories, USDA requests that you submit information identifying such standards and measures, including their name (and other identifying information as necessary), identifying who is using the standard/measure, and describing the circumstances under which the product is being used.

2. Many biobased products within the product categories being proposed for designation will have positive environmental and human health attributes. USDA is seeking comments on such attributes in order to provide additional information on the BioPreferred Web site. This information will then be available to Federal procuring agencies and will assist them in making informed sustainable procurement decisions. When possible, please provide appropriate documentation to support the environmental and human health attributes you describe.

3. Several product categories being proposed for designation today have wide ranges of tested biobased contents. For the reasons discussed later in this preamble, USDA is proposing a minimum biobased content for most of these product categories that would allow many of the tested products to be eligible for Federal preferred procurement. USDA welcomes comments on the appropriateness of the proposed minimum biobased contents for these product categories and whether there are potential subcategories within the product categories that should be considered.

4. As discussed above, the effect that the use of biobased products may have on original equipment manufacturers' warranties is uncertain. USDA requests comments and supporting information on any aspect of this issue.

5. Today's proposed rule is expected to have both positive and negative impacts on individual businesses, including small businesses. USDA anticipates that the biobased Federal preferred procurement program will provide additional opportunities for businesses and manufacturers to begin supplying products under the proposed designated biobased product categories to Federal agencies and their contractors. However, other businesses and manufacturers that supply only non-qualifying products and do not offer biobased alternatives may experience a decrease in demand from Federal agencies and their contractors. Because USDA has been unable to determine the number of businesses, including small businesses, that may be adversely affected by today's proposed rule, USDA requests comment on how many small entities may be affected by this rule and on the nature and extent of that effect.

All comments should be submitted as directed in the **ADDRESSES** section above.

To assist you in developing your comments, the background information used in proposing these product categories for designation has been posted on the BioPreferred Web site. The background information can be located by clicking on the "Federal Procurement Preference" link on the right side of the BioPreferred Web site's home page (*http://www.biopreferred.gov*) and then on the "Rules and Regulations" link. At the next screen, click on the Supporting Documentation link under Round 10 Designation under the Proposed Regulations section.

IV. Designation of Product Categories, Minimum Biobased Contents, and Time Frame

A. Background

In order to designate product categories for Federal preferred procurement, section 9002 requires USDA to consider: (1) The availability of biobased products within the product categories and (2) the economic and technological feasibility of using those products, including the life-cycle costs of the products.

In considering a product's availability, USDA uses several sources

of information. USDA performs Internet searches, contacts trade associations (such as the Bio organization) and commodity groups, searches the Thomas Register (a database, used as a resource for finding companies and products manufactured in North America, containing over 173,000 entries), and contacts manufacturers and vendors to identify those manufacturers and vendors with biobased products within product categories being considered for designation. USDA uses the results of these same searches to determine if a product category is generally available.

In considering a product category's economic and technological feasibility, USDA examines evidence pointing to the general commercial use of a product and its life-cycle cost and performance characteristics. This information is obtained from the sources used to assess a product's availability. Commercial use, in turn, is evidenced by any manufacturer and vendor information on the availability, relative prices, and performance of their products as well as by evidence of a product being purchased by a procuring agency or other entity, where available. In sum, USDA considers a product category economically and technologically feasible for purposes of designation if products within that product category are being offered and used in the marketplace.

In considering the life-cycle costs of product categories proposed for designation, USDA has obtained the necessary input information (on a voluntary basis) from manufacturers of biobased products and has used the BEES analytical tool to analyze individual products within each proposed product category. The BEES analytical tool measures the environmental performance and the economic performance of a product. The environmental performance scores, impact values, and economic performance results for products within the Round 10 designated product categories analyzed using the BEES analytical tool can be found on the BioPreferred Web site (*http://www.biopreferred.gov*) under the Supporting Documentation link mentioned above.

In addition to the BEES analytical tool, manufacturers wishing to make similar life-cycle information available may choose to use the ASTM Standard D7075 analysis. The ASTM Standard D7075 product analysis includes information on environmental performance, human health impacts, and economic performance. USDA is working with manufacturers and vendors to make this information available on the BioPreferred Web site in order to make the Federal preferred procurement program more efficient.

As discussed earlier, USDA has also implemented, or will implement, several other steps intended to educate the manufacturers and other stakeholders on the benefits of this program and the need to make this information, including manufacturer contact information, available on the BioPreferred Web site in order to then make it available to procurement officials. Additional information on specific products within the product categories proposed for designation may also be obtained directly from the manufacturers of the products. USDA has also provided a link on the BioPreferred Web site to a document that offers useful information to manufacturers and vendors who wish to position their businesses as BioPreferred vendors to the Federal Government. This document can be accessed by clicking on the "Sell Biobased Products" tab on the right side of the home page of the BioPreferred Web site; then on the "Resources for Business" tab under "Related Topics" on the right side of the next page, and then on the document titled "Selling Biobased Products to the Federal Government" in the middle of the page.

USDA recognizes that information related to the functional performance of biobased products is a primary factor in making the decision to purchase these products. USDA is gathering information on industry standard test methods and performance standards that manufacturers are using to evaluate the functional performance of their products. (Test methods are procedures used to provide information on a certain attribute of a product. For example, a test method might determine how many bacteria are killed. Performance standards identify the level at which a product must perform in order for it to be "acceptable" to the entity that set the performance standard. For example, a performance standard might require that a certain percentage (e.g., 95 percent) of the bacteria must be killed through the use of the product.) The primary sources of information on these test methods and performance standards are manufacturers of biobased products within these product categories. Additional test methods and performance standards are also identified during meetings of the Interagency council and during the review process for each proposed rule. We have listed, under the detailed discussion of each product category proposed for designation (presented in Section IV.B), the functional performance test methods, performance standards, product certifications, and other measures of performance associated with the functional aspects of products identified during the development of this **Federal Register** notice for these product categories.

While this process identifies many of the relevant test methods and standards, USDA recognizes that those identified herein do not represent all of the methods and standards that may be applicable for a product category or for any individual product within the category. As noted earlier in this preamble, USDA is requesting identification of other relevant performance standards and measures of performance. As the program becomes fully implemented, these and other additional relevant performance standards will be available on the BioPreferred Web site.

In gathering information relevant to the analyses discussed above for this proposed rule, USDA has made extensive efforts to contact and request information and product samples within the product categories proposed for designation. For product information, USDA has attempted to contact representatives of the manufacturers of biobased products identified by the Federal preferred procurement program. For product samples on which to conduct biobased content tests and BEES analysis, USDA has attempted to obtain samples and BEES input information for at least five different suppliers of products within each product category in today's proposed rule. However, because the submission of information and samples is on a strictly voluntary basis, USDA was able to obtain information and samples only from those manufacturers who volunteered to invest the resources required to gather and submit the information and samples. The data presented are all the data that were submitted in response to USDA requests for information from manufacturers of the products within the product categories proposed for designation. While USDA would prefer to have complete data on the full range of products within each product category, the data that were submitted support designation of the product categories in today's proposed rule.

To propose a product category for designation, USDA must have sufficient information on a sufficient number of products within the category to be able to assess its availability and its economic and technological feasibility, including its life-cycle costs. For some product categories, there may be

numerous products available. For others, there may be very few products currently available. Given the infancy of the market for some product categories, it is expected that categories with only a single product will be identified. Further, given that the intent of section 9002 is largely to stimulate the production of new biobased products and to energize emerging markets for those products, USDA has determined it is appropriate to designate a product category or subcategory for Federal preferred procurement even when there is only a single product with a single supplier, though this will generally occur once other products with high biobased content and two or more producers are first designated. However, USDA has also determined that in such situations it is appropriate to defer the effective Federal preferred procurement date until such time that more than one supplier is identified in order to provide choice to procuring agencies. Similarly, the documented availability, benefits, and life-cycle costs of even a very small percentage of all products that may exist within a product category are also considered sufficient to support designation.

B. Product Categories Proposed for Designation

USDA uses a model (as summarized below) to identify and prioritize product categories for designation. Through this model, USDA has identified over 100 product categories for potential designation under the Federal preferred procurement program. A list of these product categories and information on the model can be accessed on the BioPreferred Web site at *http://www.biopreferred.gov*.

In general, product categories are developed and prioritized for designation by evaluating them against program criteria established by USDA and by gathering information from other government agencies, private industry groups, and manufacturers. These evaluations begin by looking at the cost, performance, and availability of products within each product category. USDA then considers the following points:

- Are there manufacturers interested in providing the necessary test information on products within a particular product category?
- Are there a number of manufacturers producing biobased products in this product category?
- Are there products available in this product category?
- What level of difficulty is expected when designating this product category?
- Is there Federal demand for the product?
- Are Federal procurement personnel looking for biobased products?
- Will a product category create a high demand for biobased feed stock?
- Does manufacturing of products within this product category increase potential for rural development?

After completing this evaluation, USDA prioritizes the list of product categories for designation. USDA then gathers information on products within the highest priority product categories and, as sufficient information becomes available for a group of product categories, a new rulemaking package is developed to designate the product categories within that group. USDA points out that the list of product categories may change, with some being added or dropped, and that the order in which they are proposed for designation is likely to change because the information necessary to designate a product category may take more time to obtain than one lower on the list.

In today's proposed rule, USDA is proposing to designate the following product categories for the Federal preferred procurement program: Aircraft and boat cleaners; automotive care products; engine crankcase oil; gasoline fuel additives; metal cleaners and corrosion removers; microbial cleaning products; paint removers; and water turbine bearing oils. USDA is also proposing to add the following subcategories to previously designated product categories: "countertops" to the composite panels category and "wheel bearing and chassis grease" to the greases category. USDA has determined that each of these product categories and subcategories meets the necessary statutory requirements—namely, that they are being produced with biobased products and that their procurement by procuring agencies will carry out the following objectives of section 9002:

- To increase demand for biobased products, which would in turn increase demand for agricultural commodities that can serve as feedstocks for the production of biobased products;
- To spur development of the industrial base through value-added agricultural processing and manufacturing in rural communities; and
- To enhance the Nation's energy security by substituting biobased products for products derived from imported oil and natural gas.

Further, USDA has sufficient information on these product categories to determine their availability and to conduct the requisite analyses to determine their biobased content and their economic and technological feasibility, including life-cycle costs.

Exemptions. Products exempt from the biobased procurement preference are military equipment, defined as any product or system designed or procured for combat or combat-related missions, and spacecraft systems and launch support equipment. However, agencies may purchase biobased products wherever performance, availability and reasonable price indicates that such purchases are justified.

Although each product category in today's proposed rule would be exempt from the procurement preference requirement when used in spacecraft systems or launch support application or in military equipment used in combat and combat-related applications, this exemption does not extend to contractors performing work other than direct maintenance and support of the spacecraft or launch support equipment or combat or combat-related missions. For example, if a contractor is applying a paint remover product as a step in refurbishing office furniture on a military base, the paint remover the contractor purchases should be a qualifying biobased paint remover. The exemption does apply, however, if the product being purchased by the contractor is for use in combat or combat-related missions or for use in space or launch applications. After reviewing the regulatory requirement and the relevant contract, where contractors have any questions on the exemption, they should contact the cognizant contracting officer.

USDA points out that it is not the intent of these exemptions to imply that biobased products are inferior to non-biobased products. If manufacturers of biobased products can meet the concerns of these two agencies, USDA is willing to reconsider such exemptions on an case-by-case basis. Any changes to the current exemptions would be announced in a proposed rule amendment with an opportunity for public comment.

Each of the proposed designated product categories are discussed in the following sections.

1. Aircraft and Boat Cleaners (Minimum Biobased Content: 48 Percent for Aircraft Cleaners; 38 Percent for Boat Cleaners)[1]

Aircraft and boat cleaners are products designed to remove built-on grease, oil, dirt, pollution, insect reside,

[1] Additional information on the determination of minimum biobased content is presented in Section IV,D of this Preamble.

or impact soils on both interior and exterior of aircraft and/or boats.

USDA identified 6 manufacturers and suppliers of 8 biobased aircraft cleaners and 13 manufacturers and suppliers of 24 biobased boat cleaners. These 19 manufacturers and suppliers do not necessarily include all manufacturers and suppliers of biobased aircraft cleaners and boat cleaners, merely those identified during USDA information gathering activities. Relevant product information supplied by these manufacturers and suppliers indicates that these products are being used commercially. In addition, manufacturers and stakeholders identified 22 test method (as shown below) used in evaluating products within the aircraft cleaners and boat cleaners subcategories. While there may be additional test methods, as well as performance standards, product certifications, and other measures of performance, applicable to products within this product category, the 22 test methods identified by the manufacturers are:

Test Methods

- Aerospace Material Specifications 1526 Cleaner for Aircraft Exterior Surfaces, Pressure Spraying Type;
- ASTM International D877 Standard Test Method for Dielectric Breakdown Voltage of Insulating Liquids Using Disk Electrodes;
- ASTM International F1110 Standard Test Method for Sandwich Corrosion Test;
- ASTM International F1111 Standard Test Method for Corrosion of Low-Embrittling Cadmium Plate by Aircraft Maintenance Chemicals;
- ASTM International F483 Standard Test Method for Total Immersion Corrosion Test for Aircraft Maintenance Chemicals;
- ASTM International F484 Standard Test Method for Stress Crazing of Acrylic Plastics in Contact with Liquid or Semi-Liquid Compounds;
- ASTM International F502 Standard Test Method for Effects of Cleaning and Chemical Maintenance Materials on Painted Aircraft Surfaces;
- ASTM International F519 Standard Test Method for Mechanical Hydrogen Embrittlement Evaluation of Plating/Coating Processes and Service Environments;
- Boeing BAC 5763E Emulsion Cleaning & Aqueous Degreasing, Type II, Class 2, Grades A & B;
- Boeing D6–17487N Exterior and General Cleaners and Liquid Waxes;
- Environmental Protection Agency Method 796.3100 Aerobic Aquatic Biodegradation;
- Lockheed Martin FMS2004 Type II F–16, F–22, F–35 General Purpose Cleaner;
- Lockheed Martin LAC 41–4939 Cleaning Solvent, Environmentally Compliant;
- Lockheed Martin LMA–MN040 Type II F–16, F–22, F–35 General Purpose Cleaner;
- Military Performance Specification 85570D Cleaning Compounds, Aircraft, Exterior;
- Military Performance Specification 87937D Cleaning Compound, Aerospace Equipment, Type IV Heavy Duty Water Dilutable Cleaning Compound * Tested by SMI, ref # 04JAN940;
- New York City Transit S–70–01–96 Bus Wash Alkaline Cleaner—Tile Cleaning Procedure;
- SAE International AMS 3167B Solvents, Wipe for Cleaning Prior to Application of Primer and Top Coat Materials, or Sealing Compounds;
- SAE International ARP 1755B Effect of Cleaning Agents on Aircraft Engine Materials;
- South Coast Air Quality Management District Method 313–91 Clean Air Solvent—Eligibility; ATCC Biosafety Level 1; Minimal potential for causing diseases in humans, plants, animals and aquatic life;
- NSF Cat. 61; Pretreatment of Potable Water Sources; and
- EPA/600/4–90/027; Methods for Measuring the Acute Toxicity of Effluents and Receiving Waters to Freshwater and Marine Organisms.

USDA contacted procurement officials with various policy-making and procuring agencies in an effort to gather information on the purchases of aircraft and boat cleaners, as well as information on products within the other seven product categories proposed for designation today. These agencies included GSA, several offices within the DLA, OFEE, USDA Departmental Administration, the National Park Service, EPA, a Department of Energy laboratory, and OMB. Communications with these Federal officials led to the conclusion that obtaining current usage statistics and specific potential markets within the Federal government for biobased products within the eight proposed designated product categories is not possible at this time.

Most of the contacted officials reported that procurement data are appropriately reported in higher level groupings of Federal Supply Codes[2] for materials and supplies, which is higher level coding than the proposed designated product categories. Using terms that best match the product categories in today's proposed rule, USDA queried the GSA database for Federal purchases of products within today's proposed product categories. The results indicate purchases of products within product categories in today's proposed rule. The results of this inquiry can be found in the background information for Round 10, which is posted on the BioPreferred Web site. Also, the purchasing of such materials as part of contracted services and with individual purchase cards used to purchase products locally leads to less accurate data on purchases of specific products.

USDA also investigated the Web site FEDBIZOPPS.gov, a site which lists Federal contract purchase opportunities and awards greater than $25,000. The information provided on this Web site, however, is for broad categories of services and products rather than the specific types of products that are included in today's proposed rule. Therefore, USDA has been unable to obtain data on the amount of aircraft and boat cleaners purchased by procuring agencies. However, many Federal agencies routinely perform, or procure contract services to perform, the types of cleaning activities that use these products. Thus, they have a need for aircraft cleaners and boat cleaners and for services that require the use of these cleaners. Designation of aircraft cleaners and boat cleaners will promote the use of biobased products, furthering the objectives of this program.

Specific product information, including company contact, intended use, biobased content, and performance characteristics, have been collected on 8 aircraft cleaners and 21 boat cleaners. Analyses of the environmental and human health benefits and the life-cycle costs of aircraft cleaners were performed for three products using the BEES analytical tool. The results of those analyses are presented in the background information for Round 10, which can be found on the BioPreferred Web site.

2. Automotive Care Products (Minimum Biobased Content 75 Percent)

Automotive care products are formulated for cleaning and protecting automotive surfaces. Typical products include waxes, buffing compounds, polishes, degreasers, soaps, wheel and

[2] The Federal Supply Code (FSC) is a four-digit code used by government buying offices to classify and identify, in broad terms, the products and supplies that the government buys and uses. The FSC is the first four digits in the much more detailed 13-digit National Stock Number (NSN) that is assigned to all government purchases for purposes of identification and inventory control.

tire cleaners, leather care products, interior cleaners, and fragrances.

USDA identified 12 manufacturers and suppliers of 30 different biobased automotive care products. These 12 manufacturers and suppliers do not necessarily include all manufacturers and suppliers of biobased automotive care products, merely those identified during USDA information gathering activities. Information supplied by these manufacturers and suppliers indicates that these products are being used commercially. However, manufacturers and stakeholders contacted by USDA did not identify any applicable performance standards, test methods, or other industry measures of performance against which these products have been tested. USDA points out that the lack of identified performance standards is not relevant to the designation of a product category for Federal preferred procurement because it is not one of the criteria section 9002 requires USDA to consider in order to designate a product category for Federal preferred procurement. If and when performance standards, test methods, and other relevant measures of performance are identified for this product category, USDA will provide such information on the BioPreferred Web site.

USDA attempted to gather data on the potential market for automotive care products within the Federal government as discussed in the section on aircraft and boat cleaners. These attempts were largely unsuccessful. However, Federal agencies use or contract for services that use such products in maintaining fleets of automobiles. Thus, they have a need for automotive care products and for services that require the use of automotive care products. Designation of automotive care products will promote the use of biobased products, furthering the objectives of this program.

Specific product information, including company contact, intended use, biobased content, and performance characteristics have been collected on 13 automotive care products. Analyses of the environmental and human health benefits and the life-cycle costs of automotive care products were performed for two of the products using the BEES analytical tool. The results of those analyses are presented in the background information for Round 10, which can be found on the BioPreferred Web site.

3. Engine Crankcase Oils (Minimum Biobased Content 18 Percent)

Engine crankcase oils are products formulated to provide lubrication and wear protection for four-cycle gasoline or diesel engines.

USDA identified five manufacturers and suppliers of eight different biobased engine crankcase oils. These five manufacturers and suppliers do not necessarily include all manufacturers and suppliers of biobased engine crankcase oils, merely those identified during USDA information gathering activities. Information supplied by these manufacturers and suppliers indicates that these products are being used commercially. In addition, manufacturers and stakeholders identified nine performance standards and test methods (as shown below) used in evaluating products within this product category. While there may be additional performance standards, test methods, product certifications, and other measures of performance, applicable to products within this product category, the nine performance standards and test methods identified by the manufacturers are:

Test Methods

- ASTM International D2619 Standard Test Method for Hydrolytic Stability of Hydraulic Fluids (Beverage Bottle Method);
- ASTM International D665 Standard Test Method for Rust-Preventing Characteristics of Inhibited Mineral Oil in the Presence of Water;
- ASTM International D892 Standard Test Method for Foaming Characteristics of Lubricating Oils;
- SAE International 0W20 J300 Engine Oil Viscosity Classification;
- SAE International 10W40 J300 Engine Oil Viscosity Classification;
- SAE International 15W50 J300 Engine Oil Viscosity Classification;
- SAE International 20W60 J300 Engine Oil Viscosity Classification;
- SAE International 20W70 J300 Engine Oil Viscosity Classification; and
- SAE International 5W30 J300 Engine Oil Viscosity Classification.

USDA attempted to gather data on the potential market for engine crankcase oils within the Federal government as discussed in the section on aircraft and boat cleaners. These attempts were largely unsuccessful. However, many Federal agencies operate motor vehicle fleet maintenance facilities where engine crankcase oils are used. In addition, Federal agencies may contract for services involving the use of such products. Thus, they have a need for engine crankcase oils and for services that require the use of engine crankcase oils. Designation of engine crankcase oils will promote the use of biobased products, furthering the objectives of this program.

Specific product information, including company contact, intended use, biobased content, and performance characteristics have been collected on six engine crankcase oils. Analyses of the environmental and human health benefits and the life-cycle costs of engine crankcase oils were performed for two of the products using the BEES analytical tool. The results of those analyses are presented in the background information for Round 10, which can be found on the BioPreferred Web site.

4. Gasoline Fuel Additives (Minimum Biobased Content 92 Percent)

Gasoline fuel additives are chemical agents added to gasoline to increase octane levels, improve lubricity, and provide engine cleaning properties to gasoline-fired engines.

USDA identified 115 manufacturers and suppliers of 117 gasoline fuel additives. These 115 manufacturers and suppliers do not necessarily include all manufacturers and suppliers of gasoline fuel additives, merely those identified during USDA information gathering activities. Information supplied by these manufacturers and suppliers indicates that these products are being used commercially. However, manufacturers and stakeholders contacted by USDA did not identify any applicable performance standards, test methods, or other industry measures of performance against which these products have been tested. USDA points out that the lack of identified performance standards is not relevant to the designation of a product category for Federal preferred procurement because it is not one of the criteria section 9002 requires USDA to consider in order to designate a product category for Federal preferred procurement. If and when performance standards, test methods, and other relevant measures of performance are identified for this product category, USDA will provide such information on the BioPreferred Web site.

USDA attempted to gather data on the potential market for gasoline fuel additives within the Federal government as discussed in the section on aircraft and boat cleaners. These attempts were largely unsuccessful. However, many Federal agencies operate motor vehicle fleet facilities where gasoline fuel additives are used. In addition, Federal agencies may contract for services involving the use of such products. Thus, they have a need for gasoline fuel additives and for services that require the use of gasoline fuel additives. Designation of gasoline fuel additives will promote the use of

biobased products, furthering the objectives of this program.

Specific product information, including company contact, intended use, biobased content, and performance characteristics have been collected on two gasoline fuel additives. Analyses of the environmental and human health benefits and the life-cycle costs of biobased gasoline fuel additives were performed for two products using the BEES analytical tool. The results of those analyses are presented in the background information for Round 10, which can be found on the BioPreferred Web site.

5. Metal Cleaners and Corrosion Removers (Minimum Biobased Content: 71 Percent for Corrosion Removers; 75 Percent for Stainless Steel Cleaners; and 56 Percent for Other Metal Cleaners)

Metal cleaners and corrosion removers are products that are designed to clean and remove grease, oil, dirt, stains, soils, and rust from metal surfaces. Corrosion removers are formulated to remove corrosion (rust) through chemical action, although mechanical actions may be used to speed the process.

USDA identified 43 manufacturers and suppliers of 62 metal cleaners and corrosion removers. Based on the information evaluated, USDA believes that it is appropriate to subcategorize this product category into three subcategories: Corrosion removers, stainless steel cleaners, and other metal cleaners. Of the 62 products identified, 12 were formulated specifically as corrosion removers, 7 were formulated for cleaning stainless steel, and 24 were formulated for cleaning other metals.

The 43 manufacturers and suppliers do not necessarily include all manufacturers and suppliers of metal cleaners and corrosion removers, merely those identified during USDA information gathering activities. Information supplied by these manufacturers and suppliers indicates that these products are being used commercially. In addition, manufacturers and stakeholders identified eight test methods (as shown below) used in evaluating products within the other metal cleaners subcategory. While other test methods and measures of performance, as well as performance standards, applicable to products within this product category may exist, the eight test methods identified by manufacturers are:

Test Methods

- DfE Qualifying Product—The DfE review team has screened each ingredient for potential human health and environmental effects;
- ASTM D4488—Standard Guide for Testing Cleaning Performance of Products Intended for Use on Resilient Flooring and Washable Walls;
- GS–37—Green Seal Environmental Standard for General-Purpose, Bathroom, Glass, and Carpet Cleaners Used for Industrial and Institutional Purposes;
- OECD G.L. 203—Guidelines for the Testing of Chemicals, Organization;
- Ecologo CCD–146—Environmental Leadership of Hard Surface Cleaners;
- Boeing BAC 5750 Section 5.1s Glidsafe Prepsolv—95% minimum d-Limonone for Solvent Cleaning;
- OECD 301F-Manometric Respirometry Test; and
- NSF H1—Lubricants with incidental contact.

USDA attempted to gather data on the potential market for metal cleaners and corrosion removers within the Federal government as discussed in the section on aircraft and boat cleaners. These attempts were largely unsuccessful. However, Federal agencies procure metal cleaners and corrosion removers for use in facilities such as vehicle maintenance shops, metal fabrication shops, hospitals, and office buildings. Also, many Federal agencies often procure contract services that use these products. Thus, they have a need for metal cleaners and corrosion removers and for services that require the use of metal cleaners and corrosion removers. Designation of metal cleaners and corrosion removers will promote the use of biobased products, furthering the objectives of this program.

Specific product information, including company contact, intended use, biobased content, and performance characteristics have been collected on 36 metal cleaners and corrosion removers. Analyses of the environmental and human health benefits and the life-cycle costs of biobased metal cleaners and corrosion removers were performed for two products using the BEES analytical tool. The results of those analyses are presented in the background information for Round 10, which can be found on the BioPreferred Web site.

6. Microbial Cleaning Products (Minimum Biobased Content: 45 Percent for Drain Maintenance Products; 44 Percent for Wastewater Maintenance Products; and 50 Percent for General Cleaners)

Microbial cleaning products are cleaning agents that use microscopic organisms to treat or eliminate waste materials within drains, plumbing fixtures, sewage systems, wastewater treatment systems, or on a variety of other surfaces. These products typically include organisms that digest protein, starch, fat, and cellulose.

USDA identified 163 manufacturers and suppliers of 490 microbial cleaners. Based on the information evaluated, USDA believes that it is appropriate to subcategorize this product category into three subcategories: Drain maintenance products, wastewater maintenance products, and general cleaners. Of the 490 products identified, 241 were formulated specifically for drain maintenance, 186 were formulated for wastewater maintenance, and 63 were general purpose cleaning products.

The 163 manufacturers and suppliers do not necessarily include all manufacturers of microbial cleaners, merely those identified during USDA information gathering activities. Information supplied by the manufacturers and supplier indicates that these products are being used commercially. In addition, manufacturers and stakeholders identified 15 performance standards and test methods (as shown below) used in evaluating products within this product category. While there may be additional performance standards, test methods, product certifications, and other measures of performance, applicable to products within this product category, the 15 performance standards and test methods identified by the manufacturers are:

Test Methods—Drain Maintenance Products

- EPA SW–846—Test Methods for Evaluating Solid Waste, Physical/Chemical Methods;
- DfE Qualifying Product—The DfE review team has screened each ingredient for potential human health and environmental effects; and
- ATCC Biosafety Level 1—Minimal potential for causing diseases in humans, plants, animals and aquatic life.

Test Methods—Wastewater Maintenance Products

- Navsea 6840—U.S. Navy surface ship (non-submarine) authorized chemical cleaning products and dispensing systems;
- EPA/600/4–90/027—Methods for Measuring the Acute Toxicity of Effluents and Receiving Waters to Freshwater and Marine Organisms;
- EPA SW–846—Test Methods for Evaluating Solid Waste, Physical/Chemical Methods;
- EPA Method 418.1—Petroleum Hydrocarbons, Total Recoverable for

determining total petroleum hydrocarbons (TPH) in water;

- DfE Qualifying Product—The DfE review team has screened each ingredient for potential human health and environmental effects;
- ATCC Biosafety Level 1—Minimal potential for causing diseases in humans, plants, animals and aquatic life;
- ASTM E96—Standard Test Methods for Water Vapor Transmission of Materials;
- ASTM D792—Standard Test Methods for Density and Specific Gravity (Relative Density) of Plastics by Displacement;
- ASTM D638—Standard Test Method for Tensile Properties of Plastics;
- ASTM D4060—Standard Test Method for Abrasion Resistance of Organic Coatings by the Taber Abraser; and
- ASTM D2240—Standard Test Method for Rubber Property—Durometer Hardness.

Test Methods—General Cleaners

- ATCC Biosafety Level 1—Minimal potential for causing diseases in humans, plants, animals, and aquatic life.

USDA attempted to gather data on the potential market for microbial cleaners within the Federal government using the procedure described in the section on aircraft and boat cleaners. These attempts were largely unsuccessful. However, most Federal agencies routinely operate, or contract for the operation of, facilities that include drains and wastewater systems that require periodic cleaning. In addition, many Federal agencies engage in the types of cleaning operations where general purpose cleaners are used for cleaning oily or greasy surfaces. Thus, they have a need for products such as microbial cleaners. Designation of microbial cleaners will promote the use of biobased products, furthering the objectives of this program.

Specific product information including company contact, intended use, biobased content, and performance characteristics have been collected on 95 microbial cleaners. Analyses of the environmental and human health benefits and the life-cycle costs of two products (one drain maintenance product and one general cleaner) were performed using the BEES analytical tool. The results of those analyses are presented in the background information for Round 10, which can be found on the BioPreferred Web site.

7. Paint Removers (Minimum Biobased Content 41 Percent)

Paint removers are products formulated to loosen and remove paint from painted surfaces.

USDA identified 29 manufacturers of 42 biobased paint removers. The 29 manufacturers do not necessarily include all manufacturers of biobased paint removers, merely those identified during USDA information gathering activities. Information supplied by these manufacturers indicates that these products are being used commercially. However, manufacturers and stakeholders contacted by USDA did not identify any applicable performance standards, test methods, or other industry measures of performance against which these products have been tested. USDA points out that the lack of identified performance standards is not relevant to the designation of a product category for Federal preferred procurement because it is not one of the criteria section 9002 requires USDA to consider in order to designate a product category for Federal preferred procurement. If and when performance standards, test methods, and other relevant measures of performance are identified for this product category, USDA will provide such information on the BioPreferred Web site.

USDA attempted to gather data on the potential market for paint removers within the Federal government as discussed in the section on aircraft and boat cleaners. These attempts were largely unsuccessful. However, many Federal agencies use, and procure services that use, paint removers in the construction, renovation, and maintenance of facilities and equipment. Thus, they have a need for paint removers and for services that require the use of paint removers. Designation of paint removers will promote the use of biobased products, furthering the objectives of this program.

Specific product information, including company contact, intended use, biobased content, and performance characteristics have been collected on nine paint removers. Analyses of the environmental and human health benefits and the life-cycle costs of biobased paint removers were performed for four products using the BEES analytical tool. The results of those analyses are presented in the background information for Round 10, which can be found on the BioPreferred Web site.

8. Water Turbine Bearing Oils (Minimum Biobased Content 46 Percent)

Water turbine bearing oils are lubricants that are specifically formulated for use in the bearings found in water turbines.

USDA identified four manufacturers and suppliers of six water turbine bearing oils. These four manufacturers and suppliers do not necessarily include all manufacturers and suppliers of water turbine bearing oils, merely those identified during USDA information gathering activities. Information supplied by these manufacturers and suppliers indicates that these products are being used commercially. In addition, manufacturers and stakeholders identified 12 test methods (as shown below) used in evaluating products within this product category. While other test methods and measures of performance, as well as performance standards, applicable to products within this product category may exist, the 12 test methods identified by manufacturers are:

Test Methods

- ASTM D665 Standard Test Method for Rust-Preventing Characteristics of Inhibited Mineral Oil in the Presence of Water;
- ASTM D2619 Standard Test Method for Hydrolytic Stability of Hydraulic Fluids (Beverage Bottle Method);
- ASTM D892 Standard Test Method for Foaming Characteristics of Lubricating Oils;
- ASTM D5864 Standard Test Method for Determining Aerobic Aquatic Biodegradation of Lubricants or Their Components;
- DIN 51354–1—Testing of lubricants; FZG gear test rig; general working principles;
- American Petroleum Institute Ashless GL–3 Lubricant with light EP effect for transmissions and non-hypoid gear drives;
- API GL–3 Automotive Gear Lubricant Service Categories;
- ISO 46 Designates Oil Viscosity Grade;
- OECD 201 Algal Growth Inhibition Test;
- OECD 202 Acute Immobilization Test and Reproduction Test;
- OECD 203 Fish Acute Toxicity Test; and
- OECD 301B Guideline for Testing of Chemicals, Ready Biodegradability: Modified Sturm Test.

USDA attempted to gather data on the potential market for water turbine bearing oils within the Federal

government as discussed in the section on aircraft and boat cleaners. These attempts were largely unsuccessful. However, many Federal agencies are responsible for maintaining water supply systems and routinely procure water turbine bearing oils, or contract with services that procure these products. Thus, they have a need for water turbine bearing oils and for services that require the use of water turbine bearing oils. Designation of water turbine bearing oils will promote the use of biobased products, furthering the objectives of this program.

Specific product information, including company contact, intended use, biobased content, and performance characteristics have been collected on one water turbine bearing oils. Analyses of the environmental and human health benefits and the life-cycle costs of biobased water turbine bearing oils were performed for one product using the BEES analytical tool. The results of those analyses are presented in the background information for Round 10, which can be found on the BioPreferred Web site.

C. New Subcategories Proposed for Designation

On May 14, 2008, USDA finalized the designation of several product categories including one for composite panels (73 FR 27954) and one for greases (73 FR 27974). Each of these product categories included subcategories. Since that time, USDA has obtained additional information on products within these two product categories and is now proposing to add one new subcategory within each of the two product categories.

1. Composite Panels—Countertops (Minimum Biobased Content 89 Percent)

Composite panels—countertops are engineered products that are flat panels designed to serve as horizontal work surfaces in locations such as kitchens, break rooms or other food preparation areas, bathrooms or lavatories, and workrooms.

USDA identified 27 manufacturers and suppliers of 52 biobased composite panels—countertops products. These 27 manufacturers and suppliers do not necessarily include all manufacturers and suppliers of biobased composite panels—countertops products, merely those identified during USDA information gathering activities. Information supplied by these manufacturers and suppliers indicates that these products are being used commercially. In addition, manufacturers and stakeholders identified 12 test methods (as shown below) used in evaluating products within this product category. While other test methods and measures of performance, as well as performance standards, applicable to products within this product category may exist, the 12 test methods identified by manufacturers are:

Test Methods

- ASTM D256—Standard Test Methods for Determining the Izod Pendulum Impact Resistance of Plastics;
- ASTM D3023—Standard Practice for Determination of Resistance of Factory-Applied Coatings on Wood Products to Stains and Reagents;
- ASTM D570—Standard Test Method for Water Absorption of Plastics;
- ASTM D635—Standard Test Method for Rate of Burning and/or Extent and Time of Burning of Plastics in a Horizontal Position;
- ASTM D638—Standard Test Method for Tensile Properties of Plastics;
- ASTM D648—Standard Test Method for Deflection Temperature of Plastics Under Flexural Load in the Edgewise Position;
- ASTM D695—Compressive Strength, Tensile, Modulus of Elasticity;
- ASTM D785 Standard Test Method for Rockwell Hardness of Plastics and Electrical Insulating Materials;
- ASTM D790 Standard Test Methods for Flexural Properties of Unreinforced and Reinforced Plastics and Electrical Insulating Materials;
- ASTM G122—Standard Test Method for Evaluating the Effectiveness of Cleaning Agents;
- ASTM E84—Standard Test Method for Surface Burning Characteristics of Building Materials; and
- ASTM D4060—Standard Test Method for Abrasion Resistance of Organic Coatings by the Taber Abraser.

USDA attempted to gather data on the potential market for composite panels—countertops within the Federal government as discussed in the section on aircraft and boat cleaners. These attempts were largely unsuccessful. However, many Federal agencies use, and procure services that use, countertops in the construction, renovation, and maintenance of residential, medical, and office facilities. Thus, they have a need for countertops and for services that require the use of countertops. Designation of composite panels—countertops will promote the use of biobased products, furthering the objectives of this program.

Specific product information, including company contact, intended use, biobased content, and performance characteristics have been collected on 20 composite panels—countertops products. This information is presented in the background information for Round 10, which can be found on the BioPreferred Web site.

2. Greases—Wheel Bearing and Chassis (Minimum Biobased Content 50 Percent)

Wheel bearing and chassis greases are lubricants that meet ASTM D4950 Standard Classification as GC and LB (wheel bearing and chassis). These greases are for mild to severe duty wheel bearing and chassis applications commonly found in automotive, truck, heavy duty, industrial and agricultural applications. Common applications include disc and drum brakes, wheel bearings, trailer bearings, chassis parts and industrial equipment and machinery. These greases are also used where there is a broad temperature requirement and where they may be subject to high pressure or heavy load.

USDA identified six manufacturers and suppliers of eight biobased wheel bearing and chassis greases. These six manufacturers and suppliers do not necessarily include all manufacturers and suppliers of biobased wheel bearing and chassis greases, merely those identified during USDA information gathering activities. Information supplied by these manufacturers and suppliers indicates that these products are being used commercially. In addition, manufacturers and stakeholders identified 10 test methods (as shown below) used in evaluating products within this product category. While other test methods and measures of performance, as well as performance standards, applicable to products within this product category may exist, the 10 test methods identified by manufacturers are:

Test Methods

- ASTM D1742—D1742 Standard Test Method for Oil Separation from Lubricating Grease During Storage;
- ASTM D217—D217 Standard Test Methods for Cone Penetration of Lubricating Grease;
- ASTM D2265—D2265 Standard Test Method for Dropping Point of Lubricating Grease Over Wide Temperature;
- ASTM D2266—D2266 Standard Test Method for Wear Preventive Characteristics of Lubricating Grease (Four-Ball Method);
- ASTM D2270—D2270 Standard Practice for Calculating Viscosity Index

From Kinematic Viscosity at 40 and 100 °C;

- ASTM D2509—D2509 Standard Test Method for Measurement of Load-Carrying Capacity of Lubricating Grease (Timken Method);
- ASTM D2596—D2596 Standard Test Method for Measurement of Extreme-Pressure Properties of Lubricating Grease (Four-Ball Method);
- ASTM D3233—D3233 Standard Test Methods for Measurement of Extreme Pressure Properties of Fluid Lubricants (Falex Pin and Vee Block Methods);
- ASTM D445—D445 Standard Test Method for Kinematic Viscosity of Transparent and Opaque Liquids (and Calculation of Dynamic Viscosity); and
- ASTM D92—D92 Standard Test Method for Flash and Fire Points by Cleveland Open Cup Tester.

USDA attempted to gather data on the potential market for wheel bearing and chassis greases within the Federal government as discussed in the section on aircraft and boat cleaners. These attempts were largely unsuccessful. However, many Federal agencies use, and procure services that use, wheel bearing and chassis greases in the maintenance of vehicles and equipment. Thus, they have a need for wheel bearing and chassis greases and for services that require the use of wheel bearing and chassis greases. Designation of wheel bearing and chassis greases will promote the use of biobased products, furthering the objectives of this program.

Specific product information, including company contact, intended use, biobased content, and performance characteristics have been collected on seven wheel bearing and chassis greases. This information is presented in the background information for Round 10, which can be found on the BioPreferred Web site.

D. Minimum Biobased Contents

USDA has determined that setting a minimum biobased content for designated product categories is appropriate. Establishing a minimum biobased content will encourage competition among manufacturers to develop products with higher biobased contents and will prevent products with de minimis biobased content from being purchased as a means of satisfying the requirements of section 9002. USDA believes that it is in the best interest of the Federal preferred procurement program for minimum biobased contents to be set at levels that will realistically allow products to possess the necessary performance attributes and allow them to compete with non-biobased products in performance and economics. Setting the minimum biobased content for a product category at a level met by several of the tested products will provide more products from which procurement officials may choose, will encourage the most widespread usage of biobased products by procuring agencies, and is expected to accomplish the objectives of section 9002.

As discussed in Section IV.A of this preamble, USDA relied entirely on manufacturers' voluntary submission of samples to support the proposed designation of these product categories. However, in selecting the proposed minimum biobased content for each product category, USDA also considered the biobased content of several products for which manufacturers have requested certification to use the USDA Certified Biobased Product label. USDA considered these data points to be valid and useful in setting the proposed minimum biobased content because the labeling program specifies that the reported biobased content must be determined by a third-party testing entity that is ISO 9001 conformant. Thus, the biobased content data presented in the following paragraphs includes test results from the labeling portion of the BioPreferred program as well as the test results from all of the product samples that were submitted for analysis under the Federal biobased products preferred procurement program.

As a result of public comments received on the first designated product categories rulemaking proposal, USDA decided to account for the slight imprecision in the analytical method used to determine biobased content of products when establishing the minimum biobased content. Thus, rather than establishing the minimum biobased content for a product category at the tested biobased content of the product selected as the basis for the minimum value, USDA is establishing the minimum biobased content at a level three (3) percentage points less than the tested value. USDA believes that this adjustment is appropriate to account for the expected variations in analytical results.

USDA encourages procuring agencies to seek products with the highest biobased content that is practicable in all of the proposed designated product categories. To assist the procuring agencies in determining which products have the highest biobased content, USDA will update the information in the biobased products catalog to include the biobased content of each product. Those products within each product category that have the highest biobased content will be listed first and others will be listed in descending order. USDA is specifically requesting comments on the proposed minimum biobased contents and also requests additional data that can be used to re-evaluate the appropriateness of the proposed minimum biobased contents. As the market for biobased products develops and USDA obtains additional biobased content data, it will re-evaluate the established minimum biobased contents of designated product categories and consider raising them whenever justified.

The following paragraphs summarize the information that USDA used to propose minimum biobased contents within each proposed designated product category.

1. Aircraft and Boat Cleaners

Twenty eight biobased aircraft and boat cleaners have been tested for biobased content using ASTM D6866.[3] The biobased contents of 15 biobased aircraft cleaners range from 14 percent to 100 percent, as follows: 14, 29, 51, 59, 74, 79, 80, 81, 94, 94, 97, 98, 98, 99, and 100 percent. Because there is a significant break between the 29 percent product and the 51 percent product, USDA considered the need to create another subcategory within this product category. However, USDA found that there was not sufficient information on the performance or applicability of the two products with the 14 and 29 percent biobased content to justify creating a subcategory based on those products. Because the biobased contents of the remaining 13 products are somewhat uniformly distributed between 50 and 100 percent with no obvious gaps or breaks in the data, USDA is proposing to set the minimum biobased content for aircraft cleaners at 48 percent, based on the product with a tested biobased content of 51 percent.

Thirteen biobased boat cleaners have been tested for biobased content using ASTM D6866. The biobased contents of these 13 biobased boat cleaners range from 2 percent to 98 percent, as follows: 2, 3, 4, 41, 42, 43, 53, 74, 79, 82, 94, 97, and 98 percent. Because the biobased contents of three of the products are extremely low, USDA did not consider setting the minimum biobased content for the subcategory based on these

[3] ASTM D6866, "Standard Test Methods for Determining the Biobased Content of Solid, Liquid, and Gaseous Samples Using Radiocarbon Analysis," is used to distinguish between carbon from fossil resources (non-biobased carbon) and carbon from renewable sources (biobased carbon). The biobased content is expressed as the percentage of total carbon that is biobased carbon.

products. The biobased contents of 4 of the remaining 10 products fall within the narrow range of 41 percent to 53 percent. USDA believes these products are representative of those within the subcategory and is proposing to set the minimum biobased content for boat cleaners at 38 percent, based on the product with a tested biobased content of 41 percent.

2. Automotive Care Products

Seven biobased automotive care products have been tested for biobased content using ASTM D6866. The biobased contents of these seven biobased automotive care products range from 17 percent to 100 percent, as follows: 17, 41, 78, 79, 94, 98, and 100 percent. Because there is a significant break between the values for the two products with the lowest biobased contents and the five products with the highest biobased contents, USDA considered the need to subcategorize this product category. However, USDA found that there was not sufficient information on the performance or applicability of the two products with the lowest biobased contents to justify creating a subcategory based on those products. Because the biobased contents of the remaining five products are within a narrow range, USDA is proposing to set the minimum biobased content for automotive care products at 75 percent, based on the product with a tested biobased content of 78 percent.

USDA will continue to gather information on products within this product category, and if sufficient supporting information becomes available, will consider establishing subcategories based on formulation, performance, or applicability.

3. Engine Crankcase Oils

Eleven biobased engine crankcase oils have been tested for biobased content using ASTM D6866. The biobased contents of these eleven biobased engine crankcase oils range from 2 percent to 53 percent, as follows: 2, 2, 21, 30, 31, 36, 37, 37, 50, 51, and 53 percent. Because the biobased contents of two of the products are extremely low and the biobased contents of the remaining nine products are all within the range of 21 to 53 percent, USDA is proposing to set the minimum biobased content for engine crankcase oils at 18 percent, based on the product with a tested biobased content of 21 percent.

4. Gasoline Fuel Additives

Three biobased gasoline fuel additives have been tested for biobased content using ASTM D6866. The biobased contents of these three biobased gasoline fuel additives are 20, 95, and 97 percent. USDA did not find any performance or applicability features that would justify setting the minimum biobased content on the 20 percent biobased product. USDA is, therefore, proposing to set the minimum biobased content for this product category at 92 percent, based on the product with the lowest biobased content of the other two products tested.

USDA will continue to gather information on products within this product category, and if sufficient supporting information becomes available, will consider establishing subcategories based on formulation, performance, or applicability.

5. Metal Cleaners and Corrosion Removers

Twenty five biobased metal cleaners and corrosion removers have been tested for biobased content using ASTM D6866. The biobased contents of these 25 biobased metal cleaners and corrosion removers are as follows: for corrosion removers, 14, 74, 79, 90, 91, 91, 91, 91, 92, 92, 96, 97, 98, and 98 percent; for stainless steel cleaners, 12, 78, 79, 81, 83, 92, and 96 percent; for other metal cleaners, 19, 59, 79, and 98 percent. USDA is proposing to set the minimum biobased content for the corrosion removers subcategory at 71 percent, based on the product with the tested biobased content of 74 percent. USDA found no justification for setting the minimum based on the 14 percent biobased product and all of the remaining tested products are between 74 and 98 percent biobased. For the stainless steel cleaners subcategory, USDA found no unique performance features that would justify setting the minimum based on the product with the one tested biobased content of 12 percent. USDA is, therefore, proposing to set the minimum biobased content at 75 percent, based on the product with the tested biobased content of 78 percent. USDA also found no reason to set the minimum for the other metal cleaners subcategory based on the product with the tested biobased content of 19 percent. Therefore, the proposed minimum biobased content for this subcategory is 56 percent, based on the product with the tested biobased content of 59 percent.

6. Microbial Cleaning Products

Forty biobased microbial cleaners have been tested for biobased content using ASTM D6866. The biobased contents of these 40 biobased microbial cleaners are as follows: for drain maintenance products, 48, 51, 51, 53, 53, 53, 70, 74, 74, 74, 80, 91, 94, 95, and 98 percent; for wastewater maintenance products, 47, 53, 53, 58, 59, 70, 74, 95, 96, and 99 percent; and for general cleaners, 19, 27, 53, 53, 54, 69, 73, 74, 81, 91, 95, 96, 98, 99, and 100 percent.

For the drain maintenance and the wastewater subcategories, the test results cover a wide range but are fairly evenly distributed, with several products having biobased contents in the 50 percent range. USDA is, therefore, proposing to set the minimum biobased content for microbial cleaners at 45 percent for drain maintenance products and 44 percent for wastewater maintenance products based on the products with the lowest biobased content within each data set. For general cleaners, there is a significant gap between the 27 and the 53 percent products. USDA found no unique performance characteristics that justify setting the minimum biobased content based on the 19 percent or the 27 percent products. The remaining products are fairly even distributed between 53 and 100 percent. Thus, USDA is proposing to set the minimum biobased content at 50 percent for the general cleaners subcategory, based on the product with the tested biobased content of 53 percent.

7. Paint Removers

Eight biobased paint removers have been tested for biobased content using ASTM D6866. The biobased contents of these eight biobased paint removers range from 24 to 100 percent, as follows: 24, 30, 44, 55, 63, 87, 100, and 100 percent. USDA found no performance or applicability claims to justify setting the minimum biobased content for this product category based on the 24 or 30 percent products. Because three of the remaining six products have biobased contents within a narrow range of from 44 to 63 percent, USDA is proposing to set the minimum biobased content for paint removers at 41 percent, based on the product with a tested biobased content of 44 percent.

8. Water Turbine Bearing Oils

One of the biobased water turbine bearing oils has been tested for biobased content using ASTM D6866. The biobased content of this biobased water turbine bearing oil is 49 percent. USDA believes that this one product is typical of available biobased products within this product category and is proposing to set the minimum biobased content for this product category at 46 percent.

USDA will continue to gather information on products within this product category, and if sufficient supporting information becomes available, will consider establishing

subcategories based on formulation, performance, or applicability.

9. Composite Panels—Countertops

Seven biobased composite panels—countertops have been tested for biobased content using ASTM D6866. The biobased contents of these seven biobased countertops range from 18 to 100 percent, as follows: 18, 18, 44, 92, 95, 100, and 100 percent. USDA found no performance or applicability claims to justify setting the minimum biobased content for this product category based on the two 18 percent products or the 44 percent product. Because four of the remaining five products have biobased contents within a narrow range of from 92 to 100 percent, USDA is proposing to set the minimum biobased content for the countertops subcategory of composite panels at 89 percent, based on the product with a tested biobased content of 92 percent.

10. Greases—Wheel Bearing and Chassis

Five biobased wheel bearing and chassis greases have been tested for biobased content using ASTM D6866. The biobased contents of these five biobased greases range from 53 to 90 percent, as follows: 53, 54, 54, 63, and 90 percent. Because four of the five products have biobased contents within a narrow range of from 53 to 63 percent, USDA is proposing to set the minimum biobased content for the wheel bearing and chassis greases subcategory at 50 percent, based on the product with a tested biobased content of 53 percent.

E. Compliance Date for Procurement Preference and Incorporation into Specifications

USDA intends for the final rule to take effect thirty (30) days after publication of the final rule. However, as proposed, procuring agencies would have a one-year transition period, starting from the date of publication of the final rule, before the procurement preference for biobased products within a designated product category or subcategory would take effect.

USDA is proposing a one-year period before the procurement preferences would take effect because it recognizes that Federal agencies will need time to incorporate the preferences into procurement documents and to revise existing standardized specifications. Both section 9002(a)(3) and 7 CFR 3201(c) explicitly acknowledge the need for Federal agencies to have sufficient time to revise the affected specifications to give preference to biobased products when purchasing products within the designated product categories or subcategories. Procuring agencies will need time to evaluate the economic and technological feasibility of the available biobased products for their agency-specific uses and for compliance with agency-specific requirements, including manufacturers' warranties for machinery in which the biobased products would be used.

By the time these product categories and subcategories are promulgated for designation, Federal agencies will have had a minimum of 18 months (from the date of this **Federal Register** notice), and much longer considering when the Guidelines were first proposed and these requirements were first laid out, to implement these requirements.

For these reasons, USDA proposes that the mandatory preference for biobased products under the designated product categories and subcategories take effect one year after promulgation of the final rule. The one-year period provides these agencies with ample time to evaluate the economic and technological feasibility of biobased products for a specific use and to revise the specifications accordingly. However, some agencies may be able to complete these processes more expeditiously, and not all uses will require extensive analysis or revision of existing specifications. Although it is allowing up to one year, USDA encourages procuring agencies to implement the procurement preferences as early as practicable for procurement actions involving any of the designated product categories or subcategories.

V. Where can agencies get more information on these USDA-designated product categories?

The background information used to develop this proposed rule can be located by clicking on the "Federal Procurement Preference" link on the right side of the BioPreferred Web site's home page (*http://www.biopreferred.gov*) and then on the "Rules and Regulations" link. At the next screen, click on the Supporting Documentation link under Round 10 Designation under the Proposed Regulations section.

Further, once the product category designations in today's proposal become final, manufacturers and vendors voluntarily may make available information on specific products, including product and contact information, for posting by the Agency on the BioPreferred Web site. USDA has begun performing periodic audits of the information displayed on the BioPreferred Web site and, where questions arise, is contacting the manufacturer or vendor to verify, correct, or remove incorrect or out-of-date information. Procuring agencies should contact the manufacturers and vendors directly to discuss specific needs and to obtain detailed information on the availability and prices of biobased products meeting those needs.

By accessing the BioPreferred Web site, agencies will also be able to obtain the voluntarily-posted information on each product concerning: Relative price; life-cycle costs; hot links directly to a manufacturer's or vendor's Web site (if available); performance standards (industry, government, military, ASTM/ISO) that the product has been tested against; and environmental and public health information from the BEES analysis or the alternative analysis embedded in the ASTM Standard D7075, "Standard Practice for Evaluating and Reporting Environmental Performance of Biobased Products."

VI. Regulatory Information

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

Executive Order 12866, as supplemented by Executive Order 13563, requires agencies to determine whether a regulatory action is "significant." The Order defines a "significant regulatory action" as one that is likely to result in a rule that may: "(1) Have an annual effect on the economy of $100 million or more or adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order."

Today's proposed rule has been determined by the Office of Management and Budget to be not significant for purposes of Executive Order 12866. We are not able to quantify the annual economic effect associated with today's proposed rule. As discussed earlier in this preamble, USDA made extensive efforts to obtain information on the Federal agencies' usage within the eight designated product categories. These efforts were largely unsuccessful. Therefore,

attempts to determine the economic impacts of today's proposed rule would require estimation of the anticipated market penetration of biobased products based upon many assumptions. In addition, because agencies have the option of not purchasing products within designated product categories if price is "unreasonable," the product is not readily available, or the product does not demonstrate necessary performance characteristics, certain assumptions may not be valid. While facing these quantitative challenges, USDA relied upon a qualitative assessment to determine the impacts of today's proposed rule. Consideration was also given to the fact that agencies may choose not to procure products within designated product categories due to unreasonable price.

1. Summary of Impacts

Today's proposed rule is expected to have both positive and negative impacts to individual businesses, including small businesses. USDA anticipates that the biobased Federal preferred procurement program will provide additional opportunities for businesses and manufacturers to begin supplying products under the proposed designated biobased product categories to Federal agencies and their contractors. However, other businesses and manufacturers that supply only non-qualifying products and do not offer biobased alternatives may experience a decrease in demand from Federal agencies and their contractors. USDA is unable to determine the number of businesses, including small businesses, that may be adversely affected by today's proposed rule. The proposed rule, however, will not affect existing purchase orders, nor will it preclude businesses from modifying their product lines to meet new requirements for designated biobased products. Because the extent to which procuring agencies will find the performance, availability and/or price of biobased products acceptable is unknown, it is impossible to quantify the actual economic effect of the rule.

2. Benefits of the Proposed Rule

The designation of these product categories provides the benefits outlined in the objectives of section 9002; to increase domestic demand for many agricultural commodities that can serve as feedstocks for production of biobased products, and to spur development of the industrial base through value-added agricultural processing and manufacturing in rural communities. On a national and regional level, today's proposed rule can result in expanding and strengthening markets for biobased materials used in these product categories.

3. Costs of the Proposed Rule

Like the benefits, the costs of today's proposed rule have not been quantified. Two types of costs are involved: Costs to producers of products that will compete with the preferred products and costs to Federal agencies to provide procurement preference for the preferred products. Producers of competing products may face a decrease in demand for their products to the extent Federal agencies refrain from purchasing their products. However, it is not known to what extent this may occur. Pre-award procurement costs for Federal agencies may rise minimally as the contracting officials conduct market research to evaluate the performance, availability and price reasonableness of preferred products before making a purchase.

B. Regulatory Flexibility Act (RFA)

The RFA, 5 U.S.C. 601–602, generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

USDA evaluated the potential impacts of its proposed designation of these product categories to determine whether its actions would have a significant impact on a substantial number of small entities. Because the Federal preferred procurement program established under section 9002 applies only to Federal agencies and their contractors, small governmental (city, county, etc.) agencies are not affected. Thus, the proposal, if promulgated, will not have a significant economic impact on small governmental jurisdictions.

USDA anticipates that this program will affect entities, both large and small, that manufacture or sell biobased products. For example, the designation of product categories for Federal preferred procurement will provide additional opportunities for businesses to manufacture and sell biobased products to Federal agencies and their contractors. Similar opportunities will be provided for entities that supply biobased materials to manufacturers.

The intent of section 9002 is largely to stimulate the production of new biobased products and to energize emerging markets for those products. Because the program is still in its infancy, however, it is unknown how many businesses will ultimately be affected. While USDA has no data on the number of small businesses that may choose to develop and market biobased products within the product categories designated by this rulemaking, the number is expected to be small. Because biobased products represent a small emerging market, only a small percentage of all manufacturers, large or small, are expected to develop and market biobased products. Thus, the number of small businesses manufacturing biobased products affected by this rulemaking is not expected to be substantial.

The Federal preferred procurement program may decrease opportunities for businesses that manufacture or sell non-biobased products or provide components for the manufacturing of such products. Most manufacturers of non-biobased products within the product categories being proposed for designation for Federal preferred procurement in this rule are expected to be included under the following NAICS codes: 321999 (all other wood product manufacturing), 324191 (petroleum lubricating oil and grease manufacturing), 325510 (paint and coating manufacturing), and 325612 (polish and other sanitation goods manufacturing). USDA obtained information on these four NAICS categories from the U.S. Census Bureau's Economic Census database. USDA found that the Economic Census reports about 4,270 companies within these 4 NAICS categories and that these companies own a total of about 4,860 establishments. Thus, the average number of establishments per company is about 1.14. The Census data also reported that of the 4,860 individual establishments, about 4,850 (99 percent) have fewer than 500 employees. USDA also found that the overall average number of employees per company among these industries is about 30 and that the petroleum lubricating oil and grease industry has the highest average number of employees per company with an average of almost 50. Thus, nearly all of the businesses fall within the Small Business Administration's definition of a small business (less than 500 employees, in most NAICS categories).

USDA does not have data on the potential adverse impacts on manufacturers of non-biobased products within the product categories being designated, but believes that the impact will not be significant. Most of the product categories being proposed for designation in this rulemaking are typical consumer products widely used

by the general public and by industrial/commercial establishments that are not subject to this rulemaking. Thus, USDA believes that the number of small businesses manufacturing non-biobased products within the product categories being designated and selling significant quantities of those products to government agencies affected by this rulemaking to be relatively low. Also, this proposed rule will not affect existing purchase orders and it will not preclude procuring agencies from continuing to purchase non-biobased products when biobased products do not meet the availability, performance, or reasonable price criteria. This proposed rule will also not preclude businesses from modifying their product lines to meet new specifications or solicitation requirements for these products containing biobased materials.

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

While not a factor relevant to determining whether the proposed rule will have a significant impact for RFA purposes, USDA has concluded that the effect of the rule will be to provide positive opportunities to businesses engaged in the manufacture of these biobased products. Purchase and use of these biobased products by procuring agencies increase demand for these products and result in private sector development of new technologies, creating business and employment opportunities that enhance local, regional, and national economies.

C. Executive Order 12630: Governmental Actions and Interference With Constitutionally Protected Property Rights

This proposed rule has been reviewed in accordance with Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, and does not contain policies that would have implications for these rights.

D. Executive Order 12988: Civil Justice Reform

This rule has been reviewed in accordance with Executive Order 12988, Civil Justice Reform. This rule does not preempt State or local laws, is not intended to have retroactive effect, and does not involve administrative appeals.

E. Executive Order 13132: Federalism

This proposed rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. Provisions of this proposed rule will not have a substantial direct effect on States or their political subdivisions or on the distribution of power and responsibilities among the various government levels.

F. Unfunded Mandates Reform Act of 1995

This proposed rule contains no Federal mandates under the regulatory provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538, for State, local, and tribal governments, or the private sector. Therefore, a statement under section 202 of UMRA is not required.

G. Executive Order 12372: Intergovernmental Review of Federal Programs

For the reasons set forth in the Final Rule Related Notice for 7 CFR part 3015, subpart V (48 FR 29115, June 24, 1983), this program is excluded from the scope of the Executive Order 12372, which requires intergovernmental consultation with State and local officials. This program does not directly affect State and local governments.

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

Today's proposed rule does not significantly or uniquely affect "one or more Indian tribes, * * * the relationship between the Federal Government and Indian tribes, or * * * the distribution of power and responsibilities between the Federal Government and Indian tribes." Thus, no further action is required under Executive Order 13175.

I. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 through 3520), the information collection under this proposed rule is currently approved under OMB control number 0503–0011.

J. E-Government Act Compliance

USDA is committed to compliance with the E-Government Act, which requires Government agencies in general to provide the public the option of submitting information or transacting business electronically to the maximum extent possible. USDA is implementing an electronic information system for posting information voluntarily submitted by manufacturers or vendors on the products they intend to offer for Federal preferred procurement under each designated product category. For information pertinent to E-Government Act compliance related to this rule, please contact Ron Buckhalt at (202) 205–4008.

List of Subjects in 7 CFR Part 3201

Biobased products, Procurement.

For the reasons stated in the preamble, the Department of Agriculture proposes to amend 7 CFR part 3201 as follows:

PART 3201—GUIDELINES FOR DESIGNATING BIOBASED PRODUCTS FOR FEDERAL PROCUREMENT

1. The authority citation for part 3201 continues to read as follows:

Authority: 7 U.S.C. 8102.

2. Amend § 3201.19 by adding paragraphs (a)(6) and (b)(6) and revising paragraph (c) to read as follows:

§ 3201.19 Composite panels.

(a) * * *

(6) *Countertops.* Engineered products designed to serve as horizontal work surfaces in locations such as kitchens, break rooms or other food preparation areas, bathrooms or lavatories, and workrooms.

(b) * * *

(6) Countertops—89 percent.

(c) *Preference compliance dates.* (1) No later than May 14, 2009, procuring agencies, in accordance with this part, will give a procurement preference for those qualifying biobased composite panels specified in paragraphs (a)(1) through (5) of this section. By that date, Federal agencies that have the responsibility for drafting or reviewing specifications for items to be procured shall ensure that the relevant specifications require the use of biobased composite panels.

(2) No later than [DATE ONE YEAR AFTER THE DATE OF PUBLICATION OF THE FINAL RULE], procuring agencies, in accordance with this part, will give a procurement preference for those qualifying biobased composite panels specified in paragraph (a)(6) of this section. By that date, Federal agencies that have the responsibility for drafting or reviewing specifications for items to be procured shall ensure that the relevant specifications require the use of biobased composite panels.

* * * * *

3. Amend § 3201.31 by:

a. Revising paragraph (a)(2)(v);

b. Adding paragraph (a)(2)(vi);

c. Revising paragraph (b)(5);

d. Adding paragraph (b)(6); and

e. Revising paragraph (c).

The revisions and additions read as follows:

§ 3201.31 Greases.

(a) * * *

(2) * * *

(v) *Wheel bearing and chassis greases.* Lubricants that meet ASTM D4950 Standard Classification as GC and LB (wheel bearing and chassis) and that are formulated for mild to severe duty wheel bearing and chassis applications commonly found in automotive, truck, heavy duty, industrial and agricultural applications.

(vi) *Greases not elsewhere specified.* Lubricants that meet the general definition of greases as defined in paragraph (a)(1) of this section, but are not otherwise covered by paragraphs (a)(2)(i) through (v) of this section.

* * * * *

(b) * * *

(5) Wheel bearing and chassis grease—50 percent.

(6) Greases not elsewhere specified—75 percent.

(c) *Preference compliance dates.* (1) No later than May 14, 2009, procuring agencies, in accordance with this part, will give a procurement preference for those qualifying biobased greases specified in paragraphs (a)(2)(i) through (iv) and (vi) of this section. By that date, Federal agencies that have the responsibility for drafting or reviewing specifications for items to be procured shall ensure that the relevant specifications require the use of biobased greases.

(2) No later than [date one year after the date of publication of the final rule], procuring agencies, in accordance with this part, will give a procurement preference for those qualifying biobased greases specified in paragraph (a)(2)(v) of this section. By that date, Federal agencies that have the responsibility for drafting or reviewing specifications for items to be procured shall ensure that the relevant specifications require the use of biobased greases.

* * * * *

4. Add §§ 3201.100 through 3201.107 to subpart B to read as follows:

Sec.

§ 3201.100 Aircraft and boat cleaners.

(a) *Definition.* (1) Aircraft and boat cleaners are products designed to remove built-on grease, oil, dirt, pollution, insect reside, or impact soils on both interior and exterior of aircraft and/or boats.

(2) Aircraft and boat cleaners for which Federal preferred procurement applies are:

(i) *Aircraft cleaners.* Cleaning products designed to remove built-on grease, oil, dirt, pollution, insect reside, or impact soils on both interior and exterior of aircraft.

(ii) *Boat cleaners.* Cleaning products designed to remove built-on grease, oil, dirt, pollution, insect reside, or impact soils on both interior and exterior of boats.

(b) *Minimum biobased content.* The minimum biobased content for all aircraft and boat cleaners shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product. The applicable minimum biobased contents for the Federal preferred procurement products are:

(1) *Aircraft cleaners*—48 percent.

(2) *Boat cleaners*—38 percent.

(c) *Preference compliance date.* No later than [DATE ONE YEAR AFTER THE DATE OF PUBLICATION OF THE FINAL RULE], procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased aircraft and boat cleaners. By that date, Federal agencies that have the responsibility for drafting or reviewing specifications for products to be procured shall ensure that the relevant specifications require the use of biobased aircraft and boat cleaners.

§ 3201.101 Automotive care products.

(a) *Definition.* Products such as waxes, buffing compounds, polishes, degreasers, soaps, wheel and tire cleaners, leather care products, interior cleaners, and fragrances that are formulated for cleaning and protecting automotive surfaces.

(b) *Minimum biobased content.* The Federal preferred procurement product must have a minimum biobased content of at least 75 percent, which shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product.

(c) *Preference compliance date.* No later than [date one year after the date of publication of the final rule], procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased automotive care products. By that date, Federal agencies that have the responsibility for drafting or reviewing specifications for products to be procured shall ensure that the relevant specifications require the use of biobased automotive care products.

§ 3201.102 Engine crankcase oils.

(a) *Definition.* Lubricating products formulated to provide lubrication and wear protection for four-cycle gasoline or diesel engines.

(b) *Minimum biobased content.* The Federal preferred procurement product must have a minimum biobased content of at least 18 percent, which shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product.

(c) *Preference compliance date.* No later than [date one year after the date of publication of the final rule], procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased engine crankcase oils. By that date, Federal agencies that have the responsibility for drafting or reviewing specifications for products to be procured shall ensure that the relevant specifications require the use of biobased engine crankcase oils.

(d) *Determining overlap with an EPA-designated recovered content product.* Qualifying products within this item may overlap with the EPA-designated recovered content product: Re-refined lubricating oils. USDA is requesting that manufacturers of these qualifying biobased products provide information on the USDA Web site of qualifying biobased products about the intended uses of the product, information on whether or not the product contains any recovered material, in addition to biobased ingredients, and performance standards against which the product has been tested. This information will assist Federal agencies in determining whether or not a qualifying biobased product overlaps with EPA-designated re-refined lubricating oil products and which product should be afforded the preference in purchasing.

Note to paragraph (d): Engine crankcase oils within this designated product category can compete with similar re-refined lubricating oil products with recycled content. Under the Resource Conservation and Recovery Act of 1976, section 6002, the U.S. Environmental Protection Agency designated re-refined lubricating oil products containing recovered materials as products for which Federal agencies must give preference in their purchasing programs. The designation can be found in the Comprehensive Procurement Guideline, 40 CFR 247.17.

§ 3201.103 Gasoline fuel additives.

(a) *Definition.* Chemical agents added to gasoline to increase octane levels, improve lubricity, and provide engine cleaning properties to gasoline-fired engines.

(b) *Minimum biobased content.* The Federal preferred procurement product must have a minimum biobased content of at least 92 percent, which shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product.

(c) *Preference compliance date.* No later than [date one year after the date of publication of the final rule], procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased gasoline fuel additives. By that date, Federal agencies that have the responsibility for drafting or reviewing specifications for products to be procured shall ensure that the relevant specifications require the use of biobased gasoline fuel additives.

§ 3201.104 Metal cleaners and corrosion removers.

(a) *Definition.* (1) Products that are designed to clean and remove grease, oil, dirt, stains, soils, and rust from metal surfaces.

(2) Metal cleaners and corrosion removers for which Federal preferred procurement applies are:

(i) *Corrosion removers.* Products that are designed to remove rust from metal surfaces through chemical action.

(ii) *Stainless steel cleaners.* Products that are designed to clean and remove grease, oil, dirt, stains, and soils from stainless steel surfaces.

(iii) *Other metal cleaners.* Products that are designed to clean and remove grease, oil, dirt, stains, and soils from metal surfaces other than stainless steel.

(b) *Minimum biobased content.* The minimum biobased content for all metal cleaners and corrosion removers shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product. The applicable minimum biobased contents for the Federal preferred procurement products are:

(1) *Corrosion removers*—71 percent.

(2) *Stainless steel cleaners*—75 percent.

(3) *Other metal cleaners*—56 percent.

(c) *Preference compliance date.* No later than [DATE ONE YEAR AFTER THE DATE OF PUBLICATION OF THE FINAL RULE], procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased metal cleaners and corrosion removers. By that date, Federal agencies that have the responsibility for drafting or reviewing specifications for products to be procured shall ensure that the relevant specifications require the use of biobased metal cleaners and corrosion removers.

§ 3201.105 Microbial cleaning products.

(a) *Definition.* (1) Cleaning agents that use microscopic organisms to treat or eliminate waste materials within drains, plumbing fixtures, sewage systems, wastewater treatment systems, or on a variety of other surfaces. These products typically include organisms that digest protein, starch, fat, and cellulose.

(2) Microbial cleaning products for which Federal preferred procurement applies are:

(i) *Drain maintenance products.* Products containing microbial agents that are intended for use in plumbing systems such as sinks, showers, and tubs.

(ii) *Wastewater maintenance products.* Products containing microbial agents that are intended for use in wastewater systems such as sewer lines and septic tanks.

(iii) *General cleaners.* Products containing microbial agents that are intended for multi-purpose cleaning in locations such as residential and commercial kitchens and bathrooms.

(b) *Minimum biobased content.* The minimum biobased content for all microbial cleaning products shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product. The applicable minimum biobased contents for the Federal preferred procurement products are:

(1) *Drain maintenance products*—45 percent.

(2) *Wastewater maintenance products*—44 percent.

(3) *General cleaners*—50 percent.

(c) *Preference compliance date.* No later than [date one year after the date of publication of the final rule], procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased microbial cleaning products. By that date, Federal agencies that have the responsibility for drafting or reviewing specifications for products to be procured shall ensure that the relevant specifications require the use of biobased microbial cleaning products.

§ 3201.106 Paint removers.

(a) *Definition.* Products formulated to loosen and remove paint from painted surfaces.

(b) *Minimum biobased content.* The Federal preferred procurement product must have a minimum biobased content of at least 41 percent, which shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product.

(c) *Preference compliance date.* No later than [date one year after the date of publication of the final rule], procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased paint removers. By that date, Federal agencies that have the responsibility for drafting or reviewing specifications for products to be procured shall ensure that the relevant specifications require the use of biobased paint removers.

§ 3201.107 Water turbine bearing oils.

(a) *Definition.* Lubricants that are specifically formulated for use in the bearings found in water turbines.

(b) *Minimum biobased content.* The Federal preferred procurement product must have a minimum biobased content of at least 46 percent, which shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product.

(c) *Preference compliance date.* No later than [date one year after the date of publication of the final rule], procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased water turbine bearing oils. By that date, Federal agencies that have the responsibility for drafting or reviewing specifications for products to be procured shall ensure that the relevant specifications require the use of biobased water turbine bearing oils.

Dated: November 26, 2012.

Gregory L. Parham,

Acting Assistant Secretary for Administration, U.S. Department of Agriculture.

[FR Doc. 2012–29093 Filed 12–4–12; 8:45 am]

BILLING CODE 3410–93–P

FEDERAL REGISTER

Vol. 77 Wednesday,
No. 234 December 5, 2012

Part VII

The President

Federal Register
Vol. 77, No. 234
Wednesday, December 5, 2012

Presidential Documents

Title 3—

The President

Proclamation 8910 of November 30, 2012

Critical Infrastructure Protection and Resilience Month, 2012

By the President of the United States of America

A Proclamation

Every day, Americans across our country—from entrepreneurs and college students to families and community leaders—rely on critical infrastructure to travel and communicate, work and play. The assets and systems we depend on are essential to our way of life, and during Critical Infrastructure Protection and Resilience Month, we maintain our commitment to keeping our critical infrastructure and our communities safe and resilient.

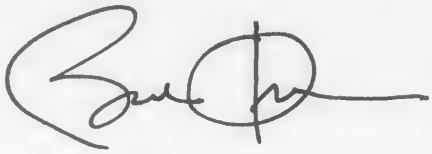
Our Nation's critical infrastructure is complex and interconnected, and we must understand not only its strengths, but also its vulnerabilities to emerging threats. Cyber incidents can have devastating consequences on both physical and virtual infrastructure, which is why my Administration continues to make cybersecurity a national security priority. As we continue to work within existing authorities to fortify our country against cyber risks, comprehensive legislation remains essential to improving infrastructure security, enhancing cyber information sharing between government and the private sector, and protecting the privacy and civil liberties of the American people.

Physical threats also put our Nation's most important assets at risk. Destruction caused by devastating storms and other natural disasters this year underscored our reliance on our critical infrastructure. Yet, these tragic events also demonstrated once again the strength and resolve of the American people when we work together to recover and rebuild. As long as we keep fortifying partnerships between Federal, State, and local governments and among community leaders and the private sector, we can continue to modernize our critical infrastructure and bolster our ability to overcome whatever challenges we may face.

All Americans have a part to play in protecting our critical infrastructure and making it more resilient, and my Administration continues to engage stakeholders in doing what it takes to keep our people safe and our assets secure. This month, we rededicate ourselves to raising awareness of the importance of critical infrastructure and to doing all we can to protect it. Americans can learn more about how they can get involved by visiting www.Ready.gov.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim December 2012 as Critical Infrastructure Protection and Resilience Month. I call upon the people of the United States to recognize the importance of protecting our Nation's resources and to observe this month with appropriate events and training to enhance our national security and resilience.

IN WITNESS WHEREOF, I have hereunto set my hand this thirtieth day of November, in the year of our Lord two thousand twelve, and of the Independence of the United States of America the two hundred and thirty-seventh.



[FR Doc. 2012–29573
Filed 12–4–12; 11:15 am]
Billing code 3295–F3

Presidential Documents

Proclamation 8911 of November 30, 2012

National Impaired Driving Prevention Month, 2012

By the President of the United States of America

A Proclamation

As Americans gather with friends and family to share in the holiday season, National Impaired Driving Prevention Month reminds us of the importance of celebrating safely. Every year, accidents involving drunk, drugged, or distracted driving claim thousands of lives, leaving families to face the heartbreak of losing a loved one. We stand with all those who have known the tragic consequences of drugged or drunk driving, and we rededicate ourselves to preventing it this December and throughout the year.

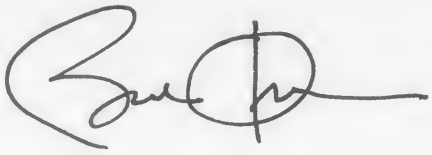
Alcohol and drugs present serious risks to all drivers. It is well known that drugs, including some prescription medications, can impair the skills necessary for safe and responsible driving. Distractions like using mobile phones and other electronics behind the wheel also make our roads more hazardous. To reduce the prevalence of impaired driving, my Administration is working to raise public awareness, improve impaired driving screening procedures, and ensure law enforcement officers get the training they need. We are also striving to stop substance abuse before it starts by supporting local prevention programs and providing youth with the facts about alcohol and drug use.

Families play an essential part in stopping impaired driving. By talking about the risks and setting clear expectations, parents and other caregivers can help their children stay safe, sober, and focused on the road. Educators, health care providers, and community leaders can join in that important work by promoting responsible decisionmaking and encouraging young people to live free of drugs and alcohol.

This month, we recommit to keeping our streets safe, our families healthy, and our communities strong. To learn more about impaired driving and how all of us can work to prevent it, visit www.WhiteHouse.gov/ONDCP and www.NHTSA.gov/Impaired.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim December 2012 as National Impaired Driving Prevention Month. I urge all Americans to make responsible decisions and take appropriate measures to prevent impaired driving.

IN WITNESS WHEREOF, I have hereunto set my hand this thirtieth day of November, in the year of our Lord two thousand twelve, and of the Independence of the United States of America the two hundred and thirty-seventh.



[FR Doc. 2012–29575
Filed 12–4–12; 11:15 am]
Billing code 3295–F3

Presidential Documents

Proclamation 8912 of November 30, 2012

Minority Enterprise Development Week, 2012

By the President of the United States of America

A Proclamation

At the core of who we are as a Nation is a fundamental belief: that no matter who you are, no matter what you look like, no matter where you come from, if you have an idea and a willingness to work hard, you can succeed. It is this belief that leads a worker to leave a job to become her own boss, propels a basement inventor to sell a new product, or drives an amateur chef to open a restaurant. It is this belief that has drawn millions to our shores and spurred America's prosperity for centuries.

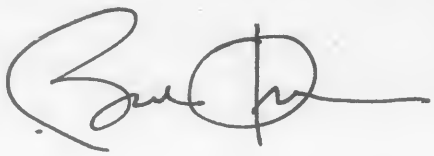
The belief in tomorrow's promise is guiding minority entrepreneurs across our country to start the kinds of businesses that make up the backbone of our economy. With a combined economic output of $1 trillion, minority-owned firms are key producers in an array of industries, hubs of innovation and new technology, and engines of job creation in our communities.

Because the continued growth and success of minority enterprises is essential to our economic recovery, my Administration has taken steps to help bolster these businesses. Through the Minority Business Development Agency, we are providing access to capital, consulting, contracts, and markets to minority entrepreneurs seeking to expand their businesses at home and overseas. We are also making it easier for business owners to find Federal resources with www.BusinessUSA.gov, a centralized, one-stop platform for businesses to access services to help them grow and hire.

As the number and size of minority-owned firms continue to expand, we must harness the diversity and power of these businesses to help strengthen our economy and put people back to work. As we celebrate the 30th anniversary of Minority Enterprise Development Week, let us honor the role America's minority-owned businesses play in spurring our prosperity and recommit to equipping them with the tools for success in the 21st century.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim December 2 through December 8, 2012, as Minority Enterprise Development Week. I call upon all Americans to celebrate this week with appropriate programs, ceremonies, and activities to recognize the many contributions of our Nation's minority enterprises.

IN WITNESS WHEREOF, I have hereunto set my hand this thirtieth day of November, in the year of our Lord two thousand twelve, and of the Independence of the United States of America the two hundred and thirty-seventh.



[FR Doc. 2012–29576
Filed 12–4–12; 11:15 am]
Billing code 3295–F3

Reader Aids

Federal Register

Vol. 77, No. 234

Wednesday, December 5, 2012

CUSTOMER SERVICE AND INFORMATION

Federal Register/Code of Federal Regulations	
General Information, indexes and other finding aids	**202–741–6000**
Laws	**741–6000**
Presidential Documents	
Executive orders and proclamations	**741–6000**
The United States Government Manual	**741–6000**
Other Services	
Electronic and on-line services (voice)	**741–6020**
Privacy Act Compilation	**741–6064**
Public Laws Update Service (numbers, dates, etc.)	**741–6043**
TTY for the deaf-and-hard-of-hearing	**741–6086**

ELECTRONIC RESEARCH

World Wide Web

Full text of the daily Federal Register, CFR and other publications is located at: **www.fdsys.gov.**

Federal Register information and research tools, including Public Inspection List, indexes, and links to GPO Access are located at: **www.ofr.gov.**

E-mail

FEDREGTOC-L (Federal Register Table of Contents LISTSERV) is an open e-mail service that provides subscribers with a digital form of the Federal Register Table of Contents. The digital form of the Federal Register Table of Contents includes HTML and PDF links to the full text of each document.

To join or leave, go to **http://listserv.access.gpo.gov** and select *Online mailing list archives, FEDREGTOC-L, Join or leave the list (or change settings);* then follow the instructions.

PENS (Public Law Electronic Notification Service) is an e-mail service that notifies subscribers of recently enacted laws.

To subscribe, go to **http://listserv.gsa.gov/archives/publaws-l.html** and select *Join or leave the list (or change settings);* then follow the instructions.

FEDREGTOC-L and **PENS** are mailing lists only. We cannot respond to specific inquiries.

Reference questions. Send questions and comments about the Federal Register system to: **fedreg.info@nara.gov**

The Federal Register staff cannot interpret specific documents or regulations.

Reminders. Effective January 1, 2009, the Reminders, including Rules Going Into Effect and Comments Due Next Week, no longer appear in the Reader Aids section of the Federal Register. This information can be found online at **http://www.regulations.gov.**

CFR Checklist. Effective January 1, 2009, the CFR Checklist no longer appears in the Federal Register. This information can be found online at **http://bookstore.gpo.gov/.**

FEDERAL REGISTER PAGES AND DATE, DECEMBER

71483–71686 3
71687–72194 4
72195–72680 5

CFR PARTS AFFECTED DURING DECEMBER

At the end of each month the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

3 CFR

Proclamations:
8909 72195
8910 72675
8911 72677
8912 72679

5 CFR

870 71687

7 CFR

915 71688
927 72197

Proposed Rules:
927 72245
3201 72654

10 CFR

171 72199
710 71689

12 CFR

Proposed Rules:
1209 72247

14 CFR

21 71691
39 ..... 71483, 71485, 71487, 71489, 71491, 72200, 72203
71 ..... 71492, 71493
97 ..... 71494, 71495, 71497, 71499

Proposed Rules:
39 ..... 71723, 71729, 71731, 72250, 72252
71 71734
121 71735
125 71735
135 71735

15 CFR

902 71501

Proposed Rules:
1400 72254

16 CFR

1107 72205

Proposed Rules:
240 71741

17 CFR

Proposed Rules:
Ch. II 71743
240 71568

21 CFR

173 71695

Proposed Rules:
150 71746
500 72254
520 72254
522 72254
524 72254
529 72254
556 72254
558 72254
573 71750

24 CFR

203 72219
1000 71513

25 CFR

162 72240

26 CFR

Proposed Rules:
1 ..... 72268, 72612
31 72268

29 CFR

Proposed Rules:
18 72142

30 CFR

Proposed Rules:
1206 71751

31 CFR

515 71530

Proposed Rules:
356 72278

33 CFR

100 71531
165 71697

40 CFR

52 ..... 71533, 71551, 71700, 72512
180 ..... 71555, 72223, 72232
716 71561

Proposed Rules:
52 ..... 71568, 71751, 72284, 72287, 72291
60 72294
63 72294

42 CFR

73 71702

44 CFR

67 71702

45 CFR

Proposed Rules:
800 72582

47 CFR

0 71711
54 ..... 71711, 71712
73 ..... 71713, 72237

Proposed Rules:
20 72294

76.....72295

49 CFR

567.....7 :714
571.....71717

Proposed Rules:

571.....71752, 72296

50 CFR

17.....71876, 72070
300.....71501
648.....71720, 72242
679.....72243

Proposed Rules:

17.....71757, 71759
648.....72297
679.....72297

LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with "PLUS" (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.archives.gov/federal-register/laws.*

The text of laws is not published in the **Federal Register** but may be ordered in "slip law" (individual pamphlet) form from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202–512–1808). The text will also be made available on the Internet from GPO's Federal Digital System (FDsys) at *http://www.gpo.gov/fdsys.* Some laws may not yet be available.

H.R. 2606/P.L. 112–197
New York City Natural Gas Supply Enhancement Act (Nov. 27, 2012; 126 Stat. 1461)

H.R. 4114/P.L. 112–198
Veterans' Compensation Cost-of-Living Adjustment Act of 2012 (Nov. 27, 2012; 126 Stat. 1463)

S. 743/P.L. 112–199
Whistleblower Protection Enhancement Act of 2012 (Nov. 27, 2012; 126 Stat. 1465)

S. 1956/P.L. 112–200
European Union Emissions Trading Scheme Prohibition Act of 2011 (Nov. 27, 2012; 126 Stat. 1477)

Last List October 24, 2012

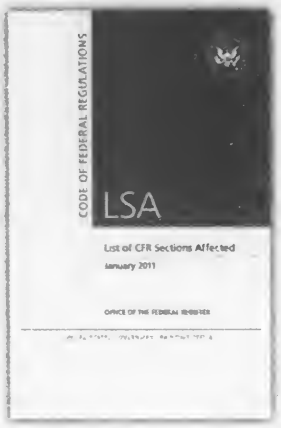
Public Laws Electronic Notification Service (PENS)

PENS is a free electronic mail notification service of newly enacted public laws. To subscribe, go to *http://listserv.gsa.gov/archives/publaws-l.html*

Note: This service is strictly for E-mail notification of new laws. The text of laws is not available through this service. **PENS** cannot respond to specific inquiries sent to this address.

Find the Information You Need Quickly with the List of Sections Affected

ORDER NOW!



The **List of CFR Sections Affected (LSA)** lists proposed, new, and amended Federal regulations published in the **Federal Register (FR)** since the most recent revision date of a **Code of Federal Regulations (CFR)** title. Each monthly **LSA** issue is cumulative and contains the **CFR** part and section numbers, a description of its status (e.g., amended, confirmed, revised), and the **FR** page number for the change.

You can purchase a subscription of the **LSA** as part of a subscription to the **FR** using the order from below, or via the U.S. Government Online Bookstore at:

http://bookstore.gpo.gov/actions/GetPublication.do?stocknumber=769-004-00000-9

To order a subscription to the **LSA** only, use the order form or go to the U.S. Online Bookstore at:

http://bookstore.gpo.gov/actions/GetPublication.Do?stocknumber=769-001-00000-0

GPO U.S. GOVERNMENT PRINTING OFFICE
KEEPING AMERICA INFORMED

Order Processing Code: 3572

Easy Secure Internet: bookstore.gpo.gov

Toll Free: 866 512–1800
DC Area: 202 512–1800
Fax: 202 512–2104

Mail: US Government Printing Office
P.O. Box 979050
St. Louis, MO 63197–9000

Qty	Stock Number	Publication Title	Unit Price	Total Price
	769-001-00000-0	List of CFR Sections Affected (LSA)	$35.00	
			Total Order	

Personal name (Please type or print)

Company name

Street address

City, State, Zip code

Daytime phone including area code

Check Method of Payment

VISA MasterCard NOVUS

❑ Check payable to *Superintendent of Documents*

❑ SOD Deposit Account ☐☐☐☐☐☐ — ☐

❑ VISA ❑ MasterCard ❑ Discover/NOVUS ❑ American Express

☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐

☐☐☐☐ (expiration date)

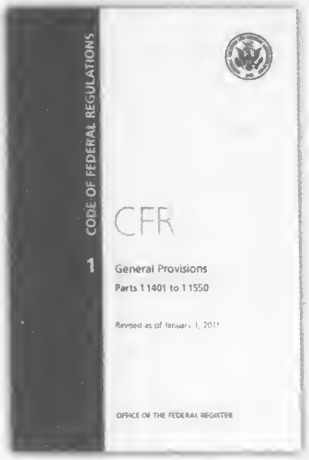
Thank you for your order!

AUTHORIZING SIGNATURE

01/11

Find the Information You Need in the Code of Federal Regulations

ORDER NOW!



The **Code of Federal Regulations (CFR)** is the codification of the general and permanent rules published in the Federal Register by the executive departments and agencies of the Federal Government. It is divided into 50 titles representing broad areas subject to Federal regulation. Each volume of the **CFR** is updated once each calendar year on a quarterly basis.

Each title is divided into chapters, which are further subdivided into parts that cover specific regulatory areas. Large parts may be subdivided into subparts. All parts are organized in sections and most **CFR** citations are provided at the section level.

Each year's **CFR** covers are printed in a different color for quick identification. **NOTE:** When a particular volume's content does not change from year to year, only a cover is printed and sent to **CFR** subscribers.

The **CFR** is available as an annual calendar year subscription. All subscribers receive all back issues of the **CFR** whenever they subscribe during the calendar year.

To subscribe, use the order form below or go to the U.S. Government Online Bookstore:
http://bookstore.gpo.gov/actions/GetPublication.do?stocknumber=869-072-00000-1

GPO U.S. GOVERNMENT PRINTING OFFICE
KEEPING AMERICA INFORMED

Order Processing Code: 3573

Easy Secure Internet: bookstore.gpo.gov

Toll Free: 866 512–1800
DC Area: 202 512–1800
Fax: 202 512–2104

Mail: US Government Printing Office
P.O. Box 979050
St. Louis, MO 63197–9000

Qty	Stock Number	Publication Title	Unit Price	Total Price
	869-072-00000-1	The Code of Federal Regulations (CFR)	$1,664.00	
			Total Order	

Personal name (Please type or print)

Company name

Street address

City, State, Zip code

Daytime phone including area code

Check Method of Payment

❑ **Check payable to *Superintendent of Documents***

❑ SOD Deposit Account — ☐☐☐☐☐☐ — ☐

❑ VISA ❑ MasterCard ❑ Discover/NOVUS ❑ American Express

☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐

☐☐☐☐ (expiration date)

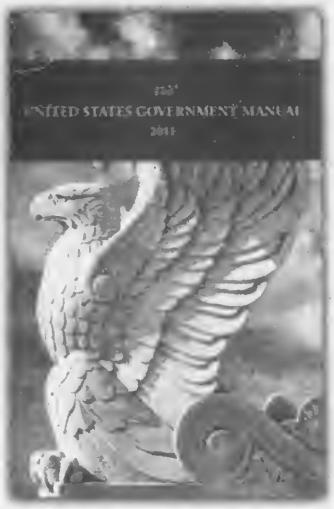
Thank you for your order!

AUTHORIZING SIGNATURE

01/11

United States Government Manual 2011

The Ultimate Guide to all Federal Government Agencies and Services



The United States Government Manual 2011
SN: 069-000-00194-7
ISBN: 9780169874703
Domestic Price: $30.00
International Price: $42.00

As the official handbook of the Federal Government, the ***United States Government Manual*** is the best source of information on the activities, functions, organization, and principal officials of the agencies of the Legislative, Judicial, and Executive branches. It also includes information on quasi-official agencies and international organizations in which the United States participates.

Particularly helpful for those interested in where to go and who to contact about a subject of concern is each agency's "Sources of Information" section, which provides addresses and telephone numbers for use in obtaining specifics on consumer activities, contracts and grants, employment, publications and films, and many other areas of citizen interest. The Manual also includes a comprehensive name index for key agency officials.

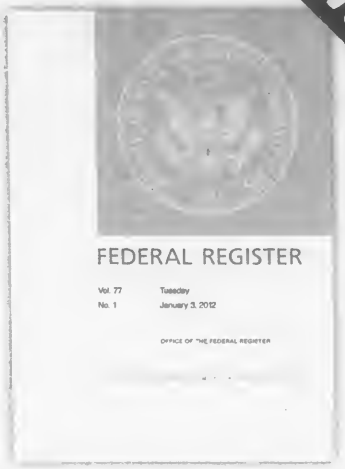
Of significant interest is the History of Agency Organizational Changes, which lists the agencies and functions of the Federal Government abolished, transferred, or renamed subsequent to March 4, 1933.

The Manual is published by the Office of the Federal Register, National Archives and Records Administration.

Subscribe to the Federal Register and receive

ORDER NOW!

- **Official and authentic legal citations of Federal regulations**
- **Quick retrieval of specific regulations**
- **Invaluable research and reference tools**



The **Federal Register (FR)** is the official daily publication for rules, proposed rules, and notices of Federal agencies and organizations, as well as executive orders and other presidential documents. It is updated daily by 6 a.m. and published Monday through Friday, except Federal holidays.

The Unified Agenda (also known as the Semiannual Regulatory Agenda), published twice a year (usually in April and October) in the **FR**, summarizes the rules and proposed rules that each Federal agency expects to issue during the next year.

The FR has two companion publications. **The List of CFR Sections Affected (LSA)** lists proposed, new, and amended Federal regulations published in the FR since the most recent revision date of a **CFR** title. Each monthly **LSA** issue is cumulative and contains the CFR part and section numbers, a description of its status (e.g., amended, confirmed, revised), and the **FR** page number for the change. **The Federal Register Index (FRI)** is a monthly itemization of material published in the daily FR.

The FR is available as an annual subscription, which also includes the **LSA** and the **FRI**. To subscribe, use the order form below or go to the U.S. Government Online Bookstore:

http://bookstore.gpo.gov/actions/GetPublication.do?stocknumber=769-004-00000-9

GPO U.S. GOVERNMENT PRINTING OFFICE
KEEPING AMERICA INFORMED

Order Processing Code: 3569

Easy Secure Internet: bookstore.gpo.gov

Toll Free: 866 512–1800
DC Area: 202 512–1800
Fax: 202 512–2104

Mail: US Government Printing Office
P.O. Box 979050
St. Louis, MO 63197–9000

Qty	Stock Number	Publication Title	Unit Price	Total Price
	769-004-00000-9	Federal Register (FR)	$929.00	
			Total Order	

Check Method of Payment

Personal name (Please type or print)

Company name

Street address

City, State, Zip code

Daytime phone including area code

❑ **Check payable to *Superintendent of Documents***

❑ SOD Deposit Account ☐☐☐☐☐☐☐ — ☐

❑ VISA ❑ MasterCard ❑ Discover/NOVUS ❑ American Express

☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐

☐☐☐☐ (expiration date)

Thank you for your order!

AUTHORIZING SIGNATURE

07/10

Printed on recycled paper
with vegetable-based ink